

WIDOW ENJOYMENT IN ROMAN AND MEDIEVAL LAW (COOPERATION WITH VENICE, FRANKISH AND "ISTRIAN MARRIAGE")

Bartulović, Željko; Ignjatović, Marija

Source / Izvornik: **Ius Romanum Uridičeski fakultet Sofijski universitet Sv. Kliment Ohridski, 2017, 2017, 1 - 10**

Journal article, Published version

Rad u časopisu, Objavljena verzija rada (izdavačev PDF)

Permanent link / Trajna poveznica: <https://um.nsk.hr/um:nbn:hr:118:570053>

Rights / Prava: [In copyright](#)/[Zaštićeno autorskim pravom.](#)

Download date / Datum preuzimanja: **2024-07-10**

PRAVI

Pravni fakultet Faculty of Law



Sveučilište u Rijeci
University of Rijeka

Repository / Repozitorij:

[Repository of the University of Rijeka, Faculty of Law](#)
[- Repository University of Rijeka, Faculty of Law](#)

uniri DIGITALNA
KNJIŽNICA


DIGITALNI AKADEMSKI ARHIVI I REPOZITORIJI

**WIDOW ENJOYMENT
IN ROMAN AND MEDIEVAL LAW
(COOPERATION WITH VENICE,
FRANKISH AND “ISTRIAN MARRIAGE”**

Assoc. prof. Marija Ignjatović, Ph.D.

University of Niš, Serbia

Prof. Željko Bartulović, Ph.D.

University of Rijeka, Croatia

1. THE HEREDITARILY-LEGAL POSITION OF A WIFE IN ROMAN LAW

According to the regulations *Lex duodecim tabularum*¹, in the Roman law there were three inheritance classes: *sui heredes*, *agnates* and *gentiles*.

Sui heredes were heirs who were the first to inherit in case of a death of a bequeather. This group of heirs consisted of the agnatic relatives who were all subject to *patria potestas* of the family head and became *sui iuris* at the time of his death. Those were the children from legal marriages, adrogated and adopted children, grandchildren of the deceased and emancipated sons, if at the time of the bequeather's death they had been under his authority, and the wife who was also considered to be *sua heres*².

The second class were agnates, outside the immediate family group (*agnati prohim*). These were bequeather's brothers and sisters and their descendants.

The third in line to inherit were gentiles, members of the same gender³.

According to the Law regulations, inheritance depended solely on the agnatic relatives (community kinship), the position of a wife in the inheritance law

¹ *Lex duodecim tabularum*, was introduced in Rome in 451–450 b.C. and published in the Roman forum on the twelve tables (firstly ten, and then two more). Original text wasn't preserved, but is almost the whole reconstructed via numerous quotes, paragraphs, comments and other historical sources. Read more NIKOLIĆ, D. i ĐORĐEVIĆ, A. *Zakonski tekstovi starog i srednjeg sveta*. Niš, 2002, str. 75.

² Read more HORVAT, M. *Rimsko pravo*. Zagreb, 2002, str. 398.

³ The hereditarily-legal position of the female relatives isn't clear. There is a dilemma if daughters inherited together with sons or their legal right for family property came with the right for dowry. Read more STANOJEVIĆ, O. *Rimsko pravo*. Beograd, 2001, str. 234.

depended on the form in which the marriage was concluded. If the marriage was concluded with *manus*, the wife was under the authority of the family head or the husband if he was *sui iuris*. However, in the marriage without the *manus*, the wife wasn't under the legal control of the husband i.e. his family head, but stayed under the authority of her *pater familias*, in the case she was still *alieni iuris* before marriage.

A wife in the *manus* marriage (*matrimonium cum manu*), considering the fact that she had the position of a daughter (*filiae loco*)⁴, was *heredes sui* and got the same inheritance as the first degree descendents⁵. Thereat, the basis for succession was a union with the bequeather i.e. agnatic kinship. This means that a wife was to inherit like an agnate and not like a bequeather's marital partner. The cause lies in the fact that still on that level of the development of the family union, Romans didn't come to the idea to isolate the income of descendants and the marital partner from the property i.e. bequest⁶, probably because the life outside the community didn't exist so everyone was made to live and work together. This reflected on the bequest itself which was split equally among *sui iuris*, who gained the status at the time of the death. Based on the previously stated, it could be concluded that the wife, having defined the status as *filia loco*, had the right of inheritance. However, this interpretation is characteristic for the later period because it differentiates the relationships that existed in the first patriarchal stand-alone family.⁷

While the issue of hereditarily-legal position of the wife in the *manus* marriage is utterly debatable, it is certain that the wife had no legal inheritance rights in the marriage without *manus* (*matrimonium sine manu*), the wife had no succession rights regarding the bequest of her husband.⁸ Justification lied in the fact

⁴ According to Jovanović, it is a complete misunderstanding that *manus* implied the co-ownership of a husband and that the position of *filiae loco* means that a living wife really had the position of a wife. It was a legal formulae necessary in the framework of an agnatic family. See JOVANOVIĆ, M. Status žene prema srpskom građanskom zakoniku. – In: *Zbornik radova "150 godina Srpskog građanskog zakonika"*, Niš, 1995, str. 87.

⁵ The right of inheritance could be realised in the case of a husband's death who was *sui iuris*, as well as in the case of death of *pater familias*, if the husband was *alieni iuris* and if he died before his father. See PUHAN, I. Rimsko pravo. Beograd, 1972, str. 166.

⁶ Read more ĐORĐEVIĆ, V. Nasleđivanje bračnih drugova. Beograd, 1988, str. 17.

⁷ About that see STANOJEVIĆ, O. Rimsko pravo. Beograd, 2001, str. 234.

⁸ Marriages without *manus* were typical for the classical and pre-classical period in the Rome's development. They appeared with the shift from the family of producers to the family of consumers and with economical independence of a wife. Read more

that a woman when getting married didn't enter the husband's family i.e. didn't become agnate with husband's agnates. She stayed the agnate with her biological family's agnates, and was *sui iuris*, if she had already been that at the moment of getting married.

On the other hand, marriage without manus had legal consequences which manifested only in the relationship between the husband and the wife, and which got the special attention in the marriage with manus. These consequences were: an obligation to mutual respect, which caused the series of other responsibilities, the right of a wife to husband's domicil and the right to be supported, the husband's right to demand from the wife to live in the household and a right to control her dowry (*ad onera matrimonii sustinenda*). The wife's property independence, was also expressed and reflected in the intercession ban or husband's guarantee. However, independent position of a wife and her bond to her agnatic family brought a sequence of illogicalities in the inheritance law itself, up to denying the wife's inheritance rights and even inheritance rights of the mother and children, because they were cognate relatives, and the basis of inheritance was still agnatic relationship.⁹

Because of these illogicalities the need for new solutions in the inheritance law emerged, which would regulate the hereditarily-legal position of a wife in a family in the completely new way. Deficiencies which appeared were largely eliminated with praetor's intercession.

Praetors introduced cognatic line as the succession basis instead of the agnatic line. This way the legal or intestate inheritance order was altered to benefit the cognatic line. Starting from the cognatic line as the inheritance basis, a better solution was devised regarding the mutual inheritance of the marital partners no matter the gender, via *bonorum possessio unde vi et uxor*. "This has opened the road to the complete reform of the intestate succession, which was, after the codification of the Digest, the Institution and the Code, executed in the Novella, 118 and 127."¹⁰

IGNJATOVIĆ, M. Udovičko uživanje u Srpskom građanskom zakoniku. – In: *Zbornik radova "Srbija 1804–2004"*, Pravni fakultet, Niš, 2004, str. 419.

⁹ About that see PUHAN, I. Rimsko pravo. Beograd, 1972, str. 375.

¹⁰ See IGNJATOVIĆ, M. Op. cit., str. 420.

According to the Code of Justinian there were five classes of inheritance. The first class were direct descendants of the bequeather (*descendenti*); the second class were all bequeather's ascendants and his brothers and sisters of full blood; the third were brothers and sisters of half blood (*consanguinei i uterini*); the fourth inheritance line were related to him in the nearest grade of consanguinity (*collaterales*), while the fifth were, officially and for the first time, the husband and wife. (*vir et uxor*).

In order for a wife to become an heiress, she had to fulfil certain conditions. Firstly, she had to file an appeal to the praetor, to prove that the marriage existed before the death of the husband and that there was no temporary break from the marital union. That is, she had to prove the effectiveness of the marriage and the marital union, which made her position harder as other relatives didn't need a proof, except the "crude kinship" on which the inheritance was based.

As wife's legal right to inherit was uncertain, because relatives of any degree could always get the wife's inheritance, emperors persisted in improving her hereditarily-legal position with particular regulations.

Therefore, in Justinian's Novels, 43 I 117, the exceptional legal inheritance was introduced (*sucessio ab intestato extraordinaria*). According to these regulations, a widow without a dowry could demand $\frac{1}{4}$ of her wealthy husband's property in competition with the other heirs. And if she competes with more than three heirs, she had the right to get the certain part, and if she competes with her own children she got the previously mentioned part (*usufructus*), enjoyment.¹¹

This way, the legal position of a wife was in much improved, as she could now inherit the certain part of the property under certain conditions or to gain the right of a lifelong enjoyment.

These solutions from the Roman law, period of Justinian, were accepted with reception of Roman law in the French civil code, and from there in all other modern codes of contemporary societies, who stipulated the right of the marital partner to choose between inheriting the little part of the property or gaining the right of the widow enjoyment in the larger part of the property.

¹¹ About that see SVORCAN, S. Sticanje svojine i plodouživanja putem nasleđivanja – naslednopravni položaj bračnog druga. – In: *Pravni život*, Beograd, 1996, no. 10, str. 100–102.

2. POSITION OF A WIFE IN THE MEDIEVAL LAW (COMPARISON OF THE VENICE LAW, THE FRANKISH LAW AND THE SO-CALLED “MARRIAGE IN ISTRIAN FASHION”)

In order to depict the wife's property law status in the North-Adriatic locality in the middle ages, for the sake of brevity, we will take into the account only two diametral solutions – her status in the Venice law, which, similarly to the Roman solution, wasn't good, and the opposite example in the area of Istra, whose roots can be found in the Frankish law, but which had its distinctive evolution.

Certain authors (Besta) claim that the “*Roman dotal system, more purely than anywhere else, although it has suffered certain significant changes*” has preserved in the Venice law, which is incorrect. There is a disjunction between a husband's and wife's property, but the Venice dowry (“*father's promise*”, *repromissa*), is neither by the name similar to the Roman *dos*. In the Rome, the contract is made by the dowry donator, usually father, with the husband, while in the Venice, the contractee is the wife. In the Rome, the owner of the dowry is the husband, while in the Venice, the owner is the wife. Exceptionally, part of the dowry (*honorificentia*) goes to the husband, unless he dies prior to the wife.¹²

Until the Tepolo's Statutum in 1242, a wife inherits husband's property, together with sons and daughters. Later, she loses that legitimacy, unless she has no descendants, ancestors and– collaterals. If she doesn't have any relatives, the property then belongs to the fiscus. From the husband's legacy, except for her property (dowry, “Monday gift”, wedding night – *donum lune*, third party wedding gifts), widow has the right to claim 10% of the dowry (*grosina, pellicia vidualis* – “widow's fur coat”), but only up to 12.5 pounds of silver. Maybe the widow who is leaving the house gets the gratuity for the honorable leave. She can stay in the house with the “widow's pledge”, she is granted food and a place to stay, but she cannot take the dowry. Her position is very low, in spite of her title “the wife and the mistress”.¹³

¹² MARGETIĆ, L. Antika i srednji vijek. – In: *Studije, HAZU, Vitagraf*, Pravni fakultet Sveučilišta u Rijeci, Rijeka 1995, str. 155.

¹³ BARTULOVIĆ, Ž. Povijest prava i države, I. dio – Opća povijest prava i države, Pravni fakultet Sveučilišta u Rijeci, str. 66; see and MARGETIĆ., L. Opća povijest prava i države, Pravni fakultet Sveučilišta u Rijeci, Rijeka 1990, str. 75.

In the economically developed environment, where the production and trade bloom, wife has the role of the housewife, who manages the household and don't contribute to the wealth. Unlike her, husband earns, therefore increasing his wealth. Wife's financial insurance consists of her dowry, gifts after the wedding night and gifts from the wedding, but that capital, unlike husband's, was not increasing. After husband's death, widow must leave his house, unless her stay was approved by his testament, if she doesn't enter a new marriage or a relationship. Except the pompous title "*domina et domina*", she was just tolerated in the house, and she, surely, couldn't lead a decent life.

Some medieval solutions flow the opposite direction, giving the widow the higher jurisdiction over the property. Sharia law acknowledges wife's right of inheritance, although it applies the principle where the females inherit two times less than the male heir of the same level. Husband inherits $\frac{1}{2}$ of the wife's legacy, if they have no children, and $\frac{1}{4}$ if they have. Widow has the right for two time smaller fraction, (IV, 12: 12. You get one-half of what your wives leave behind, if they had no children. If they had children, you get one-fourth of what they leave. After fulfilling any bequest and paying off debts. They get one-fourth of what you leave behind, if you have no children. If you have children, they get one-eighth of what you leave. After fulfilling any bequest and paying off debts. If a man or woman leaves neither parents nor children, but has a brother or sister, each of them gets one-sixth. If there are more siblings, they share one-third.)

The solution we will be talking about isn't related to the Sharia law, but to the Germanic influences. In Frankia, a husband gives his wife the dowry (*dos*), and after the wedding night, the gift (*morganige*, *Morgengabe*, *matutinale donum*). Parents give a marriage portion to the bride (*maritagium*). The wife's property is managed by the husbands. After the wife's death, children get *dos* and *maritagium*, and the widower gets *matutinale donum*. In a childless marriage, the property is returned to the wife's family (*Rückfallrecht*). However, union of the acquired property during the marriage has been developed. After the death of one marital partner, the surviving spouse takes the half of the acquired property, not as the heir, but as the co-owner. Strangely enough, there are Germanic influences in the Venice law, but the way of the development wasn't directed toward granting more rights to the wife, i.e. the widow.

In the medieval Germany, various solutions were developed. A wife is a friend of a husband, her position has improved, although he is her legal representative, and she also gains the right of inheritance, in relation to the husband. There is a difference in property relations of marital partners. At *Sachsenspiegel*, North-German law digest from the 13th century, there is, so called, management union with the property separation. The husband manages the wife's property, but the alienation requires her approval. With the end of the marriage, husband must separate the real estate as he has accepted them, without increasing or decreasing them. Marital partner's right of inheritance is not recognized.

Union of moveables and acquired goods reigns over the southern areas, which are mainly under the influence of the Frankish law – Bavaria, Austria etc. Both of the marital partners are responsible for the debts created during the marriage, but the widow can give up– the union of the property, and she is relieved from the responsibility. With the end of the childless marriage, the property is divided into two equal parts, and in the Frankish separation, the husband gets $\frac{2}{3}$, while the wife gets $\frac{1}{3}$. If there are children, a marital partner gets the personal estate, while the children get real estate, no matter if these are part of the mutual property, or property of one parent. In Westfalia, there is a union of acquired goods in the childless marriages. A universal union of imported and acquired property is distributed across the Germany, but it is comprehended diversely. Movables are managed by the husband, while real estates are managed in union. In the North-West, after the end of the marriage, the property is divided into half, in Silesia, Czech Republic and Moravia, a widow gets $\frac{1}{3}$, while a widower $\frac{2}{3}$, or the entire property. If there are children, after the end of the marriage, the union of the property is continued. Marital contract could predict other possibilities, e.g. clauses about the property that husband promises to the wife (*morgengabe, wittum, dos*) or wife to the husband (*eheststeuer, maritagium*). In Austria, Czech Republic and Moravia, *morgengabe* (czech *veno*, slov. *jutrna*) must be 50% larger than the wife's promise to the husband. The consequences of the contract are the separation of marital partner's property and union of the management.

Medieval English solutions are also under the slight Germanic influence. The ecclesiastical courts are responsible for the inheritance of the movables, which are separated in three parts: the wife, children and the Church get the $\frac{1}{3}$.

Bequeather could possess (a.k.a. *dead's part*) $\frac{1}{3}$, if he had children and the widow, and $\frac{1}{2}$ if he had only a widow or the children. If there are no children, the widow gets $\frac{1}{2}$. After the husband's death, the widow has the lifelong privilege of enjoying $\frac{1}{3}$ of the land, legal "dowry", (*dower*), even if the husband has already alienated it. The husband can assign the capital gain out of the property to the wife (jointure). Therefore, the widow has the right to the portion of the movables and solely the right of the land enjoyment.

It seems that the Frankish *tertía*, in which $\frac{1}{3}$ of everything that the husband has brought into the marriage, and everything acquired in the marriage belongs to the wife, as it is claimed by Margetić, has created marital property union and has affected the better position of the wife and the widow. The wife could influence the husband's duties during his lifetime, but the right on *tertía* was granted to her after his death. Most probably, the influence from there was spreading to France, Bavaria, Austria and Istra, from the 12th century.

This kind of union included all movables and acquired property (both gifts and acquired by the testament), but also the debts of the husband (even premarital). The property is managed by a husband, but with the constraint that the wife's consent is needed in regard to the real estate and marital property. After the death of one spouse, the widow or the widower has the right on the half of the mutual property, but he had to pay the debts, or give up on his half.

As one of the solutions, which is beneficial to the widow in the area of medieval Istra, "marriage in Istrian fashion" or "marriage alike brother and sister relationship" appeared, where the universal union of property of the husband and the wife exist. Margetić warns that it was researched by various authors, but their opinions about the influence that caused its creation differ, if it was Byzantine (Lado, Finocchiar-Sartorio, Ciccaglione), Germanic, (Pertile, Schupfer, Vaccari), Roman (Roberti), or according to the customs of the poor local classes, especially of the fraternal union of unparted brothers after the death of the family's father.

For his statements, Margetić uses the example from the Statute of Milja, from 1333. Prior to concluding the marriage, spouses or their parents assert the property that is brought to the marriage (*dotes, bona dotalicia*). Each spouse is the co-owner of the half of the imported property – "starting capital", because the statute literally refers to it as the "*primum capitale*". During the marriage, husband manages the marital property, but everything that is acquired increases

mutual property, not just the husband's, as it was the case in the Venice law. That is the ideal of the family property, where the spouses are like the "brother and sister".

From Trieste to Rijeka, in the marriages of the Slavic population, the union of acquired property has been developed, which would suggest the influence of the old Frankish law. The certain influence can be seen on Krk, Rijeka, Rab and Pag, perhaps, even in Split (here, the plebeian wives without servants have the right on the half of the property the husband has acquired in the marriage). As the proof, that this is not the case of the special Slavic interpretation, – could serve the legal act of Rus Justice, which doesn't recognize this right of the widow. Rus Justice: 123. "If the wife stays at home (*sjedet'*) after (the death) of the husband, she receives her share, what the husband left that is what belongs to her and she has no share in the husband's property". "Marriage in Istrian fashion" solution went a "step further", because the property that spouses have brought to the marriage, i.e. premarital property is included in the mutual property.

Data show that "Marriage in Istrian fashion" has prevailed in Istra, it is regulated at some places that this solution is implied if the marital contract doesn't specify anything.

3. CONCLUSION

Generally speaking, the hereditarily-legal position of a wife in all phases of Roman law evolution was very bad. The reason lies in the fact that a wife, almost throughout the whole Roman history, was considered a stranger in a family. On the other hand, the possibility of getting remarried i.e. getting married again, after the death of the husband posed a constant threat for the family property, because it would compromise the fate of the family property.

As preserving family property was one of the most important questions, especially in the beginning of Roman history, when life outside the family union (*consortium*) didn't exist, the hereditarily-legal position of a wife, in case of getting remarried, was regulated by prohibiting them to become an owner of a part of the family property and therefore import it into the new marital union.

Simultaneously, parallel to the existing inability, there was a constant need to secure the financial-legal position of a widow. In an attempt to overcome the existing difficulties, which on one hand were reflected in the need to preserve the family property, and on the other hand in the securing financial position of a wife after the death of her husband, the wife was admitted the right of enjoyment in the bequeather's property i.e. widow enjoyment in the part or the whole husband's bequest.

The poor position of a widow can be also found in the Venice law which recognizes the separate property of the wife and the husband, but everything the husband earns belongs only to him. The wife has the right only to assets she got from her family during the conclusion of their marriage, the husband's gift after the first wedding night and wedding gifts. They represent her financial security in case she becomes a widow.

Unlike that "the marriage in Istrian fashion" represents the marital property union which makes the wife a co-acquisitor in the marriage and that improves her position in property when she becomes a widow. The influence on this legal solution can be found in the Frankish law and the wife's right for the third of the property – *tertia*. But, the solution in Istra went one step further. It admits to the surviving spouse, which benefits the widow, the right to the half of the property, which also takes into the account premarital property brought to the marriage.

Isn't that the solution towards which the contemporary law tends in making a wife's and a husband's position in marriage equal regarding the divorce and inheritance today, in the 21st century. It is strange that such humane solution in the so called "dark, medieval century" can be found, not in the developed West, but in one obscure part of the Europe which isn't in the center of historical law research.

That's why we can agree with Margetić who points out completely wrong Ivan Loredan's opinion, "*the lord and owner of Barban and Raklja*", who on the 6th June 1763 "*with great astonishment found out that [...] were introduced [...] dangerous malpractices, [...] the marriages are being arranged in a manner of the brother and sister relationship which in the **barbarian law** (author's bolded text) make wives participants in the husband's property which he had owned at the time of the marriage closure, as well as the property they acquired later, etc... which causes the destruction of a family.*"