



## CONCEPTION OF ROMAN MARRIAGE: HISTORICAL EXPERIENCE IN THE CONTEXT OF NATIONAL FAMILY POLICY CONCEPT

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**Annotation.** *On 3 June 2008 the National Family Policy Concept was adopted by Seimas that states the goals and principles of the state family policy and several times refers to historical and scientific experience. The present article aims to reveal the historical and legal experience of the ancient Rome that laid foundations of contemporary private law and to compare the goals of the National Family Policy Concept and the state policy of the ancient Rome regarding family issues. The concept of family framed by the National Family Policy Concept is based on matrimony. This is why the authors of the article focus on Roman matrimony.*

*Having discussed the ancient Roman concept of marriage and Roman state policy regarding issues of matrimony and family and comparing it with the aims of the National Family Policy concept it might be stated that policy of encouraging family and promoting family relations based on matrimony that is provided by the Lithuanian state is not a new invention but may also refer to legal resolutions of the ancient Rome.*

**Keywords:** *roman law, family, marriage, National Family Policy Concept.*

## Introduction

Recently in Lithuania an active debate arose on the issues of family and matrimony. The National Family Policy Concept that had been started to develop in 2005 and approved by Seimas of the Republic of Lithuania on the 3 June, 2008<sup>1</sup> (further – Concept) for the first time legally determined what kind of social formation a family should be considered, defined the exceptional value of family and its essential functions in the life of the individual and society, introduced goals and principles of the state family policy and at the same time provoked active public debates. On the June 4 the group consisting of 36 members of the Seimas appealed to the Constitutional Court regarding the provision of the Concept that only common life based on matrimony should be considered a family and other relative provisions correspondence with the Constitution of the Republic of Lithuania. At the moment the case is prepared to be heard in the court.

The Concept several times makes references to *the historical and scientific experience* (Family based on matrimony is the most historically and scientifically reliable institute that guarantees the most beneficial conditions for a thorough and full-rate cultivation of its members' natural capacities and social skills (Art. 1.8.2, as well Art. 1.3 and 3.3.1 of the Concept). We are of the opinion that in this context it should be problematic to analyse what that historical experience is like. Whereas Roman law “lies at the foundations of European civilisation”, is not only the “origin but as well a permanently feeding source”<sup>2</sup> of the contemporary law, it is expedient and purposeful to analyse first the legal experience of ancient Rome, legal ideas of Roman jurists. The authors of the present article seek to research the genesis of family and matrimony in Roman law.

Going deeper into what the Concept determines as family, it becomes obvious that matrimony is an essential and obligatory element of contemporary family. Therefore while analysing the issues of family and matrimony in Roman law we shall concentrate our attention on matrimony.

As the hypothesis of the article we have chosen the statement formulated by the Concept: “Family based on matrimony is the most historically and scientifically reliable institute that guarantees the most beneficial conditions for a thorough and full-rate cultivation of its members' natural capacities and social skills” (Art. 1.8.2 of the Concept).

### 1. On the Notions *Family* and *Familia*

When making his/her first steps into the studies of Roman family law one at once encounters quite a problematic issue: what was considered a family in ancient Rome? The word *familia* can be translated as *family* however the notion *familia* is much more extensive than a contemporary conception of this phenomenon. “A family consists of

1 The National Family Policy Concept. *Official Gazette*. 2008, No. 69-2624.

2 Jonaitis, M. *Romėnų privatinės teisės įtaka šiuolaikinei civilinei ir civilinio proceso teisei*. Daktaro disertacija. Socialiniai mokslai (teisė). Vilnius: Mykolo Romerio universitetas, 2005, p. 247.

spouses and their children if there are any (Art 1.6.4 of the Concept). Following termination of matrimony a family is considered to be one of the former spouses, children and close relatives living together with him/her (incomplete family, Art 1.6.6 of the Concept).” The conception refers to close relatives as persons related by blood— parents and children, grandparents and grandchildren, brothers and sisters (Art 1.6.1 of the Concept). Thus members of a contemporary extended family are united by direct or lateral line of consanguinity till the second grade as well as by common life (common household).

The Roman notion *familia* is much more extensive. Scientists of Roman law distinguish two implications of the Roman notion *familia*: the first one is economical meanwhile the second one deals with family connections. On this basis two theories of Roman family had been developed during the last century: economical<sup>3</sup> and political.<sup>4</sup> The first is based on the Law of the Twelve Tables where it is stated that the term *familia* has reference to both property and persons,<sup>5</sup> i.e. includes not only persons living in one house (freemen – *pater familias* and persons under his authority, as well as slaves), but also the property of the house. Therefore a fundamental statement of the economic theory supporters is that a *familia* is a group of people that share the same house.<sup>6</sup> Furthermore the feeling of intimacy between them is called *familiaritas*, a word derived from *familia*.

Supporters of the political theory claim family connections to be the basis of a family. According to them notions of the essential meaning are – *agnatio* and *cognatio*.

The agnatic relation<sup>7</sup> emerges from the dominant position of father in the structure of roman family and interrelates several persons obeying the authority of the same *paterfamilias* – *potestas*.

All members of the agnatic family conformed the authority of the father of family – *paterfamilias*. Only a male person<sup>8</sup> free of any authority (person of own law or *sui iuris*) and having no living male ancestor<sup>9</sup> could hold the status of *paterfamilias*.

*Agnatio* occurred due to the nature (born of the legal matrimony *iustae nuptiae* and thus connected by blood relations) or the law (*adoptio* or *adrogatio* – due to adoption). Ulpian, grounding himself on *agnatio*, distinguished *proprio iure familia* and *familia communi iure*.<sup>10</sup> The first notion describes the group of persons obeying the authority

3 Followers of this theory, first of all, are V. Arangio-Ruiz, P. Voci, G. Pugliese bei M. Kaser.

4 This theory is supported most by P. Bonfante, partly – by F. de Martino.

5 Digest of Emperor Justinian – *Imperatoris Iustiniani Corpus Iuris Civilis*: Digesta. D. 50.16.195.1.

6 Perello, C. A. *Problems Concerning Familia in Early Rome*. Roman Legal Tradition. Ames Foundation, the University of Glasgow School of Law: 4, 2008, p. 41.

7 P. F. Girard calls agnatic relationship as well a civil relationship. See Girard, P. F. *Romėnu teisė*. I tomas, (translation from French by A. Tamošaitis). Kaunas: Vytauto Didžiojo Universiteto Teisių fakulteto leidinys, 1931, p. 196–198.

8 In particular cases (for instance, after the death of a husband, former *paterfamilias*) a woman could become an autonomous person *sui iuris*. On the other hand, she could never obtain the status of *paterfamilias*. See van Zyl, D.H. *History and Principles of Roman Private Law*. Durban, 1983, p. 88.

9 A son who becomes free from the power of his father through *emancipatio* is as well a person *sui iuris*. See van Zyl, D.H, p. 88.

10 Literally: *familia* “of its own law” and “of the common law”.

of the same father (it would be the mother of the family *mater familias*, staying in the power of husband *manus*, the son *filius familias*, the daughter *filia familias* and related persons – wives of sons (in case the authority of *paterfamilias*, *manus*, is applied regarding them), grandchildren (*nepotes*, *neptes*) and others). All the *agnati* that in the past were submitted to the authority of the father, regardless of the fact that after the father's death they have created separate *proprio iure familias*,<sup>11</sup> bear the name of the family of common law *communi iure familia*.

Some scientists referring to the above-mentioned classification by Ulpian divide family formations into a small patriarchal family (*familia proprio iure* or *familia iure paterno*), a family *sensu generale* or a great family (*familia communi iure*) and a tribe (*gens*).<sup>12</sup> After the death of *pater familias* a small patriarchal family splits into as many separate families as many sons there had been. These new families comprise a great family. A tribe that is also called *familia* by Ulpian (*Item appellatur familia plurimum personarum, quae ab eiusdem ultimi genitoris sanguine profisciscuntur*) is a group of persons realising that they have descended from the same ancestor, united by solidarity, name of the tribe (*nomen*), common cult (*sacra*) and family graves. They inherit in case there are no subordinate persons and *agnati*.<sup>13</sup> Cicero, quoting the pontific Scaevola, mentioned that *gentiles*, first of all, are persons having common name (*eodem nomine sunt*), second, born free (*ingenui*), third, having not a drop of slave's blood in their veins and, fourth, those that have not experienced *capitis deminutio*,<sup>14</sup> i. e. reduction of legal capacity.

The tribe differs from the family in narrow aspect by several features. First of all, the family has a clearly indicated patriarch, dead or alive, meanwhile a tribe has none. Members of the tribe commemorate only a mythic but not a real progenitor of the tribe. Moreover, the family possesses a system of relationship, divided into grades, meanwhile members of the tribe (*gentiles*) are interrelated together without grades.<sup>15</sup> Finally, having in mind features of the tribe indicated by Cicero, the family differs from the tribe as well because the progenitor of the family can be a released serve – *libertinus*.

Belonging to the tribe, *gens*, is reflected in the name of the tribe, *nomen gentilicium*. Meanwhile belonging to the family – in the family name *cognomen*. A name characterising a particular person is known as *praenomen*, thus Romans are called by three names, for example, *Publius Cornelius Scipio*.

One of the most famous specialists in the field of legal regulation of Roman family relations an Italian G.Franciosi claims *gens* to be a more ancient phenomenon than family in its narrow sense.<sup>16</sup> First of all, name of the tribe, *nomen gentilicium*, appeared earlier than the name of the family *cognomen*. The most ancient territory tribes have

11 Францози, Д. Институционный курс римского права [Franciosi, D. *The Institutional Course of Roman Law*]. Москва: Статут, 2004, p. 113.

12 Franciosi, G., p. 113.

13 Franciosi, G., p. 115.

14 M. Tvlii Ciceroni *Topica*. 6.

15 Franciosi, G., p. 115.

16 For more see: Franciosi, G., p. 120–121.

only tribal, but not family names. Secondly, the tribal exogamy<sup>17</sup> is chronologically earlier, than exogamy of the great family (marriage is not allowed until the sixth grade of relationship, meanwhile in the family, as G.Franciosi argues, relationship of the sixth grade in the direct line is not practically possible.<sup>18</sup>) Finally, the earliest family graves appear not earlier than in the end of 4<sup>th</sup> and the beginning of 3<sup>rd</sup> century B.C. Till that time there were only tribal graves. “The earliest history of Rome is the history of tribes (*gentes*); only later, starting with the end of 4<sup>th</sup> century B.C. it becomes the history of the great families”<sup>19</sup>.

As the family is a later phenomenon than the tribe, the contemporary conception of a family group is later than *familia sensu generale*.

Beside the notion *adgnatio* the other notion, *cognatio*, is used to describe the relationship. At first *cognatio* meant only consanguinity. Though consanguinity gained an exclusive importance not earlier than in the époque of Justinian, the notion *cognatio* itself is mentioned in historical sources and legal acts starting with the III century B.C.<sup>20</sup> Most often it is used dealing with prohibitions to conclude marriage that are introduced to avoid incest.

Consanguinity based on blood relation, according to Ulpian, exists between slaves as well. “*Itaque parentes et filios fratresque etiam servorum dicimus*” (“Therefore, we speak of parents, children, and brothers of slaves”), but cognation between slaves “is not recognized by servile laws”.<sup>21</sup> Cognatic relations between slaves – *cognati servilis*<sup>22</sup> - remain as well after their release from slavery. The legal meaning of *cognatio* is a prohibition for such persons to marry one another.<sup>23</sup>

Consequently, in Rome there existed two differently described types of relationship: *cognatio* based on blood relation and *adgnatio* founded on personal authority of the family father. It is characteristic that in agnatic relationship a mother who is not under the authority of her husband, *manus*, and because of that not being in the status of the daughter towards her husband and in the status of the sister towards her children, *loco sororis*, was not considered a relative of her children. Similarly blood relatives, the *adgnati* of her former family, are not considered to be relatives of her children. In consanguinity a mother is always treated as a relative towards her children.

Besides the agnatic and cognatic relationship, there is a one more notion used to describe relationship – *adfinitas*, marital relationship. It is a relation that emerges through marriage and bounds one of spouses and the cognates of another spouse. This relation did not have a legal meaning for *ius civile*, but later it could become an obstacle

17 A custom prohibiting a man and woman of the same tribe, kin or family to marry one another (Vaitkeviciūtė, V. *Tarptautinių žodžių žodynas*. Vilnius: Žodynas, 2001.).

18 For more see: Franciosi, G., p. 117–118.

19 Franciosi, G., p. 120.

20 For instance, plebiscite *Lex Cincia de donis et muneribus* (204 B. C.).

21 D. 38.10.10.5.

22 Бартошек, М. *Римское право: (Понятия, термины, определения)* [Bartoshek, M. *Roman Law: (Notions, Terms, Definitions)*]. Москва: Юридическая литература, 1989, p. 72.

23 D. 23.2.14.2.

to conclude marriage. For example, a man could not marry his former mother-in-law or sister-in-law, a woman could not marry her brother-in-law or father-in-law<sup>24</sup>.

## 2. Marriage

When speaking about Roman marriage the major part of authors start pompously quoting Modestine: “Marriage is the union of a man and a woman, forming an association during their entire lives, and involving the common enjoyment of divine and human privileges”<sup>25, 26</sup>. Often the importance of this quotation is exaggerated, for example, one of the most famous scholars in the field of Roman law of South Africa D.H. van Zyl states: “This impressive definition of the institution of marriage is indicative of its cardinal importance in Roman community life as also in the legal world”<sup>27</sup>. However, G.Franciosi mocks at such a rhetoric pomp and translates Modestine slightly differently than a conventional attitude. He argues that Modestine’s saying even in his own époque did not correspond with the reality of life. Firstly, matrimony could be considered as association of divine privileges, *communicatio divini iuris*, only in the sense that entering her husband’s family a woman accepted family cults, *sacra familiaria*, but lost connection with the cults of her former family. Secondly, association of human privileges, *communicatio humani iuris*, is obviously denied by the separation of property prevailing in the classical period. It is even less probable in the archaic and early Republican period because in the ancient times, when marriages with the authority of husband, *manus*, were usual, a wife stated in the position of the daughter or a granddaughter towards her husband or his father, to whose authority she was submitted, meanwhile the owner of the whole property was a husband or his father.<sup>28</sup> In our opinion one should not ignore the saying “association of the entire life”, *consortium omnis vitae*, which signified no more than all the common living of the husband and wife, but not living until the death of either of them; the Romans did not dissociate a possibility to dissolve marriage from marriage itself.<sup>29</sup>

24 van Zyl, D. H., p. 100.

25 “*Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*” (D. 23. 2.1); Nekrošius I., Nekrošius, V.; Vėlyvis, S. *Romėnų teisė*. Vilnius: Justitia, 2007, p. 156–157; Burdick, W. L. *The Principles of Roman Law and their Relation to Modern Law*. Clark, New Jersey: The Lawbook Exchange, Ltd., 2004, p. 215, van Zyl, D. H., p. 97 ir kt.

26 This provision is slightly modified in the Institutes of Justinian where the community of all the spheres of marital life is emphasised: “*Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens*” (Wedlock or matrimony is the union of male and female, involving the habitual intercourse of daily life.). *Imperatoris Iustiniani Corpus Iuris Civilis: Institutiones*. I.1.9.1.

27 van Zyl, D. H., p. 97.

28 Franciosi, G., p. 165. D. H. van Zyl, having in mind that property of a woman becomes a part of her husband’s property when she falls under his power and the separation of property when both spouses are persons *sui iuris* notices that Romans did not know the institute of community property at all. See van Zyl, D. H., p. 105.

29 See C. 8.38.2.

A Polish scientist in the field of Roman law W.Litewski in reference to definitions of marriage given by Modestine and the one presented in the Institutes of Justinian noted that a permanent character of marital union meant that marriage could not be concluded for a definite period of time (be time-limited), but on the other hand it did not comprise an obstacle for terminating marriage.<sup>30</sup>

The Roman marriage differed essentially from the contemporary canonical and civil marriage.

*First of all*, a contemporary marriage begins with a solemn act – conclusion of marriage – and ends with the solemn act – the legal declaration about termination of marriage or by the death of one of the spouses. In Rome a solemn act was not important because marriage was treated by law as an actual situation, *res facti*, though it as well created legal consequences. A marriage provided a clearly defined social status, meanwhile a wedding or a wedding ceremony seems to have been of importance just under some particular circumstances, namely, when changes in property relations occurred.<sup>31</sup> Marriage was held concluded since the moment of consent.<sup>32</sup> Meanwhile transfer of the bride, most often the entering of the spouse's home, *ductio in domum mariti*, signified a marriage being accomplished. A marriage could be accomplished even if the husband was not present. It was enough to send a letter or a messenger, and the accomplishment was signified by the bride's arrival to her husband's home.<sup>33</sup>

As it is noted in scientific literature sometimes marriage could be concluded in three different ways: *confarreatio*, *coemptio* and *usus*.<sup>34</sup> Such a position in our opinion is not precise and is determined by erroneous identification of the following institutes: conclusion of a marriage and emergence of husband's power upon his wife (differences between them will be revealed later). *Confarreatio*, as Gaius prescribed, was a procedure, when a woman came into the hand of her husband (literally – was placed in the hand of her husband, *manus*). A sacrifice for Jupiter Farreus was performed, a special cake, called *farreus panis*, from whence the ceremony obtains its name, was eaten, accompanied with certain solemn words, in the presence of ten witnesses. The essential goal of *confarreatio* was the acception of the husband's family cults by the wife. According to Gaius, the principal flamens, that is to say, those of Jupiter, Mars, and Quirinus were exclusively selected from persons born of marriages celebrated by *confarreatio*.<sup>35</sup> In marriage by *coemptio*, *coemptio*, woman became subject to her husband by mancipation, that is to say by a kind of fictitious sale in the presence of not less than five witnesses.<sup>36</sup> *Usus*, or falling of the wife under her husband's influence by prescription, can not

30 Litewski, W. *Rzymskie prawo prywatne*. Warszawa: Wydawnictwo prawnicze LexisNexis TM, 2003, p. 170.

31 Glendon, M. A. *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe*. Chicago and London: The University of Chicago Press, 1989, p. 19.

32 D. 24.1.66.

33 D. 23.2.5.

34 Nekrošius, I.; Nekrošius, V.; Vėlyvis, S., p. 160.

35 Institutes of Gaius - Gai I. 112.

36 Gai I. 113. In fact, buying of a bride that nowadays can seem to be inhumane and not corresponding with the consent of the bride as well as with the obligatory element of Roman marriage – *affectio maritalis*, was

be called a ceremony at all and even less a form of marriage conclusion, because in the case of *usus* a woman came into the hand of her husband by use when she had lived with him continuously for a year after marriage without any procedures or ceremonies. As Gaius states, already by the Law of the Twelve Tables it was provided that if a woman was unwilling to be placed in the hand of her husband in this way, she should every year absent herself for three nights.<sup>37</sup>

The fact that Roman legal acts did not regulate the conclusion of marriage does not mean that the law was indifferent to marriage. The existence or non-existence of a marriage was indirectly significant for Roman law when it had to deal with problems involving succession or responsibility for civil wrongs. But in dealing with such matters Roman law accepted as a marriage whatever was customarily recognized as such<sup>38</sup>. On the other hand, the public element of Roman citizen's legal capacity was manifested by marriage. When a person became captivated, first of all his relations with the state were broken, but at the same time his marriage was considered to be terminated. For instance, children born to two captivated spouses were not held to be born in the legal wedlock.<sup>39</sup>

*Secondly*, in spite of that marriage was considered to be *res facti*, what demonstrates sort of materialistic attitude towards marital relations, the requirement of permanent love and affection, *affectio maritalis*, rendered a mark of a higher value to the common life of spouses.<sup>40</sup> The disappearance of *affectio maritalis ipso facto* terminated the marriage, meanwhile nowadays expiration of mutual love and affection does not have any direct impact on the validity of marriage.

*Thirdly*, Roman marriage differs from the contemporary canonical marriage because the validity of Roman marriage did not depend on its confirmation by the conjugal act. The canon law states: "*Matrimonium ratum et consummatum nulla humana potestate nullaque causa, praeterquam morte, dissolvi potest*" ("A marriage that is *ratum et consummatum*<sup>41</sup> can be dissolved by no human power and by no cause, except death")<sup>42</sup> and "*Soli coniuges, vel alteruter, quamvis altero invito, ius habent petendi gratiam dispensationis super matrimonio rato et non consummato*" ("Only the spouses, or one of them even if the other is unwilling, have the right to petition for the favor of a dispen-

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characteristic for the major part of indo-german tribes in ancient times. It seems to be considered as the possibility for the bride's relatives to negotiate for the respectful treatment of the bride when she becomes a wife and a widow. Glendon, M. A. p. 19.

37 Gai I. 111.

38 Glendon, M. A., p. 21.

39 Дождев, Д. В. *Римское частное право* [Dozhdev, D.V. *Roman Private Law*]. Москва: Норма, 1999, p. 316.

40 Санфилиппо, Ч. *Курс римского частного права* [Sanfilippo, Cz. *The Course of Roman Private Law*]. Москва: Норма, 2007, p. 185.

41 A phrase *ratum et consummatum* that is used in the canon is explained in canon 1061.1: "A valid marriage (...) is called *ratum et consummatum* if the spouses have performed between themselves in a human fashion a conjugal act which is suitable in itself for the procreation of offspring, to which marriage is ordered by its nature and by which the spouses become one flesh". Codex Iuris Canonici, can. 1061.1.

42 Codex Iuris Canonici, can. 1141.



sation from a marriage *ratum et non consummatum*”).<sup>43</sup> In the other words conjugal act is essential judging if the marriage took place under canon law. However Roman law absolutely clearly and repeatedly emphasized: “*Nuptias non concubitus, sed consensus facit*” (“Consent and not cohabitation constitutes marriage”),<sup>44</sup> “*Non enim coitus matrimonium facit, sed maritalis affectio*” (“For marital affection, and not coition, constitutes marriage”)<sup>45</sup> etc. This statement is confirmed by the fact that Roman marriage could be concluded even in the absence of the husband when he was away, *inter absentes*, meanwhile the bride conducted to the bridegroom’s house and started performing the duties of the wife.

### 3. Elements of Roman Marriage

The Roman marriage started and lasted if two essential elements were present: common life (objective requirement) and marital love or willing to create family relations, *affectio maritalis* (subjective requirement). The expiry of any of these elements meant termination of marriage.

*Common life* was considered as living in the husband’s house. If the woman did not enter the house of her husband, she could not be treated as married. The house of the husband was the domicile of matrimony.<sup>46</sup> On the other hand this element of matrimony should not be treated very narrowly, i.e. as permanent staying of spouses together, an uninterrupted life under the same roof. When staying in marital relations it is important that spouses would be treated as living together according to universally accepted customs. Meanwhile temporal separations, periodical as well as irregular, do not dissolve marriage on its own accord.<sup>47</sup>

The other essential element of marriage, *affectio maritalis* – i.e. mutual affection, passion and love externally expressed and permanently supported by man’s and woman’s will to continue matrimony and to stay together,<sup>48</sup> reciprocal striving to live together particularly in matrimony, but not in another kind of union.

*Affectio maritalis* as a subjective psychological moment was differently expressed between spouses in every particular family. First of all it meant an exceptional position in the family that the husband rendered for his wife in regard to persons submitted to paternal authority and guests, the honourable name of *mater familias*, a request for children to respect their mother. The combination of these features was called the *honor matrimonii* (marital honour) and distinguished the wife from a concubine.<sup>49</sup>

43 Codex Iuris Canonici, can. 1697.

44 D. 50.17.30.

45 D. 24.1.32.13.

46 D. 23.2.5.

47 D. 24.1.32.13.

48 Dębiński, A. *Rzymskie prawo prywatne. Kompendium*. Warszawa: Wydawnictwo Prawnicze LexisNexis, 2005, p. 182.

49 D. 24.1.32.13, 39.5.31.

Some authors even argue that matrimony is distinguished from any other type of relations between persons of different sex only by *affectio maritalis*<sup>50</sup> that supported a marital relation when the spouse could not stay together for a longer period of time, for instance, due to the performance of public duties abroad.

When judging whether a valid marriage has been concluded, it was easier to prove a common life than the existence of a subjective element, *affectio maritalis*. This is why it should not be surprising that in Rome there existed several ceremonies connected with the conclusion of marriage, clearly (in the face of all future witnesses) expressing the consent of spouses to lead a common life, *consensus*, as well as *affectio maritalis*. It would be the above described *deductio in domum mariti*, the solemn conduction of the bride to the bridegroom's house, a ceremony of *confarreatio* when the bride in a celebratory manner accepted the cults of her husband's family, the ritual *aqua et igni accipere*<sup>51</sup>, i.e. bringing of water and fire, etc<sup>52</sup>. Marital ceremonies sometimes were accompanied by oral formulas, for example, the most known "*Ubi tu Gaius, ibi ego Gaia*" ("Where you are, Gaius, there I, Gaia, will be")<sup>53</sup>.

#### 4. Marriage and *Manus*

Some scientists recognize two kinds of marriage: marriage with power of husband, *matrimonium cum manu*, and marriage without power of husband, *matrimonium sine manu*.<sup>54</sup> It is stated that in case of the first kind of marriage the wife completely fell under her husband's power, but in the second case she did not. The conclusion of marriage is equated to uprising of *manus* on the wife.<sup>55</sup>

Nevertheless the institute of marriage should be clearly distinguished from the institute of transition into power of husband, *conventio in manum mariti*. First, because Romans themselves did not acknowledge dichotomy of marriage *cum manu* and *sine manu*, therefore such a classification lacks a historical legitimacy. The Roman marriage was an indiscrete institute without reference to status of the wife in marriage: either she was submitted to her husband's authority, *manus*, or not. At least there is no evidence in the sources regarding differentiation of marriages according to the wife's subordination to the husband.<sup>56</sup> One and only hint of Quintilian about the *duae formae matrimonium*,<sup>57</sup> two forms of marriage, supposedly is just erroneously understood Cicero's phrase "*duae*

50 Glendon, M. A., p. 21.; Lee, R. W. *The Elements of Roman Law*. 4<sup>th</sup> edition. London: Sweet & Maxwell limited, 1956, p. 66.

51 D.24.1.66.1.

52 More about the modes of expressing *affectio maritalis* see: Zabłocki, J. *Consensus facit nuptias*. Marriage. Ideal – Law – Practice. Proceedings of a Conference Held in Memory of Henryk Kupiszewski. Służewska, Z. Urbanik, J. (ed.) *The Journal of Juristic Papyrology*. 2005, 5: 245.

53 For example, this sacral formula is mentioned by Cicero in *Pro L. Murena Oratio*, 12.27.

54 Nekrošius, I.; Nekrošius, V.; Vėlyvis, S., p. 157, Burdick, W. L., p. 221, van Zyl, D. H., p. 102–103.

55 Nekrošius, I.; Nekrošius, V.; Vėlyvis, S., p. 160.

56 Zabłocki, J., p. 40.

57 Quintilianus, *Institutio Oratoria*. 5.10.62.

*formae uxorum*” which he was quoting and by which Cicero talks not about a marriage *cum manu* and *sine manu*, but about a wife submitted or not submitted to her husband’s authority (*duae formae uxorum*).<sup>58</sup> We may consider that the theory of different types of marriage was created on the grounds of sources that refer to wife’s falling under husband’s power, all the more as in the archaic time the conclusion of marriage was always accompanied by transition of the wife to her husband’s family.<sup>59</sup>

Historians of law, who equate the conclusion of marriage and uprising of *manus* on the wife, usually gratuitously make equal forms of conclusion of marriage and forms of transition of power onto wife: “The archaic Roman law acknowledged three ways of conclusion of marriage or rising of *manus* on wife: *confarreatio*, *coemptio* ir *usus*”<sup>60</sup>. Nevertheless a thorough analysis of sources does not leave any doubts that all the methods mentioned above are just procedures of *manus* transition, but not forms of a marriage ceremony. *Confarreatio* as well as *coemptio* and *usus* did not aim to conclude a marriage, but just to subject the wife to the husband’s authority. This position is best revealed by Gaius in the Institutes: “Both males and females are under the authority of another (*potestas*), but females alone are placed in the hands (*manus*). Formerly this ceremony was performed in three different ways, namely, by use (*usus*), by confarreation (*farreo*), and by coemption (*coemptio*)”<sup>61</sup>. In those passages Gaius talks only about falling under a husband’s influence, but not about a conclusion of marriage.

*Second*, the moments of conclusion of marriage and appearing of *manus* are not always simultaneous. For instance, in case of *coemptio* a purchase of the wife by which she falls under husband’s *manus* occurs earlier than the beginning of the spouses’ common life. Meanwhile in case of *usus* she falls under his authority not earlier than after one year after beginning of common conjugal life (or the wife can ensure to be absent from the common home for a period of three successive nights each year, *absentia trinoctium*, in order to prevent the confirmation of the *manus*).

*Third*, subjects of conjugal relationship and transition of *manus* upon the wife can vary, for instance, when the wife falls not under her husband’s, but under his father’s or grandfather’s authority.

*Fourth*, those two institutes can not be equated yet because there can exist both: a marriage without *manus* and *manus* without marriage (in cases, when the uprising moment of the first and the later is not the same).

*Fifth*, the consequences of imperfection of form of *manus* transition upon the wife are not applied to the marriage. For example, formal defects of the *confarreatio* procedure (such as lack of required number of witnesses or persons duty-bound to participate

58 See Zablocki, p. 40.

59 Dozhdev, D. V., p. 317.

60 Nekrošius, I.; Nekrošius, V.; Vėlyvis, S., p. 160.

61 “*Sed in potestate quidem et masculi et feminae esse solent; in manum autem feminae tantum conveniunt. Olim itaque tribus modis in manum conveniebant: usu, farreo, coemptio*” Gai I. 109-110.

in some rite) bring negative consequences only in respect to *manus*<sup>62</sup> but a marriage despite those imperfections was not considered to be void.<sup>63</sup>

Most likely all early Roman marriages have been characterised by the husband's or his father's (grandfather's) power upon the wife, but anyway marriages without falling under husbands power emerged very early. At the end of the Republic period marriages with the husband's authority falling upon the wife became very rare, in the Principate – extremely exceptional and at the beginning of the Dominate completely disappeared.<sup>64</sup>

## 5. Prerequisites for a Valid Marriage

In different periods of Roman history prerequisites for concluding a marriage slightly varied. However it is possible to indicate principal and obligatory prerequisites for concluding a Roman marriage, *iustae nuptiae* or *iustum matrimonium*. One of the post-classical compilations of Roman law *Tituli ex corpore Ulpiani* (that is as well known as *Regulae Ulpiani, Epitome Ulpiani*) lists all the prerequisites necessary for concluding a valid marriage: “*Iustum matrimonium est, si inter eos, qui nuptias contrahunt, conubium sit, et tam masculus pubes quam femina potens sit, et utrique consentiant, si sui iuris sunt, aut etiam parentes eorum, si in potestate sunt*”<sup>65</sup> (“Matrimony is lawful when a legal marriage takes place between those contracting it, if the male has arrived at puberty, and the female is nubile, and when both consent, if they are their own masters; or their parents give their consent, if they are under their control”).

Moreover the legal science indicates several other obligatory prerequisites for concluding a marriage, such as physical suitability, *de facto* absence of other matrimony, absence of consanguinity. We shall describe every prerequisite of marriage separately:

1) *Ius conubii* – a right to conclude a valid marriage. This right is inseparable from the status of liberty and citizenship. Both future spouses first of all should have been freemen. Slaves had no right to conclude marriages either between themselves or with freemen. *Ius conubii* is most often associated with Roman citizens; however this right belonged not only to the *quirites* but as well to the ancient inhabitants of Latium, *latini veteres*, also known as *latini prisci*. If there were no *ius conubii*, a valid Roman marriage could not be concluded and the adequate legal consequences did not arise. Marriage concluded between persons who did not possess *conubium* was considered to be valid only under *ius gentium*, but not the *ius civile*. In different historical periods valid marriages in Rome were not possible between patricians and plebeians,<sup>66</sup> citizens of Rome and fo-

62 Husbands power in such a marriage could arise on the *usus* ground, but in that case the wife was not considered taken into her husband's family, accordingly the negative consequences fell upon her children.

63 See Rozwadowski, W. *Prawo rzymskie wraz z wyborem źródeł*. Poznań: Ars boni et aequi, 1992, p. 205.

64 Litewski, W., p. 171.

65 *Tituli ex corpore Ulpiani*, 5.2.

66 This prohibition was abolished by *lex Cannuleia* in 445 B. C.

reigners,<sup>67</sup> freemen and freedmen,<sup>68</sup> a governor of the province under Roman rule and an inhabitant of the same province,<sup>69</sup> and later between Christians and Jews.<sup>70</sup> Besides, the right to conclude marriage was not rendered to tutor or curator and their former ward.<sup>71</sup> In the period of early Empire (Principate) soldiers in duty could not marry. A widow or a divorced woman could not marry until a particular period of time (usually 10 months) past after her husband's death or divorce. This rule was established considering the interests of children. If the mother disobeyed the above mentioned requirement, children born during that period were treated as *spurii* or *vulgo concepti* (born out of wedlock or of an unclear nature), meanwhile the mother was condemned to civil infamy, *infamia*.<sup>72</sup>

2) *Physical suitability* for marriage, or otherwise, potential to live sex-life and in such a way to express an *affectio maritalis*.<sup>73</sup> For instance, castrates could not enter into marriage.<sup>74</sup> In the times of Justinian the rules prohibiting monks and nuns<sup>75</sup> as well as high standing ecclesiastical dignitaries to conclude marriage were introduced.<sup>76</sup>

3) *The age*.<sup>77</sup> Girls were considered to be suitable to conclude marriage since the 12<sup>th</sup> year of life and the boys – since the 14<sup>th</sup> year.<sup>78</sup> This issue had been a question to doctrinal debates between Sabinian and Proculian schools of law. The first school expressed an opinion that the fact whether a person is of a marital age in every particular case should be stated by performing inspection of the body, *inspectio corporis*. The Proculians claimed that the age of 14 years was adequate and such a position was accepted in legal science of the classical period.<sup>79</sup>

4) *Actual absence of another marriage* since Roman marriage was legally strictly monogamic. It means that at the same time a person could not have several husbands

67 This prohibition lost its relevance after the Constitution of Emperor Caracalla (*Constitutio Antoniniana*) was passed in 212 A. D. This Constitution rendered Roman citizenship almost for all the inhabitants of Roman empire, except slaves, barbarians and persons sentenced for certain grave crimes.

68 This prohibition was abolished by *lex Papia Poppaea* in 9 A. D.

69 Code of Emperor Justinian - *Imperatoris Iustiniani Corpus Iuris Civilis: Codex*. C.1.9.6., D.23.2.63.

70 During the rule of Justinian nearly all the prohibitions of social kind, except the religious ones, had been abolished. C. 5.4.23.

71 van Zyl, D. H., p. 101.

72 For more see: van Zyl, D. H., p. 101.

73 Physical suitability is distinguished as a prerequisite of marriage because of the procreation (giving of birth) which was considered to be the essential purpose of Roman marriage. See van Zyl, D. H., p. 99; Dozhdev, D. V., p. 323.

74 D. 23.3.39.1.

75 Novels of Emperor Justinian - *Imperatoris Iustiniani Corpus Iuris Civilis: Novellae*. Nov. 5.8; Nov. 6.1; Nov. 123.14.29.

76 Nov. 123.12.

77 It would be true to say that marital age as the prerequisite of marriage could be included into the content of physical suitability because the marital age was determined according to the sexual maturity of future spouses, i. e. according to the ability to conceive a child. A boy of such an age was called *pubes* (mature), meanwhile a girl - *viripotens* (of a marital age, derived from the words *vir*; man, and *potens*, potential, able). We distinguish the marital age as a separate prerequisite of marriage according to the classification presented by Ulpian.

78 D. 33.1.2.4.

79 Gai I.196; II.113; *Tituli ex corpore Ulpiani* 2.28; 20.15; D.42.4.5.2; D.32.51; I.1.22.

or wives.<sup>80</sup> In classical Roman law concluding of another marriage meant dissolution of the first one, which excluded any bigamy. The law of post-classical period established sanctions: invalidity of the second marriage and penalty for the bigamy.<sup>81</sup> When facts of bigamy or polygamy came into the open, the person lost his/her honour and reputation.<sup>82</sup> By the way, the requirement of monogamy is applied only to the legitimate Roman marriage, *matrimonium iustum*, but it does not exclude other kind of out-of-wedlock relations. In fact, the wife, no matter whether she is or is not under the authority of husband, in the earliest times could be killed for being unfaithful. Meanwhile since the time of Augustus she could be exiled for ever, *relegatio perpetua*.<sup>83</sup> However if the husband was unfaithful, the wife could not even touch him because she did not have any right for this.<sup>84</sup> G. Franciosi alleges that a contradiction between loose behaviour of men out of wedlock, which was very common in the high society, and strict defence of the official family moral should not be surprising. “In fact these are the two different sides of the same medal. An ancient world alongside with a monogamic family always tolerated the existence of hetaerae who in turn supported and strengthened monogamy. This statement, which at first glance seems to be an antinomy, could be aptly reasoned by a quote from the works of ancient rhetor: “Hetaerae are necessary for pleasure, concubines – for everyday demands of our body, meanwhile wives lead our household and bear us legitimate children”.<sup>85</sup> It should be pointed out that this pompous phrase does not imply that marriage and concubinate, which is, as we shall see later, of a monogamic nature, are concluded having different purposes: concubinate for contenting bodily demands and legitimate marriage for bearing future heirs.

5) *Consent of future spouses*. The clearly declared consent<sup>86</sup> of both future spouses to conclude a valid and legitimate marriage, but not just to live in a concubinate or to enter a similar relationship of a provisional nature: “*Nuptias non concubitus sed consensus facit*” (“Consent and not cohabitation constitutes marriage”).<sup>87</sup> The consent of both spouses was the basis for forming *affectio maritalis* (an obligatory element of marriage). A Polish scholar W. Rozwadowski even uses notions *consensus* and *affectio maritalis* as synonyms emphasising in such a way a permanent will of spouses to stay together. Moreover he states: “Contemporary marriage lasts because it was concluded meanwhile

80 D.3.2.1.

81 Litewski, W., p. 172.

82 D. 3.2.13.1-16. Civil infamy, *infamia*, had impact on the legal capability of the person. Nekrošius, I.; Nekrošius, V.; Vėlyvis, S., p. 91.

83 D. 48.5, D. 48.5.21. G. Franciosi emphasizes that fidelity of a woman was guarded by all the ancient civilisations, first of all, to ensure the origin of the descendant from his father in the case of inheritance. Misconduct of a woman could “perturb the purity of the family blood”, *turbatio sanguinis*. See Franciosi, D., p. 122–123, 180.

84 Aulus Gellius, *Noctes Atticae*. X.23.4-5.

85 Franciosi, D., p. 122–123.

86 Paulus stresses that not only the consent of the power holders but as well of the persons intending to get married is necessary: *Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt*. D. 23.2.2.

87 D.50.17.30, *taip pat* D.35.1.15.

Roman marriage lasted only because spouses permanently continued a marital union.<sup>88</sup> In order to agree and to express their consent both parties had to be physically and mentally sane because lunatics did not have right to conclude a legitimate marriage.<sup>89</sup>

6) *Consent of patres familias*, if persons submitted to paternal authority, *personae alieni iuris*, intended to conclude marriage.<sup>90</sup> A young man would receive a permission to conclude marriage not only from the person to whose power he was directly submitted, for instance, from his grandfather, but as well from his father, who in the future after the grandfather's death had to overtake the power upon his son and his future children. Since future descendants of the daughter will belong to the husband's family, she would receive a permission to conclude marriage exceptionally from her direct *pater familias*.<sup>91</sup> A marriage concluded without consent of *pater familias* was treated as void.<sup>92</sup> However the decrease of paternal power stipulated magistrates to render claims against *pater* in case he refused to give a permission without a serious reason.<sup>93</sup> Moreover it was possible to marry without a permission of *pater* in case he was unable to render it, for instance, due to his mental illness.<sup>94</sup>

7) *Absence of relationship*. The parties were not permitted to be within the forbidden degrees of relationship in respect to each other, no matter what kind of relationship it was: direct, lateral or affinity. Ascendants (*ascendentes*) and descendants (*descendentes*) in the direct line (*linia directa*, joining ancestors and descendants) were forbidden to conclude marriage independently from the grade of relationship (*ad infinitum*). This prohibition was applicable in the case of both *cognatio* and *adgnatio*. Meanwhile, persons related in the lateral line (*linia obliqua*, joining the descendants of the same ancestor) were forbidden to conclude marriages up till the sixth degree in the law of pre-classical period. During the classical period this prohibition regarding relatives of the lateral line was mitigated, i.e. only marriage between *collaterales* up till the third grade was prohibited. Since the rule of Claudius till Constantine the Great it was allowed to marry a niece – a brother's daughter:<sup>95</sup> a special *senatusconsultum* passed in 49 A.D. rendered a permission to conclude such a marriage however the marriage with the sister's daughter remained prohibited despite that the grade of relationship is the same in both cases.<sup>96</sup> The constitution passed in 342 A.D. restored the former prohibition to marry a brother's daughter.<sup>97</sup> A prohibition to conclude marriage was as well placed on persons who were related by marriage, *adfinitas*. In this way a person was not permitted to marry his pre-

88 Rozwadowski, W., p. 206.

89 D.23.2.16.2.

90 D. 23.2.2.

91 Sanfilippo, Cz., p. 188.

92 D. 23.2.2.18-35.

93 In the Digest there is a note of Marcian that such a provision had been introduced by *lex Iulia et Papia Pop-paea*. D.23.2.19.

94 C 5.4.25.

95 This *senatusconsultum* had been passed to meet the whims of Claudius himself. The latter was willing to marry a daughter of his brother – Agrippina Junior.

96 See Gai 1.62.

97 Code of Emperor Theodosius – *Theodosiani libri XVI cum constitutionibus Sirmondianis*. C. Th. 3.12.1.

vious mother-in-law (or in the case of a woman, her father-in-law), stepparents could not marry their stepchildren. Moreover, persons were treated as related by marriage not only in the case when such relations arose from the legitimate Roman marriage, *matrimonium iustum*, but as well from a usual cohabitation, *concubinatus*. A marriage concluded ignoring the above mentioned obstacles was considered to be void and treated as an incest (*incestum matrimonium* or *incestae nuptiae*)<sup>98</sup>. Children, born out of such a relation were held impurely conceived and could not ever be adopted or inherit.

## 6. Non-Marital Unions

If examining the Roman legal experience we referred to the law applicable only to Roman citizens, we could restrict the examination to considering the legal Roman marriage, *matrimonium iustum*. However in Rome besides citizens there lived a lot of other persons, who due to one or another reason did not have *ius connubii*, but who could enter into unions of a permanent character and who were protected, e.g., by praetorian law, therefore, in our opinion, it would be unfair not to take such unions into consideration.

Alongside the legal Roman matrimony there existed a permanent non-marital bond, which differed from *matrimonium iustum* only by *affectio maritalis* – the striving to establish a legal Roman family. It was called *concubinatus*. The relation of a permanent character between slaves was called *contubernium*.

1) *Concubinatus*. According to the Roman law, concubinate should not be considered as exclusively actual relationship not defended by law or contradictory to the legal acts. This is the sort of union that does not equal to marriage, but is acknowledged by the law. One used to enter into a concubinate first of all when a union of two persons could not be treated as a legitimate marriage because of not complying with any of the obligatory prerequisites or when due to the reasons of social nature<sup>99</sup> there was no matrimonial honour, *honor matrimonii*, and consequently *affectio maritalis*. That is why seeking to avoid groundless rumours everyone who intended to take as a concubine a freeborn and honourable woman, *ingenua et honesta*, was obliged to declare about it in the presence of witnesses.<sup>100</sup> It is notable that a couple deliberately living in a concubinate (not intending to create a legitimate marriage) is held to start living in matrimony since the moment they begin treating one another as spouses, in the other words, when *maritalis honor* and *affectio* arise.<sup>101</sup> Concubinate, the same as marriage, should meet particular preconditions: first, it had to be monogamous, i.e. it was prohibited to have several concubines or a wife and a concubine at the same time,<sup>102</sup> second, there should be no obstacles related to kinship, and third, the common life should have be of a perma-

98 D.23.2.14.

99 For instance, a relation of a senator and a freedwoman.

100 Sanfilippo, Cz., p. 197.

101 D.39.5.31.

102 Sentences of Paulus - *Pauli Sententiae*, 2.20.



ment nature.<sup>103</sup> Children born in the concubinate were reckoned illegitimate, i.e. they did not inherit the status of the father, however they were not treated as conceived impurely, *spurii*, as for example, in the case of incest, or *vulgo quasiti*, born out-of-wedlock and could be adopted.<sup>104</sup>

2) *Contubernium*. Slaves in Rome did not possess a *ius conubii*, the right to conclude a legitimate marriage, however it would be a mistake to suppose that interrelation between slaves was of no importance. Long lasting and affectionate common life of slaves<sup>105</sup> was called *contubernium* (from *taberna*, a hut). Although slaves living together were not treated as spouses and their common life did not result in any legal consequences as in the case of a legitimate Roman marriage (for instance, there was no inheritance), nevertheless a particular legal security of their family relations existed. For example, when selling slaves one could not separate persons living in *contubernium* or to separate children from parents. Released slaves could not conclude marriages either with their cognates or with persons they were related to through *contubernium*. For example, a freedman, *libertinus*, could not marry a released girl, if both of them have been manumitted, even though it was doubtful whether the alleged father is her parent.<sup>106</sup>

## 7. Institute of Marriage and State Policy

While discussing the historical experience and issues of Roman marriage in the context of Lithuanian National Family Policy Concept, several important moments should be pointed out.

The social situation of the Roman State in the period of late Republic could be compared to the present situation in Lithuania:<sup>107</sup> nowadays similarly as it had been then the methods to stabilise a marital and family life as well as to increase the number of children in a family are actively being searched for. The Roman resolution of the problem was as follows: a law obliged spouses that have concluded a legitimate marriage to give birth to at least one child. However when intending to make use of particular privileges, freeborn Romans, *ingenui*, should have given birth to at least three legitimate children, meanwhile the freedmen – at least to four.<sup>108</sup> One of such privileges, for example, was the possibility for the mother, who had given birth to three children, to become a Roman citizen.<sup>109</sup> These privileges can be compared with the intentions to render privileges to

103 Sanfilippo, Cz., p. 197-198.

104 Lee, R. W., p. 69.

105 Of a freeman and a slave, of a freewoman and a slave.

106 D.23.2.14.

107 More about the present-day demographic situation in Lithuania and its problems see: Explanatory letter to the Law of Family Support Basis of the Republic of Lithuania (Lietuvos Respublikos Paramos šeimai pagrindų įstatymo projekto Nr. XP-2526 Aiškinamasis raštas).

108 van Zyl, D. H., p. 98.

109 Sanfilippo, Cz., p. 176.

the children raising families that are presently being discussed in the Seimas of the Republic of Lithuania.<sup>110</sup>

Since the most ancient times the procreation, *liberorum procreandum causa*, was considered to be the most important purpose of marriage in Rome. A Greek historian Dionysius of Halicarnassus relates about legal provisions from the period of King Romulus' rule that obliged citizens to conclude marriage and to give birth to the descendants. In 403 B.C. the censors Camillus and Postumius imposed a special tax (*aes uxorium*) on the citizens who remained bachelors until the old age.

As Valerius Maximus claims, the imposing of the tax was reasoned by the fact that nature obliges everyone not only to come to this world, but as well to give birth to the descendants. Everyone owes to his parents the raising and education and this debt should be paid by providing for his own children. Thus bachelors should not be surprised by the obligation to pay taxes in behalf of those who are bounded by the duty to maintain numerous offsprings.<sup>111</sup>

The significance of procreation as a purpose of marriage is proved by the story of Carvilius Ruga who divorced his wife in 232 B.C. because of her bareness.<sup>112</sup>

In 131 B.C. new legal provisions obliging to conclude marriage and to give birth to the children were passed in Rome. The author of these provisions was a consul, praetor and censor Quintus Cecilius Metellus Macedonicus by whom the above mentioned obligations were treated as a patriotic duty.<sup>113</sup>

Every fifth year when forming a list of citizens, *census*, the censors used to ask: "Did you marry to give birth?"<sup>114</sup> and often in a form of a joke tried to encourage starting a family. This is how Quintus Cecilius Metellus did in 102 B.C.: "If we could get on without a wife, Romans, we would all avoid that annoyance; but since nature has ordained that we can neither live very comfortably with them nor at all without them, we must take thought for our lasting well-being rather than for the pleasure of the moment."<sup>115</sup>

And finally, we could try to answer the essential question raised by National Family Policy Concept whether historical-scientific experience enables us to claim that a family based on matrimony is the most historically and scientifically reliable institute that guarantees the most beneficial conditions for a thorough and full-rate cultivation of its members' natural capacities and social skills. The historical legal experience of the ancient Rome proves that the Roman institutes of *familia* and matrimony were closely related: only children born in the legitimate wedlock inherited the social status of their father and all the related rights; only a woman living in a legitimate marriage could share the status of her husband and be proud of matrimonial honour, *honor matrimonii*, an

110 Particular provisions of the so called 2V (Two children) programme are attempted to realize through the National Family Policy Concept and are as well reflected in the draft Law of Family Support Basis of the Republic of Lithuania Nr. XP-2526, presented to the Seimas of the Republic of Lithuania on 18th of September 2007.

111 Valerius Maximus, *Facta et dicta memorabilia*. 2.1.4.

112 Aulus Gellius, 4.3.2.

113 Aulus Gellius, 1.6.1.

114 Aulus Gellius, 17.21.

115 Aulus Gellius, 1.6.1-2.

honourable name of mother of the family, *mater familias*, and to anticipate the respect adequate for her status; only a man living in a legitimate matrimony could have children submitted to his paternal power, who will inherit his property in the future. Taken into consideration all that has been stated above we can arrive at the conclusion that the hypothesis raised in the present article is confirmed as far as it deals with the experience of the ancient Rome.

## Conclusions

1. Lithuania's National Family Policy Concept refers to historical and scientific experience more than once, therefore it is purposeful to take into consideration juridical decisions of Roman jurists, as well as historical legal experience of the ancient Rome, the law of which constitutes the basis of European civilization.

2. In the National Family Policy Concept, which for the first time defines the concept of family in Lithuania, marriage is held to be the essential factor for establishing family.

3. The Roman concept *familia* is by far broader than the contemporary concept of the family; it encompasses not only the husband, wife, children and close relatives, but also slaves and movable and immovable property of the family.

4. A prominent position given to the definition of marriage as a union between a husband and a wife, alliance of the whole life, union of divine and human law, formulated by Roman jurist Modestin and taken over by Justinian's Institutes, is criticized by the contemporary scholars, since *consortium omnis vitae* signified no more than all the common living of a husband and wife, but not living until the death of either of them; the Romans did not dissociate the possibility to dissolve marriage from marriage itself.

5. The Roman marriage differed from the contemporary canon and civil marriage by several characteristics. First of all, the Roman marriage was actual but not juridical; therefore the form of its conclusion was not significant. Second, the will of the married couple to live in matrimony was an obligatory element of matrimony not only at the moment of its conclusion but throughout the whole duration of the marriage. Third, the Roman matrimony differed from the contemporary canon marriage by the fact that its validity did not depend on confirmation with a conjugal act.

6. The following were necessary elements of the Roman marriage: living together (objective element) and *affectio maritalis* - mutual love between a husband and a wife, devotion, desire and will to enter into and maintain the Roman marriage (subjective element).

7. In modern science of Roman law it is necessary to distinguish institutions of marriage and husband's authority over wife, *manus*. It is also important to state that ways of wife's falling under husband's *manus* – *confarreatio*, *coemptio* and *usus* should not be treated as forms for concluding of the matrimony.

8. There were certain prerequisites for conclusion of the marriage in the Roman Law: the right to conclude the legal Roman marriage, certain age, physical suitability,

*de facto* absence of other matrimony, consent of the future spouses and/or their *patres familias*, absence of family connections.

9. Together with the legal Roman marriage there as well existed other unions of permanent character in Rome.

10. In Rome the main aim of marriage was procreation, and Roman national policy, which encouraged the creation of the family and procreation, may be compared to the contemporary policy of the Lithuanian State, which is targeted at improvement of the demographic situation.

11. Analysis of the conceptions of the Roman family and marriage allow to state that marriage-based family in ancient Rome established the most favourable conditions for wellbeing of its members. This statement justifies the statement of the National Family Policy Concept that marriage-based family is a historically and scientifically proven and most reliable institution, establishing the best conditions for a thorough and fully-fledged development of the natural powers and social skills of its members.

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ROMĖNIŠKA SANTUOKOS SAMPRATA:  
VALSTYBINĖS ŠEIMOS POLITIKOS KONCEPCIJA.  
ISTORINĖ PATIRTIS

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**Santrauka.** 2008 m. birželio 3 d. patvirtinta Lietuvos Valstybinė šeimos politikos koncepcija, nustačiusi valstybinės šeimos politikos tikslus ir principus, ne sykį daro nuorodą į istorinę ir mokslinę patirtį. Todėl šiame straipsnyje siekiama atskleisti Senovės Romos, pa-

dėjusios šiuolaikinės privatinės teisės pamatus, istorinę teisinę patirtį bei glaustai palyginti Konceptijos tikslus ir Senovės Romos valstybinę politiką šeimos klausimais. Konceptijoje suformuluota santuokos sudarymu pagrįsta šeimos samprata, todėl straipsnyje daugiausia dėmesio skiriama romėniškai santuokai, jos būtiniesiems elementams, sudarymo formoms ir išankstinėms santuokos sąlygoms.

Išanalizavę senovės Romos santuokos sampratą ir Romos valstybės politiką su šeima ir santuoka susijusiais klausimais bei palyginę su Lietuvos Valstybinės šeimos politikos koncepcijos tikslais, galime konstatuoti, jog šiuo metu Lietuvoje vykdoma šeimos rėmimo ir šeiminių, santuoka grįstų, santykių skatinimo politika nėra šių dienų išradimas, bet gali remtis Senovės Romos teisiniais sprendimais.

**Reikšminiai žodžiai:** romėnų teisė, šeima, santuoka, valstybinė šeimos politikos koncepcija.

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