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# Considerations on the *Matrimonium Juris Gentium*: An Invitation to Compare Roman Law and International Human Rights Law*

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## I. Introduction

Roman law is unquestionably one of the main legacies of ancient Rome. Sherman (1917) noted that the "past and present in law are inextricably woven together" (p.8). Modern legal systems are directly or indirectly, depending on variations of scope, descendants of Roman law (Borkowski & du Plessis, 2005). Furthermore, the influence of Roman law also permeates international law (Phillipson, 1911). The historical connections between Roman law and modern legal systems call for a comparative analysis of certain Roman institutes and how they changed or could impact modern law. Indeed, it was not only the Roman legislation that arguably influenced modern law but also the historical developments that shaped ancient Rome's legal system that arguably echo in the contemporary world. The Roman reasoning was eventually adopted within the structure of contemporary law, including international law and human rights law.

This article seeks to analyze the Roman's law of nations, how it changed the Roman understanding of marriage and how that bears similarities with current international human rights law. The conclusion is that both the Roman law of nations (or *jus gentium*) and current international human rights law are both seeking to adapt domestic legal systems based on reasoning, *de facto* considerations and consent.

* The views expressed herein are those of the author.

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## II. Current International Law and Roman Law

Certain notions of international law were part of the practice of a number of ancient civilizations (Ch'eng, 1927). The law of nations is not a Western invention. Indeed, it is not even a Christian creation(1) and its roots could arguably stem from ancient Rome. Experiencing contact with different civilizations, the Romans expanded and shaped the application of part of its legal system officially recognizing that there is a law applicable to different individuals or groups of individuals regardless of their religion, social status, origin and ethnicity (*see* Muirhead, 1916). Nussbaum (1952) explains that:

> Roman law held out a convenient name for the new discipline: *jus gentium* (law of nations, *droit des gens*). In ancient Roman law, to be sure, that term had a different significance. It meant first a *quasi*-cosmopolitan segment of municipal Roman law designed primarily for litigation among or with foreigners; in a broader — as it were philosophical — sense it meant the law common to all or to many nations…It was in the latter sense that *jus gentium* included rules of international law such as the sanctity of envoys or the captor's right to war booty; in fact, international law is to a great extent necessarily "universal" (p. 682).

Phillipson (1911) asserts that Rome, at least in the first period of her history, "recognized the existence of sovereign and independent states other than her own, that she had clear notions of a *civitas gentium*, and possessed an international juridical conscience, and admitted the principle of reciprocity" (p. 116). The juridical basis of international law rested upon the idea of an international juridical conscience (Phillipson, 1911). Phillipson (1911) further adds that Cicero's notion of *civitas* (or *societas*) *gentium* is not only a metaphysical concept but rather, "[t]he existence and the influence of a juridical consciousness is clearly evidenced in the whole fabric of the law of nations as accepted by the Romans" (p. 117). Cicero

(1) Slavery, for example, was legal under the rules of the law of nations *see* Grotius (1925, p. 764).

(1999) believed that law is the highest reason, established by the human mind and rooted in nature, "which commands things that must be done and prohibits the opposite" (p. 111). Furthermore, Cicero (1999) commenting on the universality of law and the consciousness of *jus gentium*, adds that:

> What nation is there that does not cherish affability, generosity, a grateful mind and one that remembers good deeds? What nation does not scorn and hate people who are proud, or evildoers, or cruel, or ungrateful? From all these things it may be understood that the whole human race is bound together; and the final result is that the understanding of the right way of life makes all people better (p. 116).

Cicero's notions of universality and natural law influenced Roman law, especially the branch known as *jus gentium* (Sherman, 1917). Roman law is based on a dichotomy between *jus gentium* and *jus civile*. The latter was a legal system for the Romans (Walton, 1916). The term *jus civile* can designate two different notions. First, it can refer to a whole branch of law applicable to all individuals enjoying rights in Rome similar to the French term *droit civil* (Walton, 1916). Furthermore, it can be used to describe the law applicable to Roman citizens (Walton, 1916). Administered by the city praetor (*praetor urbanus*), *jus civile* existed for the exclusive benefit of the Romans, while foreigners and Roman provincial subjects remained outside its jurisdiction (Sherman, 1916).

The growth of Rome and the influence of Stoic philosophy through the works of notables such as Cicero required a fresh outlook on law. *Jus civile* was not suited to accommodate legal notions rooted on Stoic philosophy. Furthermore, after the First Punic War, there was a large influx of foreigners to Rome and an expansion of commerce between Romans and foreigners (Stephenson, 1912). This pluralistic system strengthened by notions of a law that could be applicable to all peoples required a new perspective on law. To that end, the notion of *jus gentium* was gradually developed. *Jus gentium* is a universal law first applied to foreigners and relationships between foreigners and Roman citizens. However,

eventually, as Stephenson (1912) argues, it "proved so far-reaching and useful that it was accepted in the dealings of citizens with citizens, and became part and parcel of *jus Romanorum*" (p. 917). Gaius (1946) asserted that:

> Law which a people establishes for itself is peculiar to it, and is called *ius civile* (civil law) as being the special law of that *civitas* (state), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partially its own peculiar law and partially the common law of mankind (Gaius, 1946, G 1.1; Inst 1.2.1.).(2)

Gaius, therefore, sets the basic definition of *jus gentium* rooted in two interconnected elements: the law of nations as a law of all mankind or nations (*iure omnes gentes*); and rooted in the natural law notion of natural reason of all humankind (*naturalis ratio inter omnes homines*) (Gaius, 1946, p.1 *commentarius primus*). Notwithstanding its universality element, *jus gentium* mainly concerned free or freed individuals — as slavery was an important part of Roman law (Watson, 1967) — and could cover topics from international law, private international law, and foreign law.

Later, Emperor Justinian partially codified Gaius's concept of the law of nations with the *Corpus Juris Civilis*. However, different from Gaius's Institute (Gaius, 1946, note 1, § I. = Inst, I, 2, I (D.)), the *Corpus Juris Civilis* also adopts a tripartite division of law accepting and codifying the concepts of the law of nations (*jus gentium*), civil law/domestic law (*jus civilis*) and natural law (*jus naturali*). The Institutes of the *Corpus Juris Civilis*, in section two named "of natural law, of the law of nations and of civil law" (*de iure naturali et gentium et civili*), adopts Gaius's division of law when it establishes that:

All peoples are governed by the laws and costumes which are partially their

(2) Gaius. The Institutes of Gaius, translated by F.de Zulueta (1946). Oxford: Clarendon Press, p. G 1.1; Inst 1.2.1.

> own and partially the law of the common use of all men. The law which the group of individuals establish as the law for themselves as part of a particular group is called civil law, that is, the peculiar law of the society. However, the law established by natural reason between all individuals observed by all individuals is called the law of nations, which is the law that all nations or peoples observe (Krueger, vol. 1, 1973, Inst I, 2, I [translated by author]).

However, in this same section, the compilers of the *Corpus Juris Civilis* also adopted Ulpian's division of law, which includes natural law (Zuckert, 1989). The Justinian Institute, citing Ulpian (Krueger, vol. 1, 1973, Inst I, 2, I, note 11 and Dig 1,1,1 § 3), defined natural law as "what nature teaches to all animals; for it is not specific to the human race, but rather to all living creatures, that is, animals from the air, earth and sea"(3). Furthermore, this same reasoning is part of the Digest of the *Corpus Juris Civilis*. The Digest (Krueger, vol. 1, 1973, Disg I, 2, I, p. 29) establishes that:

> Natural law is what nature teaches all animals: for it is not specific to the human race alone but to all animals…. From this law comes the union of male and female, which we call marriage, the procreation of children and their education. We see that other animals, even wild beasts, are acquainted with this law. The law of nations is observed by all peoples or nations of the world. It is lawful to depart from the natural law, because the first is common to all animals, whereas the latter is men and is common to all individuals [translated by author].

Consequently, the *Corpus Juris Civilis* accepted with equal standing, two divisions of law. The first, from Gaius, does not recognize the existence of a wide notion of natural law which binds humans and animals alike. The second classification, from Ulpian, points out a tripartite view of law which includes a

(3) *Krueger*, *vol. 1*, *1973*, *Inst I*, *2*, *I*, *note 11 and Dig 1,1,1 § 3* [translated by author].

broad view of natural law as a separate law. Much has been written about this apparent contradiction found in the outset of the Institutes and the Digest, and about the Roman concept of natural law (Kroger, 2004; Pollock, 1901).

The Roman notion of the law of nations or *jus gentium* is, thus, quite complex and encompasses domains currently envisaged as part of public international law (*e.g.*: in areas relating to diplomatic envoys, ambassadors, and agreements), private international law, and matters pertaining to civil law but which are not constrained to Roman citizens (*see* Bederman, 2001; Walton, 1916; Muirhead, 1916). However, there is one common thread to all notions of *jus gentium* and definitions from Gaius and Ulpian, which is the recognition of international rights and duties which belong to all individuals. Furthermore, Jeremy Waldron, for example, points out that the Roman law of nations includes the traditional idea of natural law but with a substantial difference (Waldron, 2005). In his words, in 2005, Waldron wrote:

> Now, natural law also involved the idea of commonality: just as fire burns in Persia as well as in Greece, so murder is wrong in Carthage and in Rome. The difference was that the law of nature posed itself explicitly as an ideal: what did human reason as such say about the basics of human action and relationship, justice and injustice, right and wrong? *Ius gentium*, on the other hand, afforded a more grounded focus of aspiration, looking not just to philosophic reason but to what law had actually achieved in the world (p. 134).

Slavery is a common example mentioned to highlight the difference between natural law and the law of nations. Following the precepts of Roman law, slavery was prohibited under natural law but nevertheless accepted under the rules of the law of nations (Waldron, 2005). However, there is still no a clear separation between both concepts, especially considering the divergence in the divisions of law between Gaius and Ulpian. The latter of which explicitly mentions natural law, while the former only divides law between civil law and the law of nations.

Unequivocally, though, Rome had eventually to deal with issues and legal disputes concerning non-citizens. Certain elements arguably contributed to developing the Roman law of nations or *jus gentium* that coexisted and influenced *jus civile* (Muirhead, 1916). The Roman expansion and the influx of foreigners from different corners of the world increased the integration between Romans and non-Romans. Moreover, magistrates (the judges of Rome) faced the difficult task of applying the law to new cases arising from the increase of Rome and the influx of non-citizens. Finally, there was also the influence of the legal and philosophical perspectives of a law beyond Rome's borders (Muirhead, 1916). *Jus gentium*, different from *jus civile*, was not envisaged to be constrained to a specific group or rigid in old traditions and forms (Walton, 1916). Furthermore, perhaps due to its Stoic influence, the Roman law of nations arguably developed under more humane considerations, that is, was arguably preoccupied with notions of universality and fairness and, consequently, changed and adapted *jus civile* itself (Walton, 1916).(4)

## III. The Influence of the Roman Jus gentium

The Roman *jus gentium* centered on four basic premises, which were later adopted by modern international human rights law. The first is universality. Roman *jus gentium* seeks and presupposes universal application. Second, the Roman law of nations and modern international human rights law are centered on the human person as the source and end of law. Third, the development of both systems is highly based on the work of jurists and adjudication bodies. Finally, both systems influence and establish guidelines for domestic law. Based on these characteristics, it is possible to assert that both the Roman *jus gentium* and current international human rights law are inherent laws of natural reason, established among all mankind and binding on all peoples alike.

The influence of the Roman law of nations on post-Second World War international human rights law is not constrained to its definition. The

(4) Walton, however, does not refer to *jus gentium* as a fairer or more humane legal system. It is, thus, my conclusion.

interpretation, application and evolution of human rights closely follow the reasoning of that of Roman *jus gentium*. This Roman legal system was intrinsically connected to natural law and *jus civile*. Furthermore, it changed the reasoning and certain aspects of *jus civile* providing a fairer and human-centered system, as in the institute of marriage, for example (Walton, 1916). Accordingly, certain aspects of the *jus gentium* were subsumed by *jus civile*. Moreover, magistrates "must have had a powerful influence in giving shape and consistency to the rising jurisprudence" (Muirhead, 1916, p. 219).

International human rights law follows this Roman reasoning. Lauterpacht (1968) for example, mentioning Cicero and Ulpian, argues that the contribution of Roman legal thinking lies in the ideas of freedom and equality of individuals (pp. 83-84). Arguably influenced by Roman law, the development of human rights and their interpretation and application, are centered on the human person. Furthermore, international law of human rights helps shape domestic systems. The American Convention on Human Rights, for example, informs that its member states must give domestic effect to the provisions enshrined in this treaty.(5) Modern international human rights law, following the steps of the Roman law of nations, also influences the development of domestic law and is, to a great extent, shaped by the decisions of international courts.

International human rights courts, especially the Inter-American Court of Human Rights, follow the precepts of the Roman *jus gentium*. In other words, international judges contribute to the reaffirmation that international human rights are indeed centered on the human person as the end and source of law. Furthermore, it seeks to implement a universal system of protection that could modify domestic law and establish a legal system more preoccupied with justice and the human person than with formalities and state interests (Cançado Trindade, 2011). The Inter-American Court in the advisory opinion on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (para 52) asserted that "if in the same situation both the American Convention and another

(5) *The American Convention on Human Rights*, 1969, 1144 UNTS 123, Article 2.

international treaty are applicable, the rule most favorable to the individual must prevail."

The European Court of Human Rights(6) has also held that international human rights should impact domestic law in order to protect the human person. In the *case of Elmasri v The Former Yugoslav Republic of Macedonia* (2012, paras. 16-36), for example, the European Court dealt with a difficult situation concerning a German national who traveled to Macedonia and was unlawfully detained at the border. He was first kept at a hotel in Skopje (being incommunicado) and after, sent by "rendition" to a prison in Afghanistan. According to the applicant, after several rough interrogations and ill-treatments, he was finally released to European territory. The Court, after analyzing several legal instruments and hearing from different organizations, asserted that:

> The Court reiterates that the Convention is an instrument for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory… it impacts the obligations imposed on respondent Governments, but also has effects on the position of applicants (*Case of Elmasri v The Former Yugoslav Republic of Macedonia*, para. 134).

The European Court decided that the respondent state breached Article 3 of the European Convention for subjecting the applicant to torture or to inhuman or degrading treatment or punishment in the hotel, at Skopje's airport, and for having transferred him into the custody of the authorities of the United States (paras 194, 204, 211, 221 and 222). The European Court of Human Rights stretched the application of its convention and, in a human-centered approach, asserted that third states not part of the European Continent but working with European states need to treat their prisoners in accordance with human rights, regardless of suspicions of links with terror organizations (paras. 218-222).

(6) *Protocol N° 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 11 May 1994, Eur TS 155 at 27-46.

The Inter-American and European reasoning focused on the human person and changing domestic law is not unparalleled in legal history. Arguably, this approach flows from a Roman framework part of *jus gentium*, which surfaced under the view that law is not only applicable to a small group of people and there should be a minimum set of rules applicable to all. The example of the changes in the institute of marriage under Roman law is paradigmatic.

## IV. Marriage in Roman Law

Marriage under *jus civile* was limited to Roman citizens (Borkowski & Plessis, 2005; Reynolds, 1983). Non-Roman citizens did not usually possess *conubium*, one of the imperative requirements to enter into a Roman marriage (or *justae nuptiae*). However, *jus gentium* changed the Roman institute of marriage to include the *matrinonium juris gentium* which represents an accommodation of diversity, and the recognition of a certain degree of equality and fairness between Romans and non-Roman citizens. It also demonstrates that the main aspects of *jus gentium*, namely, individual-centrality, universality and the less formal and consent-based system, influenced and helped shape the Roman civil law (Walton, 1916). In pointing out the lack of *patria potestas* of the husband over the children, Walton (1916) argued that "a marriage *juris gentium* came to be recognized side by side with a strictly Roman marriage" (p.367).

The case of Roman marriage is an example of the influence of the Roman law of nations in civil law based on an extensive and human-centered interpretation and application of the former. This development was arguably aided by the work of judges, that is, the praetor (Walton, 1916). The jurists and philosophical works improved and shaped the theoretical framework of *jus gentium* but, "broadly speaking, the *jus gentium* was home-grown law worked out at Rome by Roman magistrates" (Walton, 1967, p. 366).

As was the case during the Roman development of *jus gentium*, in modern times, international human rights depends highly on the work of judges to reiterate its main *jus gentium* elements and apply an expansive interpretation helping shape a new domestic law. *Jus gentium*, which is grounded on the notions of

human reason and the human person regardless of nationality, influenced some changes in these strict *jus civile* rules. Former rules granting strong observation to the form prescribed by law were eventually replaced by the *jus gentium* rule of intention or consent (Walton, 1916). The influence of *jus gentium* in the domestic legal system led to the abandonment of the Latin language requirement in favor of any language as long as it is understood by all the parties (Walton, 1916). Furthermore, certain rules concerning trade and mercantile law, in general, were not strictly attached to the form and fell under the scope of *jus gentium* as well.

Moreover, as previously mentioned, marriage is another example of a legal institute influenced by *jus gentium*. The agreement of marriage or *justae nuptiae* based on mutual promises required the existence of *connubium*, that is, no impediment to marriage, limiting the possibility of marriage to Roman citizens (Stephenson, 1912). This was the only marriage accepted in Roman law (Stephenson, 1912). However, judges and the law eventually recognized the increasing interaction between Romans and non-Romans, including in marital bonds. Would marriage exist if different individuals with different backgrounds gather and live as a family? To accept that marriage can be a fact of life and not on requirements rooted in ancestry, Roman law would need to change to emphasize an expressed desire to marry and form family bonds and on the fact of law (people living as married) than on formal requirements. In other words, legal emphasis should be placed on consent and on practice than on the requirements on who can marry.

The change in the marriage requirements eventually came to light. Marriages without *connubium*, that is marriage without ancestry requirements, or *matrimonium juris gentium* came to be legally recognized side by side with *justae nuptiae* (Stephenson, 1912). This change in the law went even further than recognizing that consent to marry and the wish to form a family plays a relevant role in the institute of marriage. It also changed the legal relationship between parents and their children. Following the *matrimonium juris gentium*, the children were lawful and the father was bound to feed/raise them although without the *potestate* part of *justae nuptiae* (Walton, 1916). In other words, a parent is

someone who consented to the marriage and who has a child (fact of life) and not only who is formally bonded together with someone else in the rules of ancestry and citizenship.

The changes in the institute of marriage represent how *jus gentium* eventually changed the fabric of Roman law. A law focused on tradition, ancestry and formalities gradually shifted to focus more on the human person (on consent and what was happening in practice). Law, to be universal, needs to apply to all and be meaningful to all. This shift arguably happened with the influence of diversity and the recognition that law is also international. The influence of *jus gentium* in the development of *jus civile* led Walton in 1916 to affirm that:

> The history of the Roman law is to a large extent the history of the gradual invasion of the *jus civile* by the *jus gentium*. The rapid development of the *jus gentium*, if not its origins, was due to the growth of foreign trade at Rome. The praetorian edicts, and especially the edict of the *praetor peregrinus*, formed the vehicle by which it was introduced. Its evolution was aided by the spread of philosophical culture, and the consequent decline of the exclusive sentiment which at first prevented the Romans from admitting that a foreigner could claim to be heard before a Roman tribunal, or that the Romans could have any laws in common with foreign nations [emphasis in original] (pp. 363-364)

## IV. Further Considerations on the Roman *Jus gentium* and International Human Rights

The Roman law of nations was also envisaged to change and set parameters to *jus civile* (Clark, 1920). With a less rigid system focused on the human person and on universality, *jus gentium* changed certain aspects of *jus civile* which were not in conformity with social developments. As previously pointed out, the *matrimonium juris gentium* is an example of *jus gentium*'s interference in the institutes of *jus civile* in order to adapt it to social aspirations — in this case, to broaden the scope of the persons who could legally marry — and center it on the

human person (consent of the parties) instead of rigid legal formalities (Walton, 1916).

Accordingly, the same decision can be reached in modern times based on similar considerations. The Inter-American Court of Human Rights, for example, affirmed that justice cannot be sacrificed for the sake of formalities (Cayara Case, 1993, para. 42). This decision from the Inter-American Court is arguably an example of how Roman reasoning is intrinsically part of modern international human rights law. The Inter-American Court's decision placing less emphasis on "formalities", that is, on the strict observance of rules, in favor of recognizing the reality of life and on consent is a *jus gentium* reasoning. What can be drawn from this decision is that human rights instruments, in accordance with Roman law, seek universal application, prioritize persons and are not rigidly constrained by formalities. In modern times, same-sex marriage, for example, could be advocated as part of the *matrimonium juris gentium*.

Following the reasoning of the Roman *jus gentium*, the International Covenant on Civil and Political Rights, in Article 23, does not restrict marriage to the rigid and formal system of an agreement between a man and a woman. Section 2 of Article 23, spells out that "the right of men and women of marriageable age to marry and to found a family shall be recognized" ([ICCPR] 19 Dec 1966, 999 UNTS 171, 1976). An extensive interpretation of this provision only ensures that both men and women "of marriageable age" have the right to marry — it is not necessarily about the right to marry each other, but rather a general right to marry whomever they choose as long as they can express the consent to marry. Furthermore, section 3 requires "the free and full consent of the intending spouses" to marry ([ICCPR] 19 Dec1966, 999 UNTS 171, 1976, Article 23 (3)). It carefully uses the more gender-neutral word "spouses" instead of "men and women". Consequently, following the precepts of Roman *jus gentium*, the ICCPR focuses on persons and consent and less on rigid terms and limitations.

The American Convention on Human Rights goes even further in the Roman *jus gentium* reasoning and establishes the right of men and women to marry "if they meet the conditions required by domestic laws, insofar as such conditions do

not affect the principle of nondiscrimination established in this Convention" (ACHR, 1144 UNTS 123, OASTS nº 36, Article 17 (2)). Accordingly, international human rights adjudication bodies or domestic governments could arguably recognize same-sex marriage following the Roman reasoning behind the *matrimonium juris gentium*, which extended the scope of the institute of marriage based on consent and the fact that people agree to form families and live as married couples.(7) This is precisely the conclusion of the European Court of Human Rights.

Article 12 of the European Convention states that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right" (ECHR, 11 May 1994, Eur TS 155). Following a formalistic interpretation, Article 12 could deny the possibility of same-same marriage. However, in *Schalk and Kopf*, the European Court recognized that Article 12 of the European Convention would not prohibit marriage between two persons of the opposite sex (No. 30141/04, Judgement, [2010], para. 61). The position of the European Court is that Article 12 does not impose a double obligation: it does not require the recognition of only marriages between two people of the opposite sex as valid as it equally does not impose the obligation to establish domestic laws implementing same-sex marriages.(8) In other words, although the Court did not recognize same-sex marriage as a human right, it did acknowledged it as a *de facto* aspect of life and placed consent as the main element of marriage instead of formalities. These decisions of same-sex marriage are in accordance with the Roman reasoning part of *jus gentium*. Indeed, although Roman law moved towards consent and *de facto* aspects instead of formalities, there seems to be no evidence that the Romans recognized same-sex marriage at any time in their history. However, there is also no impediment in following this consent-based reasoning to provide for a right to same-sex marriage

(7) Roman law, however, only accepted marriage between man and woman even in its *jus gentium* form (Muirhead, 1916).

(8) *See Case Of Oliari and Others v. Italy*, No. 30141/04. 18766/11 and 36030/11, Judgment, [2015], para. 191.

as part of a contemporary *matrimonium juris gentium*.

The application and interpretation of human rights norms can be based on the Roman *jus gentium*. Although current international law, including human rights, is not Roman law, there is some resemblance in reasoning, rules, and developments. A system of law cannot simply appear out of thin air. It is a consequence of previous legal systems and historical and social events. Even though the world has changed considerably, the Roman *jus gentium* might still live on – not in rules or objectionable aspects such as slavery – but in the reasoning that can make room for more universal and less formalistic human rights.

## VI. Conclusion

This article seeks to show some similitudes between the Roman *jus gentium* and contemporary international human rights law with marriage as an example. The traditional body of Roman law, known as civil law (*jus civile*), was strongly formalistic. In the institute of marriage, this formality meant that there were codified elements that one would have to meet for a marriage to be legal in accordance with Roman law. In practice, this meant that legal marriage (*justae nuptiae*) would not be applicable if one requirement was not met. As *jus civile* was a legal system mainly for the Romans, being a Roman citizen was one of the basic requirements. In other words, following the "letter of the law", only Roman citizens would be able to meet all the requirements for marriage. However, the reality was different. With the expansion of the Roman Republic and then the Empire, people from different backgrounds came to live in the same place. People could be falling in love, getting together and living like married couples regardless of their citizenship status. However, the law did not recognize their union as a marriage. This non-recognition had consequences. One of the consequences was the inexistence of legal responsibility fathers had over their legitimate offspring (Walton, 1916).

However, Roman law gradually changed with the development of *jus gentium*, which was — if at least in theory — a universal law. Universality means it is applicable to anyone within Roman territory due to its roots in human reason.

This reason and universality-based law shock *jus civile* pillars. Many aspects concerning foreigners could not be solely regulated within traditional civil law. Moreover, certain requirements such as ancestry and Latin language had to make room for new ways to address social aspects and a *de facto* reality. *Jus gentium* came to fill those gaps. It not only applied to more "traditional" aspects of international law such as diplomatic envoys, treaty-making and wars, but it also impacted domestic/civil law with a more universal and reason-based approach.

*Jus gentium* strongly impacted Roman law. Consequently, the institute of marriage was no different. Formalistic requirements were less important in the *matrimonium juris gentium*. Recognition of *de facto* marriage-like unions and consent by the parties were the main requirements for this kind of marriage. It protected families with social recognition and granted obligations to parents in relation to their offspring (Stephenson, 1912). Changes in the institute of marriage in ancient Rome arguably represent changes in the Roman legal system from a formalistic to a consent-based approach.

Similarly, human rights courts such as the Inter-American and the European courts deal with similar issues, that is, how to interpret and apply their human rights treaties considering a multicultural international society. Courts follow a Roman reasoning when they interpret and apply treaties based on less formalistic approaches recognizing consent coupled with the recognition that reality, that is, what is actually happening in society and how can the law answer social demands, as an indispensable aspect for legal development and application. The Roman *jus gentium* may be dead as a legal system, but some of its reasoning lives on as part of international human rights law.

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# Considerations on the *Matrimonium Juris Gentium*: An Invitation to Compare Roman Law and International Human Rights Law

<Summary>

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What is the underlying reason behind human rights cases? If international law, generally speaking, focuses on states, how can human rights diverge from this general perspective and focus on the human person instead? This paper seeks to address whether human rights, with its human-centric reasoning, creates a new framework detached or only vaguely linked to modern international law, or, rather, it has deep-rooted historical roots. The main argument is that contemporary human rights reasoning stems from Roman law. More specifically, the current expansion of the right to marry bears strong similarities with the development of the right to marry within Roman law. This paper does not intend to prove that these institutes and doctrines on marriage are the same. Quite the opposite, current society and legal systems diverge significantly from the Romans. However, contemporary law, including international human rights, is strongly connected with Roman law, as past legal systems, especially the Roman, influence and serves as the foundations of current law.

This paper addresses how Roman law was divided between civil law (*jus civile*) and the law of nations (*jus gentium*). The former, the traditional part of Roman law, regulated most aspects of people's lives, including marriage. However, *jus civile* was mainly applicable to Roman citizens, which meant that foreigners would not meet the requirements for legal marriage. The limitation on marriage started to change with the increasing development of *jus gentium*, which

changed the Roman formalistic approach to marriage to be based on consent and *de facto* marriage-like unions, which allowed foreigners to marry legally.

The reasoning behind *jus gentium*'s development and change of civil law institute's such marriage mirror that of current international human rights law, which seeks to apply its treaties and change domestic laws based on less formalistic approaches rooted on *de facto* considerations and consent.