Adoptio and *Adrogatio*: A Comparative Analysis of the Twin Institutes in Roman Law

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This article by **Kane Sammut Henwood** was previously submitted as part of CVL2009 and is being published with the author's permission. It examines adoption in Roman law, distinguishing between *adoption*, which is the transfer of a person from one *paterfamilias* to another and *adrogatio*, referring to the adoption of a *sui iuris* person, resulting in the dissolution of their existing family. Both served to preserve family lines, settle inheritances, and sometimes alter social status, *adoptio* followed a private legal process akin to emancipation, whilst *adrogatio* required public or imperial approval due to its greater legal impact. The article also discusses the distinct legal consequences akin to each form which evolved from the Twelve Tables to Justinian's Institutes.

TAGS: Roman Law, Adoption, *Adrogatio*, Roman Institutes

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Introduction

Adoption and *adrogatio* have a long history in Roman law. In the annals of Roman history, one can find the famous adoption of Octavian by Gaius Julius Caesar.[1] Although this practice hints at a more upper class or aristocratic usage of this provision of Roman law, there are also cases of it being used to lower one's status into the plebeian class such as what was done by Clodius to be able to partake in the plebeian assemblies. However, adoption and *adrogatio* had other uses, namely to settle inheritances as, due to the nature of laws, it was mainly men who inherited. Therefore, when a direct line of male inheritors dies, one might adopt a male to continue the familial line. Roman law had certain procedures and requirements in order to recognise an adoption or *adrogatio* as legally valid and binding. These various processes ensured that there was continuity throughout the familia, from the passing down of property to *cognomen*.

Definitions and Comparing *Adoptio* and *Adrogatio*

At first, adoption law started as an alteration that was stated in the Twelve Tables which had existed from the Republican epoch of Roman law. In this form, it was a way for a *filius* to emancipate himself if his father sold him three times. Each sale was called a *mancipatio* and on the third sale, the son could either sell himself, be adopted and added to the *tribus* of his adopter if the claim is made to the Praetor or otherwise become *sui iuris*.[2]

While there is a distinction between adoption and *adrogatio* in Roman law, there is also the mention and emphasis of how adoption must reflect natural familial relations. Even though the adoptee would not be considered a natural born child to the adoptive parents in modern times, the child was considered as the *paterfamilias*' natural offspring. In fact, this was intended to mimic nature due to provisions specifying the age of whom adopts and the adoptee, with a provision stating that 'it is settled that a man cannot adopt another person older than himself, for adoption imitates nature, and it would be unnatural for a son to be older than his father'.[3]

In Roman law, adoption is a generic term which denotes the person passing from under one *paterfamilias*' *potestas* to another, with no real concern towards the person being adopted regardless of age or gender.[4] As mentioned, anyone could be adopted under Roman law as long as the *paterfamilias* consented. It is important to note that individuals who are

[1] Henry Thompson Rowell, *Rome in the Augustan Age* (University of Oklahoma Press 1971) 15.
[2] Hugh Lindsay, 'Adoption and Succession in Roman law' (1998) 3(1) Newcastle Law Review 57, 63.
[3] *Inst* 1.11.
[4] Jane F Gardner, *Family and Familia in Roman Law and Life* (Clarendon Press Oxford 1998) 115.

adopted are '*capitis diminutio'*. This is a direct clash with *adrogatio*, which requires the individual to be *sui iuris*. A distinction is also made between who is adopting. If the natural father is Roman and the adoptive father is foreign, the Roman father is still imbued with legal powers that the foreign father does not have.[5]

A peculiarity to Roman law which is not found in most modern legal systems is the system of *adrogatio*. This affected individuals who were *sui iuris*, thereby acting as a direct contradiction to the standard form of adoption. An individual who was *sui iuris* was either already a *paterfamilias* or an independent figure not under any *patria potestas*.[6] It is important to note that an *adrogatio* leads to the extinction of the family of the individual who was subjected to it since the said individual adopts the family name of the one who adopts them. This stemmed from the fact that the individual was *sui iuris*. There were other concerns to consider as well, including economic ones, i.e., property and debts, as well as other familial ties. Moreover, Ulpian was of the opinion that if the individual who is adopting is over the age of 60, he 'ought to be making an effort to beget children' and thus, should not resort to *adrogatio*.[7] During the empire, it became common practice for the emperors to use *adrogatio* to adopt, such as when Hadrian was adopted by Trajan. But *adrogatio* never became common due to the drawbacks and the difficulty in obtaining one. In fact, later on, Diocletian would state that, 'adrogations of those legally independent can take place neither in the imperial city nor in the provinces except by imperial rescript'.[8]

The third way of adoption was called testamentary adoption and it was an established practice among the Ancient Greeks, yet if it was a tradition carried out by the Romans is still a debated subject among scholars.[9] This was probably used to help protect and ensure that the *familia* or dynasty continued in such a way so that the paternal figure did not have to raise the child and by extension not owe the child more inheritance under ancient adoption laws. The debate arises due to the fact that there is not enough evidence to state with certainty that this practice started in the Republican era. Most evidence points to the fact that it started later, and it also had caveats such as the fact that adoptions could be finalised after the testament, leaving the possibility for a multitude of issues to arise in relation to property and inheritance.[10] This was still a very uncommon practice and not much is known about how it happened due to rare mention by Roman jurists. An example of this type of adoption is the adoption of Atticus, a friend of Cicero, by his maternal uncle. As was the younger Pliny, who was adopted by

[5] *Inst* 1.11 (n 3).
[6] Adoption and Succession in Roman law (n 2) 62.
[7] *Family and Familia in Roman Law and Life* (n 4) 128.
[8] C 8.47(48).2.1.
[9] A. Lefas, *Nouvelle revue historique du droit français et étranger* (1922) 721.
[10] Adoption and succession in Roman law (n 2) 60.

his maternal great-uncle.[11] In Roman law, it became a form of *adrogatio* and the most famous example is the adoption of Octavian by Julius Caesar. Ergo, one can see that *adrogatio* itself split into two, much like *adoptio* did, but nonetheless, they both served fundamentally different functions with very different processes.

Contrasting *Adoptio* and *Adrogatio*

A key difference between *adoptio* and *adrogatio* is the processes which had to be undertaken in order for them to be acquired and given the weight of law. The first main requirement is that the individuals affected had to be Roman citizens and not *peregrini*.[12] Gaius defines the procedures as *populi auctoritate* and it is possible to differentiate between *adoptio* and *adrogatio* in the terms of 'private' and 'public' due to one requiring a legislative act and the other not requiring such an act.[13]

The so-called 'private' adoption followed the same basic laws as emancipation, meaning that it required the three-fold sale of the *filius* before a Magistrate, but instead of completing a final re-emancipation, the adoptee was placed directly in the *potestas* of the adopter.[14] For *adrogatio*, the procedure was more complicated as it had multiple requirements. This was necessary because the individual was already *sui iuris*, meaning they were independent and not under any *potestas*.[15] The procedure of *adrogatio* had two stages. The first was an enquiry by the college of pontiffs to determine whether the *adrogatio* was viable since an *adrogatio* terminated a *familia* and with it, a *sacra*. The second stage was a meeting of the assembly of the *curiate*, later replaced by an assembly of lictors, which was presided over by the *pontifex maximus*. This was required as there was the need for a *lex curiata*, which grants the person being adopted full legal equality with a *filius familias*.[16] Later on, this process would be simplified as it would require only an imperial rescript which was granted by the emperor on the advice of the *pontifex maximus*. Another key difference between *adoptio* and *adrogatio* was the need for a more extensive 'background check'. Gellius says that there was a careful examination of the ages of the two parties in question, the potential for the adopter to have children of his own and a check to ensure that the *adrogatio* was not merely a scheme to steal or take the property of the person being adopted.[17]

For an adoption to be considered legitimate, there were numerous hurdles that were either solved over time or remained restrictions which reduced one's ability to adopt. These were chalked down to age, the gender of both

[11] Ronald Syme, *The Augustan Aristocracy* (Clarendon Press, 1986) 159-160.
[12] *Family and Familia in Roman Law and Life* (n 4) 126.
[13] ibid.
[14] ibid.
[15] ibid.
[16] ibid 126-7.
[17] ibid 128.

the adopter and the adoptee, and consent. The age was instated to protect the adoptee and prevent the adopter from adopting just to cheat the system and gain more property. Age was restricted to the adoptee being younger than the adopter after the occurrence of cases such as that of Clodius, in which Cicero reportedly remarked, 'You were made the son of the man of whom, in terms of age, you could have been the father'.[18] Additional protections were extended to the *impubes* who were individuals under the age of 14. A unique feature of Roman law is that women could not adopt since women were *in mani* and thus, not fit to exercise *potestas* over a *familia*.[19] But contrary to this, women could be adopted.[20] As for consent, only those who were *sui iuris* could consent or not consent to an adoption for the other kind, along with the *paterfamilias* and the adopter.[21]

The members who partook in this activity were mostly of senatorial rank.[22] This hints at the aristocratic nature of it, seeing how its main goal relies in the continuation of the *familia*, especially when the patrilineal line is broken, which could consequently result in extinction of the *familia* as well as a loss of property. There is also a difficulty in deciding which parts relate to adoptions or not. The Roman emperors are mostly recorded, but for other adoptions, one must look at the individual's *praenomen* (fore name) and *nomen* (gens name) of the adopting father and subsequently look and compare the adaption of the *gentilicium* for use as a *cognomen* as it was a common practice in Republican era naming standards. This occurred for both *adoptio* and *adrogatio*, although it is not uniform.

Adoption itself had numerous legal effects for both the paterfamilias and the adoptee. This is the case as it involved the individual moving from one *familia* into another, as well as placing the individual under the *potestas* of the *paterfamilias* of the new family.[23] This act kept all maternal relations but extinguished all paternal relations.[24] The extinction of paternal relations is logical since the individual was transferred to a new *paterfamilias*. With all the previous paternal relationships extinguished, it means that the only remaining paternal figure is the one who adopted the adoptee. A particular legal effect relates to inheritance, as the adoptee acquires new inheritances but still keeps the old inheritances from their birth father and mother. Thus, it would prove more advantageous for a financially struggling *paterfamilias* to put his child up for adoption than to emancipate said child.[25] Naturally, there was also the fact that an *adrogatio* resulted in the extinction of the previous family of whom was being subjected to *adrogatio* which granted

[18] ibid 146.
[19] *Inst* 1.11 (n 3).
[20] *Family and Familia in Roman Law and Life* (n 12) 159.
[21] ibid 177.
[22] ibid 133.
[23] ibid 117.
[24] ibid.
[25] ibid 118.

the *paterfamilias potestas* over a previously *sui iuris* individual.

Conversely, the practice has its downsides such as the *filius* becoming financially dependent on the *paterfamilias*. If the filius is emancipated by his adoptive father, this dependence could result in dire consequences since the emancipation would annul all the rights acquired through the adoption and his testamentary rights would revert to the natural father, assuming that the natural father is still alive. If not, the *filius* would have no inheritance rights.[26] An individual who gave himself up for an adoption via *adrogatio* would have his property absorbed into the *paterfamilias*' property with no guaranteed benefit to him or his descendants as his children would also be part of the *paterfamilias*' *potestas*.[27] Since, the individual was *sui iuris*, the individual had more to lose but entered into the contract via their own free volition. As was custom for the time, there were obviously different status differentiations which could be lost or gained via an adoption or *adrogatio*, making the process more desirable. For example, someone adopted by a senator via either adoption or *adrogatio* became *senatorius* and a child of a senator that was adopted by a lower rank remained a *senatorius*.[28]

Conclusion

One can see that adoption was a process that evolved from the Twelve Tables to Gaius' writing, all the way to Justinian's Institutes. It is also visible that *adrogatio* was a mutation of adoption law to fill in a lacuna created by the passing of time, indicating an ingenuity in Roman law that would not be seen for centuries after the dissolution of the Western Roman Empire. The differences between *adoptio* and *adrogatio* are stark which is formed by the processes and reasons for having one but they both continue a *familia*.

[26] ibid.
[27] ibid 118-9
[28] Iustiniani Digesta 1.1.5, 1.1.6, 1.1.10.



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