*Capitis deminutio minima. An unresolved problem**

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RESUMEN

Los tratados de derecho romano en su mayoría se ocupan del fenómeno de *capitis deminutio* o sea la pérdida o cambio de los derechos civiles y, mientras hay acuerdo sobre el valor de las llamadas *maxima* y *media*, las discrepancias sobre el alcance y sentido de la *minima* son notables. Estas discrepancias se deben mayormente al hecho de que los autores en sus interpretaciones se basan en una insegura reconstrucción histórica o en deducciones lógicas no siempre sustentadas por los textos jurídicos. Este trabajo se propone un regreso a las fuentes y un examen lo más exhaustivo posible de las mismas. Aunque del cotejo de los textos legales no emerge una conclusión inequívoca, la autora confía que, habiendo desbrozado el campo de elementos espúreos, el estudio de esta importante cuestión quede abierto a nuevas interpretaciones.

SUMMARY

Most of the treatises of Roman law deal with *capitis deminutio,* that is the loss or change of civil rights. While there is agreement about the values of the so-called *maxima* and *media*, there are marked discrepancies about *capitis deminutio minima.* These disagreemnts are due mostly to the fact that the scholars have based their interpretations on different criteria, either a shaky historical reconstruction or logical deductions not necessarily supported by legal texts. This paper aims at returning to the sources and examining them as exhaustively as possible. Although the collation of the texts does not afford an unequivocal conclusion, the author trusts that the elimination of spurious facts and interpretations will open the study of this important matter to further scholarly work.

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Capitis deminutio is the loss of or change in civil rights. It features in almost all the treatises of Roman Law, the authors of which recognize the importance of its effects and repercussions in the public and private lives of the Romans. Nevertheless these authors are far from unanimous in their explanations of the origin and nature of the three versions of *capitis deminutio, i.e. maxima, media* and *minima.*

Early classical sources are scarce but the late jurists have devoted considerable attention to the matter and we might expect to be reasonably enlightened were not for the fact that the treatment of *capitis deminutio minima* is frequently ambiguous, fragmented or downright contradictory [1]. For more than a century distinguished scholars have endeavoured to elucidate the meaning of the legal texts and have suggested various solutions to supplement absent information or to smooth over contradictions or incongruities. It is very difficult to escape the impression that these cogent, and sometimes highly seductive, theories or explanations do considerable violence to the ancient texts.

My aim is to point out where the sources have been subjected to a procustean treatment either by ignoring what does not fit or by inferring what is absent. I have few illusions that I can reach a satisfactory conclusion that will set readers' minds at peace about *capitis deminutio.* However, if I can present an inventory of the information we have and point to what has been dismissed or added by the Roman Law experts, this will make it possible for future scholars to reconsider the question *da capo* and to suggest an all embracing explanation.

Types of *capitis deminutiones*

Paulus *libro II. ad Sabinum* in *Digest* IV, V, 11: Capitis deminutiones tria genera sunt: maxima, media, minima; tria enim sunt, quae habemus: libertatem, ciuitatem, familiam. Igitur quum omnia haec amittimus, hoc est, libertatem, et ciuitatem, et familiam, maximam esse capitis deminutionem; quum uero amittimus ciuitatem, libertatem retinemus, mediam esse capitis deminutionem; quum et libertas et ciuitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem constat. [2]

Paulus is categorical, unequivocal and well organized: *capitis deminutio maxima* involves the loss of freedom, *capitis deminutio media*, the loss of

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[1] W.W. Buchland, *The Main Institutions of Roman Private Law*, Cambridge 1931, p.69: «The account of Gaius is somewhat incoherent». P. Bonfante, *Corso di Diritto Romano. Diritto di Famiglia*, Milano 1963, p.172, declares that as far as *capitis deminutio minima* is concerned he thinks that Justinian would have done a favour to the interpreters of Roman law had he considered this institution extinct and not talked of the restitution of the action against the *capitis deminutus.* The interpreter dictates to the jurist what he should have said.

[2] *Cf.* Just. *Inst.* I, XVI, 1-5.

citizenship and *capitis deminutio minima,* a change of family. Here the first difficulty arises.

It is not possible to put freedom, citizenship and family[3] under the same heading for the following reasons:

- in Roman society the free man, *homo liber,* belonged to a recognized group, endowed with well defined legal rights, in opposition to the slave, *seruus,* a non-existent entity from the point of view of the law.
- in Roman society the citizen, *ciuis,* also enjoyed a neatly defined set of rights to which the non Roman citizen, *peregrinus,* had no access.
- in Roman society membership of a family or the loss of such membership did not entail legal rights or capabilities *per se.* There is no such a thing as a person with a family as opposed to one without it.
- *Ciuitas* is always *Romana* and *libertas* is also *Romana* according to Cicero[4]. This *Romanitas* is not extended to the family.

This asymmetry between freedom and citizenship on the one hand and family on the other is reinforced by:

- Paulus himself who, at the end of the paragraph, talks of loss of freedom and citizenship *(amittimus)* whereas with respect to the family he speaks of change *(mutatur)* of family.
- *Capitis deminutio maxima* and *media* involves not only a loss, but at the same time, a demotion. The *deminuti* of these categories are deprived of rights and downgraded not only in the legal but also in the social scale. Those who have undergone *capitis deminutio minima,* by contrast, are not necessarily deprived of rights —indeed, they may acquire some— and suffer no damage to their *dignitas* or social standing.[5]

It is no wonder that so many scholars' attempts to deal with this plurality of systems have led to so many ways of explaining it.

Historical reconstruction of *capitis deminutio*

The historical development approach is well represented by Desserteaux. He argues that in Cicero's time there were only two types of *capitis deminutio.* The first was connected with the loss of freedom and citizenship, so closely related to the point that there was only *maxima capitis deminutio,* the other, *minima,* was dependent on the condition of *mancipium,* which, in

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[3] Nor are they the only three things that we have (*tria sunt quae habemus).* See M.F.C. de Savigny, *Traité de Droit Romain,* traduit de l'Allemand par M.CH. Quenous, Paris 1841, p.469 ff..

[4] *Pro Caec.* 96: qui enim potest iure Quiritium liber esse is qui numero Quiritium non est?

[5] Just. *Inst.* XVI, 5: quibus autem dignitas magis quam status permutatur capite non minuuntur: et ideo senatu motos capite non minui constat. See also note 37 below.

his view, had become different from slavery at an early stage[6]. The classical references to capitis *deminutio* are so scant that we cannot accept Desserteaux' views without certain reservation. Moreover one of the very rare Ciceronian passages on *capitis deminutio* does not seem to substantiate this view[7]. W.W. Buchland contends that Cicero knew nothing of the three degrees. He claims that for the orator *capitis deminutio* is an exiting of the civic community either by slavery or exile and he does not mention the *status permutatio* or *familiae mutatio*. In spite of this absence of evidence, Buchland concludes that the tripartite division is a creation of the Empire and he accepts as possible a change in the meaning of the notion.[8]

Another attempt at hypothetical reconstruction of the historical process is made by J. Declaireuil[9] who considers that classical law had conceived citizens' rights to be derived from freedom, citizenship and family. The theory remained, but the circumstances changed. The extension of citizenship made *capitis deminutio media* a mere instrument of punishment. Moreover, the increase in the power of the state reduced the importance of the family links since the citizen dealt more and more directly with the state and *capitis deminutio minima* «devenait chaque jour plus fantômale»[10]. But Declareuil's view is contradicted by the jurists who seem to have escalated their concern for *capitis deminutio minima,* -if we judge by the number of references to it- to the neglect of the other types.

Efforts to trace the evolution of capitis *deminutio* in Roman Civil law were put at rest by the comprehensive and learned paper by Max Kaser «Zur Geschichte der capitis deminutio» in *Iura*[11]. The author claims that the tripartition into *maxima, media* and *minima*[12] was not adopted by the great classic jurists, but only by later scholars. In addition he has doubts about Paulus' triad freedom, citizenship and family because they are not classical

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[6] *Etudes sur la formation historique de la capitis deminutio; I. Ancienneté respective des cas et des sources de la capitis deminutio,* Dijon 1909. This view is shared by Robert von Mayr, *Historia del derecho Romano,* Barcelona 1941, p. 36 who states that in early times the foreigner was as deprived of rights as the slave, so the *capitis deminutio* could adopt only one form, namely *maxima.* He also argues (probably from *Digest* IV, 5, 7) that already in the Twelve Tables there were two types, one including the loss of freedom and citizenship, the other the change of the family status. *cf.* also Emilio Costa, *Cicerone Giureconsulto,* Roma 1964, p. 87: La *capitis deminutio* consistente in una *familiae mutatio* di un soggeto ad altrui *potestas* è da riguardare adunque come la più recente de le tre specie di *deminutio* rappresentate dai giureconsulti classici, certamente già ben fissata buon tratto innanzi il momento a cui il Nostro (Cicero) appartiene.

[7] See later *Topica,* VI, 29 in p. 59.

[8] *Op. cit.*, p. 70.

[9] *Rome et l'Organisation du Droit*, Paris 1924, p. 351.

[10] *Ibid.*

[11] *Revista Internazionale di Diritto Romano e Antico,* 3 (1952) 48-89.

[12] The nomenclature is not uniform. Gaius I, 159: Est autem capitis deminutio prioris status permutatio: eaque tribus modis accidit: nam aut maxima est capitis deminutio aut minor, quam quidam mediam uocant, aut minima. In Ulp. *D.* 38.16.1. 4 *maxima* and *media* are called *magna* in opposition to *minor i.e. minima.*

concepts [13]. In Kaser's view, «Die Schulschriftsteller sagen also mit ihrer Terminologie nichts Unrichtiges aus, sonder vollziehen nur eine sachlich berichtigte Klassifizierung« [14]. He wonders how the non-juridical expression *caput diminuere alicui* became a technical legal expression meaning the separation of a person from a particular group and sees in the *damnati capitis* or *poena capitis* the link that explains the change [15]. This is not hard to accept for *capitis deminutio maxima* and *media;* but *capitis deminutio minima* is quite different hence the division of the phenomenon of *capitis deminutio* into two different modes, the *minima* in opposition to the others. In the case of the *minima,* Kaser explains its heterogeneous nature by tracing its history. He assumes that *adrogatio* and *conuentio in manum* were not originally cases of *capitis deminutio,* and that the jurists later bundled together disparate legal situations of which they had no firm grasp [16]. Even so, Kaser's study of the historical development, however erudite, is based on numerous presuppositions [17] that cannot be confirmed and, ultimately, fails to explain the disparities between the types of *capitis deminutio.*

The nature of the phenomenon

Paul Frédéric Girard equates *capitis deminutio* with civil death. This he does on the basis of Gaius 1, 153: ciuili ratione capitis deminutio morti aequatur [18]. This civil death entails the loss of freedom, citizenship and family and a resurrection ensues: the enslaved person resurrects *iure naturali* (although the author admits that the Romans do not use the expression); the citizen who becomes a *peregrinus* resurrects *iure gentium* and the one who loses the family acquires a new civil family, even if he is the only member of it. The idea is ingenious but, not only is that principle of *ius naturale* conjectural, but also it does not account for the more deleterious condition in which those who suffer capitis *deminutio maxima* and *media* find themselves vis à vis those who underwent the *minima* [19]. Correctly, in my opinion, W.W.

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[13] *Cf.* also Savigny who bases most of his arguments on the fact that Paul is unreliable, *op. cit.* p. 474.

[14] «Zur Geschichte...» p. 53.

[15] *Ibid.* pp. 63-75.

[16] *Ibid.* p. 87: Die zum Teil recht heterogenen Prinzipien, die in ihr vereinigt Bind, liegen fest und werden in der Folgezeit nicht mehr verändert.

[17] *Vermuten* and *vermutlich* are well represented in Kaser's prose.

[18] *Manuel Elémentaire de Droit Romain,* Paris 1918 pp. 195-196. Kaser, «Zur Geschichte ...» pp. 75-76 accepts the parallel with death for the *capitis deminutiones maxima* and *media,* but in the case of the *minima,* it becomes totally inappropriate. On that point *cf.* also Desserteaux p. 380 ff.

[19] Bonfante, *op. cit.*, p. 172 states that this parallelism with death had only historical value in Gaius' time and in Justinian times *capitis deminutio* was compared with death only in case of slavery.

Buchland [20] says that the idea of death is used as a mere analogy and that the effects are different: death brings a will into operation whereas no type of *capitis deminutio* did. In addition, the persons who suffered *capitis deminutio minima* did not lose their rights to legitimate inheritance [21]. Concerning the acquisition of a new family, there are difficulties in spite of *D.* 50, 16,195, 2: «...idemque eueniet et in eo qui emancipatus est: nam et hic sui iuris effectus propriam familiam habet». The jurist clearly has only the Roman male in mind *(qui emancipatus, hic... effectus)* who, married or not, is a *paterfamilias;* the female, on the other hand, even if *sui iuris,* does not constitute a family.

Fritz Schulz [22] follows a well established tradition [23] and claims, in spite of the evidence of our earliest sources where the meaning of *caput* is the literal one [24], that originally the word *caput* was synonymous with *persona* and the *capitis deminutio* was applicable to the group of people who lost a member [25]. For instance, the argument goes, when a Roman citizen lost his citizenship, it was the Roman people who suffered the diminution, *populus Romanus capite deminutus est.* Similarly, when a son was adopted it was his natural family that suffered that diminution. Moreover, if a son, because of his father's death, becomes *sui iuris,* there is no *capitis deminutio* because the death of the father dissolves the *familia,* which, in consequence, cannot be *deminuta* [26]. This interpretation is arguable. A close look at *capitis deminutio minima* proves that the theory that the group, i.e. the family, is the one being deprived, would not be adequate in cases such as the arrogation of a freedman or the marriage *manu* of a freedwoman since, in both instances, there would not be a family to suffer a loss. Furthermore, men or women *sui iuris* who, having lost their agnates, do not have a family that can be *deminuta;* instead they themselves could become respectively *deminutus* or *deminuta* by *adrogatio* or *conuentio in manum.* Schulz, unaware of or indifferent to these cases, claims that the *deminutio* was later applied to the person who was separated from the group and, after this change, *capitis deminutio* could be correctly applied to the *deminuti* who suffered a loss. In the case of *capitis deminutio maxima* and *media* this theory works but it does not account for the person who changed family, for example an adopted son who is adopted by another *paterfamilias.* This is regarded as *capitis*

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[20] *Op. cit., ibid.*

[21] *Digest,* 38, 17, 8: Capitis minutio saluo statu contingens liberis nihil nocet ad legitimam hereditatem... Proinde sive quis ... capite minuatur ad legitimam hereditatem admittetur: nisi magna capitis deminutio interueniat, quae uel ciuitatem adimit, ut puta si deportetur.

[22] *Classical Roman Law,* Oxford 1951, pp.72-3.

[23] *Cf.* Savigny, *op. cit.,* pp. 451 ff.

[24] Plaut., *Most.* 266: illi speculo diminuam caput; *Men.* 304: illic homini diminuam caput; Ter., *Eun.* 803: dimminuam ego tibi caput, nisi abis; *Adelph.* 571: dimminuatur tibi quidem iam cerebrum.

[25] This point is strongly denied by Kaser, » Zur Geschichte...» pp. 59-63, who claims that it is an argument of *ius ciuile* and only a free person (and not a group of persons) can suffer *capitis deminutio.*

[26] *Ibid.* p. 73.

deminutio although, from the son's point of view, the new status does not differ from the previous one. The same is true in the case of a father who, by emancipating his son, makes him an *homo sui iuris*. His new independence can hardly be considered a *deminutio* for the son, yet the family is *deminuta*. This explanation of *capitis deminutio minima* is unsatisfactory because it is based on the assumption of semantic change: the signifier *caput* has changed its signified. It used to stand for a body of people and later it stood for an individual. There is no evidence of such a change.

Bonfante rejects contemporary views that consider that *capitis deminutio minima* was, originally, a unique phenomenon and declares that it cannot be discussed outside the framework of the general *capitis deminutio* [27]. Nevertheless, when confronted with its triple nature, he does not attempt to explore the possible unifying factor, merely stating that the first two *capitis deminutiones* have a uniform definition in the sources and a clear meaning. The lack of an equally uniform and precise definition of *capitis deminutio minima* in the sources is due to historical reasons: this version of *capitis deminutio* was in the process of disappearing already in classical times and it is understandable that the jurists did not have a clear view [28]. In another *non sequitur,* Bonfante declares that «*c. d. minima* è la *capitis deminutio* per antonomasia, data la simplicità delle altre due figure» [29]. In Bonfante's view complexity grants a greater value to the least comprehensible aspect of a tripartite institution. Nevertheless he does not address the problem of the relation between these parts and nor does he attempt to explain that complexity.

So far we have failed to find any cogent argument that explains the jurists' classing together of disparate legal conditions. Yet it is hard to believe that the incongruity was not obvious to them.

Capitis deminutio minima

Since the *tertius discordans* is *capitis deminutio minima,* is natural that we should concentrate on it.

The historical approach does not seem rewarding and we are prepared to accept, with Kaser, that *capitis deminutio minima* introduces a new concept, moving away from the original one. This new concept is what the jurists had in their minds:

> Liess sich bei den altrömischen Fällen der *c.d. maxima* und *media* die Parallele mit strafweisen Tötung unschwer herstellen, so gewähren die Tatbestände der *c.d. minima* demgegenüber ein ganz anderes Bild. Wir

[27] *Op. cit.* p. 165.
[28] *Ibid.* p. 166.
[29] *Ibid.* p. 167.

> erkennen darin die Zeichen einer tiefgreifenden Umgestaltung, die sich der Begriff der *c.d.* hat gefallen lassen müssen. Bei den Juristen, denen ja vornehmlich die privatrechtlichen Erscheinungen am Herzen liegen, stehen die Falle der *c.d. minima* in Vordergrund des Interesses. [30]

As far back as 1841, M.F.C. de Savigny in Appendix VI of his *Traité de Droit Romain*, [31] much attacked [32] and frequently unfairly discarded, suggests that there are conflicting systems of interpretation of *capitis deminutio minima,* that involve agnation, dependence or a mixture of both:

- Dans un système, la famille des agnats;
- Dans un autre système, la indépendance ou la dépendance;
- Dans un troisième système, tous les rapports de famille, ce qui embrasserait à la fois les changements reconnus par les deux premiers systèmes. [33]

This is a neat classification, but we shall adopt a different order and before dealing with the first point, that is agnation, we shall explore whether 1) *capitis deminutio minima* involves a change that affects legal dependence or independence and 2) the concept of *status* can be applied to the family. Finally, we shall discuss 3) *mutatio status* and agnation.

1) Legal dependence

> Justinian, *Inst.*, I, XVI, 3: Minima capitis deminutio est, quum et ciuitas et libertas retinetur, sed status hominis commutatur; quod accidit in his, qui, quum sui iuris fuerunt, coeperunt alieno iuri subiecti esse, uel contra.

Justinian is here concerned only with the condition *sui iuris* or *alieni iuris* of a Roman citizen and the change of this condition is the result of *capitis deminutio minima.* Moreover he makes clear in the following paragraph (4) that this change is restricted to Roman citizens:

> Seruus autem manumissus non capite minuitur, quia nullum caput habuit.

Had Justinian limited his statement in paragraph 3 to those who, having been *sui iuris* become *alieni iuris,* we would have been in a position to support the assertion that *capitis deminutio* involves s a loss, a change *in deterius,* a concept dear to Savigny [34]. This concept is made more attractive by the fact that the manumitted slave or the foreigner who becomes a citizen, that is those who by changing status acquire freedom or citizenship, do not suffer capitis *deminutio.* If this were the case, a satisfactory parallelism with the

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[30] «Zur Geschichte ...» p. 75.

[31] Pp. 423-473.

[32] The excursus I pp.181-184 in *Iustiniani Institutionum Libri Quattuor,* introd., commentary and excursus by J.B. Moyle, Oxford 1964, is the least charitable attack.

[33] *Op. cit.* pp. 445-446.

[34] *Op. cit.* p. 446. When discussing the concept of status in the jurists, Savigny concludes that in the case of *capitis deminutio* the definition should be completed: *status mutatio in deterius.*

other types of *capitis deminutio* would have emerged [35]. The explanation of cases such as the children of the *adrogati* or a *filiafamilias* entering into *manus* (i.e those who change but not necessarily *in deterius)* could be that the were relatively late examples of *capitis deminutiones* [36]. However, it would not be so easy to explain why a senator or a magistrate can lose his status, which is true demotion, without undergoing *capitis deminutio* [37]. In spite of these cases, the argument in favour of a change *in deterius* is cogent, but Justinian says *vel contra,* that is those who having been *alieni iuris* become *sui iuris.* The temptation to declare *vel contra* an interpolation or an infelicitous second thought is strong, but we shall resist it since it is our intention to explore the texts as they stand, without doing them violence to suit our theories. To be consistent with this principle we should read in Justinian's words that the transit into independence involves a *capitis deminutio,* but it will be necessary to add that the change of status should be the result of a legal act not of a natural event [38] such as the death of the *paterfamilias,* which alters the status of those previously under his *potestas.*

2) Status and family

We should enquire first whether or not *capitis deminutio minima* is a change of family and then whether or not capitis *deminutio minima* is a change of status.

Not sufficient attention is given, in my opinion, to the fact that the only jurist who mentions the change of *familia* in the context of *capitis deminutio* is Paulus [39] *Digest* IV, V, *3. Libro XI. ad Edictum:*

> Liberos qui arrogatum parentem sequuuntur, placet minui caput, quum aliena potestate sint, et quum familiam mutauerint. [40]

The fact that the jurists do not always agree [41] or, as in this case, one of them has no textual support from any of the others is not enough reason for us to

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[35] Savigny, *op. cit. passim,* in fact contends that *capitis deminutio* occurred when a person *sui iuris* passed into *potestas* or *manus* or when a *filiusfamilias* or a woman married *manu* was conveyed into *mancipium* in order to be emancipated or given into adoption. Since the texts do not provide substantial support for this hypothesis, Savigny is forced to resort to *argumenta ex silentio* or the postulation that Paulus' text is corrupt.

[36] W.W. Buchland, *op. cit.* p. 71.

[37] *D.* 4. 5. 5. 2 (Paul ll.ed.): Nunc respiciendum, quae capitis deminitione pereant: et primo de ea capitis deminutione, quae salua ciuitate accidit, per quam publica iura non interuerti constant: nam manere magistratum uel senatorem uel iudicem certum est.

[38] Savigny, *op. cit.,* p. 446.

[39] Ulpian *(Digest* IV, V, 6) mentions the family in the context of *capitis deminutio* but he is referring to the rights of the family of the *deminutus,* not to the loss or change of family. *Libro LI ad Sabinum.-...:* capitis enim minutio priuata hominis et familiae eius iura, non ciuitatis amittit.

[40] See also paragraph 11 quoted in p. 50.

[41] Discrepancies are not infrequent, for instance Gaius 2. 234 and Ulpian, *Epit.* 11. 14 concerning the scope of early testaments.

discard a statement. Nevertheless, the uniqueness of an opinion should act as a *caveat*.

Secondly, *capitis deminutio* perceived as a change of *status* enjoys a greater textual popularity. This concept could be general. *Digest* IV, V, 1, Gaius *libro IV ad Edictum prouinciale:*

> Capitis deminutio est status permutatio.

Or the concept of *status* could be restricted to *capitis deminutio minima:*

> Ulpian XI, 13. Minima capitis deminutio est, per quam et ciuitate et libertate salua, status dumtaxat hominis mutatur quod fit adoptione et in manum conuentione.
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> Justinian, *Inst.* I, XVI, 3. Minima capitis deminutio est, quum et ciuitas et libertas retinetur, sed status hominis commutatur[42].

The nature of *status* deserves some discusssion. Savigny, who addresses this matter comprehensively[43], states the accepted definition:

> On appelle *status* la manière d'être en vertu de laquelle un homme a certains droits[44].

Consequently, there are *status naturales* and *status civiles* and, within the latter, the *status libertatis,* the *status civitatis* and the *status familiae.* J.B Moyle in his notes to title XVI in *Imperatoris Justiniani Institutionun Libri Quattuor* agrees with the traditional definition of status and adds that a man's position in respect to legal rights «is usually determined by reference to three *"momenta", libertas, civitas* and *familia*»[45]. As far as freedom is concerned, there is no difficulty because no person can have a *status* unless he or she is free. Modestinus, *libro I Pandectarum* in *D.* IV, V, 4 is unequivocal when, referring to a manumitted slave, he says: «hodie enim incipit statum habere». Similar argumentation can be applied to citizenship. Family is different because the legal texts mention *mutatio status*[46] and *mutatio familiae*[47] but *status familiae*[48] has no textual support[49]. The attempt to define *status*

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[42] Already quoted in p. 56. Also Gaius I 162 quoted in *extenso* in p. 62.

[43] *Op. cit.* pp. 424-445.

[44] *Ibid.* p. 424.

[45] p. 155.

[46] *Cf.* Ulpian XI, 23 and Just., *Inst.* XVI 3. Also *D.* IV, VI, I: status permutatio.

[47] *Cf. Digest,* IV, V, 11.

[48] Paul Frédéric Girard, *Manuel Elémentaire de Droit Romain,* Paris 1918, p.195 mentions the *status familiae* and uses Paul, *D.* IV, V, 11 as the authority disregarding the fact that Paul never uses such an expression. Likewise Robert von Mayr, *Historia del Derecho Romano,* traduc. del alemán por Wenceslao Roces, Barcelona 1964, p.165. An opposite view is taken by Alvaro D'Ors, *Derecho Privado Romano,* Pamplona 1973, p. 235 n. 11 who states:» No es romana la tripartición correspondiente de *status libertatis, civitatis, familiae*», a point already made by Savigny, *op. cit.* p. 443.

[49] It can be argued that Ulpian, in particular (XI, 13) and, more generally, Justinian *Inst.* XVI 3 (*cf.* text supra) can only refer to the family. This is possible, but remains in the area of speculation.

familiae as the totality of people united by agnation and the rights derived from that agnation is unconvincing. This is because those rights, as in the case of *patria potestas* or marriage, are not called *status*. To restrict the concept of *status* as far as the family is concerned to the division of freeborn persons into independent and dependent *(sui iuris* or *alieni iuris)* is the only possibility but this is too limited. Because of this, we find some merit in Savigny who introduces the concepts of *privata* and *publica iura* and, after a long discusion, concludes:

> *Status hominum* ou *hominis* ne désigne donc pas un état juridique en général, mais la place que l'individu occupe dans la famille, par opposition à celle qu'il occupe dans l'Etat. Le *status hominis* constitue la position de l'homme *(privata hominis et familiae iura)*[50] mise en parallèle avec la position de citoyen *(publica, civitatis iura)*[51].

We need have no reservation in accepting that *mutatio* status designates a change in freedom, citizenship and but we must stretch the meaning of it to include all the different family connections. We have already noted an asymmetry i.e. *capitis deminutio maxima* and *media* involved change and loss and *capitis deminutio minima* mere change-*mutatio*. The change in *capitis deminutio maxima* and *media* concerns the *publica iura* while the *minima* concerns the *privata iura*. A new dissymmetry, not different from the original one, albeit less pronounced, emerges.

3) *Mutatio status* and agnation

Moyle says that «the essence of *capitis deminutio minima* is the leaving, by the *minutus*, of his previous agnatic family»[52]. This statement deserves inspection.

The only classical text that could be suitable for our purpose is Cicero, Topica, VI, 29:

> Itemque ut illud: «Gentiles sunt qui inter se eodem nomine sunt». Non est satis. «Qui ab ingenuis oriundi sunt». Ne id quidem satis est. «Quorum maiorum nemo seruitutem seruiuit». Abest etiam nunc. «Qui capite non sunt deminuti». Hoc fortasse satis est. Nihil enim uideo Scaeuolam pontificem ad hanc definitionem addidisse.

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[50] Savigny *op. cit.* p.443 says that the double meaning of *status* concerning public and private law is not directly established by the Roman law but is recognized indirectly. In my opinion the following passages are sufficiently explicit: *Digest* IV, V, 6 . Ulpianus, *Libro LI (8) ad Sabinum.*: Nam et cetera officia, quae publica sunt in eo non finiuntur; capitis enim minutio priuata hominis et familiae eius iura, non ciuitatis ammittit. This *priuata iura* is the counterpart of *publica iura* which is retained after *capitis deminutio. cf. Digest* IV, V, 2: Nunc respiciendum, quae capitis deminutione pereant; et primo ea capitis deminutione, quae salua ciuitate accidit, per quam publica iura non interuerti constat; nam manere magistratum uel senatorem uel iudicem certum est.

[51] *Op. cit.* p. 438.

[52] *Op. cit.* p. 156.

The assertion that the *capite deminuti* break their gentile links is undermined by *fortasse,* and it is followed by Scaeuola's reticence in elaborating any further. These facts warn us not to draw conclusions from this passage [53].

Centuries later, Gaius I, 163 is more explicit:

> Nec solum maioribus (capitis) deminutionibus ius agnationis corrumpitur, sed etiam minima. et ideo, si ex duobus liberis alterum pater emancipauerit, post obitum eius neuter alteri agnationis iure tutor esse poterit.

The first sentence is unequivocal and the prohibition on exerting the *tutela legitima* in the second is a clear corroboration.
In the *Digest* IV, V, Paulus *libro XI ad Edictum,* 7 confirms Gaius' view:

> Sed legitimae tutelae ex duodecim tabulis interuertuntur eadem ratione, qua et hereditates exinde legitimae, quid agnatis deferentur, qui desinunt esse familia mutati.

If agnation was destroyed by capitis *deminutio minima,* cognation survived. Gaius I, 158:

> Sed agnationis quidem ius capitis deminutione perimitur, cognationis uero ius eo modo non commutatur, quia ciuilis ratio ciuilia iura corrumpere potest, naturalia uero non potest.

This is ratified by Just. *Inst.* I, XVI, 6:

> Quod autem dictum est, manere cognationis ius et post capitis deminutionem, hoc ita est, si minima capitis deminutio interueniat; manet enim cognatio [54].

If *capitis deminutio minima* had as its purpose the breaking the agnatic bond [55], we face some difficulties when reading two texts that have not been questioned:

> Aulus Gellius, I, 12, 9: uirgo autem Vestalis simul est capta atque in atrium Vestae deducta est et pontificibus tradita, eo statim tempore sine emancipatione ac sine capitis minutione e patris potestate exit et ius testamenti faciendi adipiscitur [56].
>
> *Ibid.* 18: Praeterea in *Commentariis* Labeonis, quae ad *Duodecim Tabulas* composuit, ita scriptum est: «Virgo Vestalis neque heres est cuiquam

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[53] If applied to adoption, the passage could be interpreted that the adopted person entered the *gens* of the adopter whose name he took, but it could also indicate that the adoptee never became a member of the *gens* of the adopter.

[54] In case of *capitis deminutio maxima* cognation is destroyed.

[55] Moyle *op. cit.*, p. 184 explains why the Vestal Virgins and the Flamen Dialis did escape *capitis deminutio* mentioning a text of Cicero that I have not been able to trace not even with the assistance of E. Costa, *op. cit.*. Moyle states that the there was *mutatio familiae* in only those forms which involved entry into *mancipium,* so the *adrogatus* and the woman who made a *conventio in manum* did not undergo *capitis deminutio.* An attractive theory, but where is the evidence.

[56] Plutarch, *Numa,* 10 3 attributes the capacity of making a will and managing their own affairs to Numa.

> intestato, neque intestatae quisquam, sed bona eius in publicum redigi aiunt. Id quo iure fiat quaeritur[57].

In the first text we see that the destruction of agnation was possible without *capitis deminutio;* the second one points to a consequence of the disappearance of agnation: neither is the Vestal virgin an heir in intestacy nor does she have heirs when dying intestate because she has no agnates. If this was done in deference to their special relation to the gods *(in honorem sacerdotii)* as claimed by Gaius (I, 145), this must have been obvious to the classical jurists and there would not have been a reason for puzzlement, consequently it is likely that this reason was invented by Gaius and/or his contemporaries. Labeo's perplexity *(id quo iure fiat quaeritur)* is due, most likely, to the fact that those agnatic links were severed without *capitis deminutio,* as the practice required. We must accept the fact that not every break of agnatic links was due to *capitis deminutio* and, conversely, agnation could be destroyed without *capitis deminutio.* Indeed, if we change the focus in a *mutatio status* such as adoption and look at the natural father, it could be said that he, in giving his son in adoption, severs himself from an agnatic bond without suffering *capitis deminutio.*

The case of the flamen Dialis is similar. Gaius I, 130:

> Praeterea exeunt liberi uirilis sexus de parentis potestate si flamines Diales inaugurentur et feminini sexus si uirgines Vestales capiantur[58].

Other instances of what Kaser labels as *ius singulare* could be added to the cases of the Vestals and the Flamen Dialis[59]. Ulpian in *D.* XIV, 6, 4, 3:

> Si a filiofamilias stipulatus sim, et patrifamilias facto crediderim, sine capite deminutus sit, siue morte patris uel alias sui iuris sine capitis deminutione fuerit effectus, debet dici cessare senatusconsultum quia mutua iam patrifamilias data est.

It is natural to restrict *alias* to the known cases, but there is no reason for denying the possibility of other unrecorded cases. It is worth noting that in Justinian's times a new type of *adoptio* was introduced —*adoptio minus plena*—, whereby the adoptee acquired rights of inheritance from the adopted father without losing his right to inherent from his own family *(CJ* 8, 47,10

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[57] In addition, because of the absence of agnates *tutela* becomes redundant, inclusive the *legitima* one. Gaius I, 145: itaque, si quis filio filiaeque testamento tutorem dederit, et ambo ad pubertatem peruenerint, filius quidem desinit habere tutorem, filia uero nihilo minus in tutela permanet, ... Loquimur autem exceptis uirginibus Vestalibus, quas etiam ueteres in honorem sacerdotii liberas esse uoluerunt; itaque etiam lege XII tabularum cautum est.

[58] Tacitus, *Ann.* IV, 16,3:» ... et quoniam exiret e iure patrio qui id flamonium apisceretur quaeque in manum flaminis conuenerit». Later the situation of the flamen did not change but legislation was passed whereby the flaminica was subject to the general law for women.

[59] Kaser, «Zur Geschichte...» p. 85.

dated 530 A.D.). In this case there was *capitis deminutio* but the agnatic links were not broken.

Cases of *capitis deminutio minima*

In the present exploration of *capitis deminutio minima* it will be useful to list the instances generally acknowledged by Roman law scholars and to cite their textual authority. Two texts are important. Just. *Inst.*, I, XVI 3 establishes general principles:

> Minima capitis deminutio est quum et ciuitas et libertas retinetur, sed status hominis commutatur: quod accidit in his, qui, quum sui iuris fuerunt, cooperunt alieno iuri subiecti esse, uel contra[60].

In addition, Gaius, I, 162 offers a catalogue of sorts:

> Minima est capitis deminutio cum et ciuitas et libertas retinetur, sed status hominis commutatur; quod accidit in his qui adoptantur, item in his quae coemptionem faciunt, et in his qui mancipio dantur quique ex mancipatione manumittuntur; adeo quidem ut, quotiens quisque mancipetur aut manumittatur, totiens capite deminuatur.

On the basis of these passages we shall attempt a classification of *capitis deminutio minima* in its various instances. It is to be hoped that a clearer picture will emerge. The organization is made around two axes: 1. change from independence to dependence and vice versa, and 2. change of family. In some cases both changes take place so we shall cross-reference them.

1. Change from independence to dependence or vice versa

a) A person *sui iuris* becomes subject to someone else's *potestas.*

(i) adrogatio. Gaius I, 99:

> Populi auctoritate adoptamus eos qui sui iuris sunt. quae species adoptionis dicitur adrogatio.

In addition if, according to Paulus *Libro ad Edictum* [61] the children of the adrogatus suffer *capitis deminutio, a fortiori* the *adrogatus* suffers it himself. The praetor in D. IV, V 2 referring to *capite deminuti,* includes the *adrogatus;*

> Et quidem, si adrogatus sit, nullus labor; nam perinde obligabitur ut filiusfamilias[62].

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[60] Already quoted p. 56.

[61] *Cf.* infra p. 64.

[62] Max Kaser, *Das Römischen Privatrecht, Ertser Abschnitt das Altrömische, das Vorklassische und Klassiche Recht,* München 1971, p. 348: «Die Arrogation macht den arrogierten zum Kind der Annehmenden. Er erleidet eines *capitis deminutio (minima),* seine Gewaltunterworfenen und sein Vermögen fallen an den neuen Gewalthaber.» Concerning the position of the *adrogatus* in earlier times see *ibid.* p. 67.

Under this rubric of adrogatio could be inserted the *causae probationis* of the ancient laws and the *legitimationes* of more recent law, but we have no texts to corroborate these assumptions.

(ii) conventio in manum[63]. Since the jurists do not specify whether the woman is *sui iuri* or *alieni iuris* we shall include this case under 1 and 2. Gaius, III, 83 says:

> Etenim, cum paterfamilias se in adoptionem dedit mulierue in manum conuenit, omnes eius res incorporales et corporales, quaeque ei debitae sunt, patri adoptiuo coemptionatoriue adquiruntur.

Since the *paterfamilias* is necessarily *sui iuris,* it is natural to assume that the woman mentioned in the same sentence is of a similar status. Nevertheless, it has to be borne in mind that the text is imprecise not only because it does not mention the status of the woman but also we would expect the word *adrogatio* for the *paterfamilias.* Ulpian XI, 13 repeats the imprecision:

> Minima capitis deminutio est, per quam et ciuitate et libertate salua, status dumtaxat homines mutatur quod fit adoptione at in manum conuentione.

In Kaser's[64] opinion these two manifestations of *capitis deminutio* were recognized as such only in the late Republic. Before that time, he claims, the rights of the *adrogatus* and the woman *in manu* remained, in spite of their being subject to *aliena potestas,* almost intact. He bases his point on the edict *De capite minutis*[65] whereby an *adrogatus* and a woman in *manu* remain responsible for their own debts (unless hereditary). It is added, in a convoluted way, that, in spite of the fact that they are not liable because they have undergone capitis *deminutio,* an *utilis actio* against them is given in which the *capitis deminutio* is set aside. There are some problems, the first one being the date of the Edict which Kaser speculates could go back to the 2nd or 1st century B.C., but no evidence is available. The second one is what happened before the Edict. It is easy to realise that the situation of the creditors of *sui iuris* people was extremely precarious because the male could

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[63] For a comprehensive bibliography on this point see Juan Iglesias, *Instituciones de Derecho Privado,* Barcelona 1965, p. 512 n. 49.

[64] «Zur Geschichte...» p. 79-85.

[65] Gaius III, 84: Ex diuerso, quod is debuit qui se in adoptionem quaeue in manum conuenit, non transit ad coemptionatorem aut ad patrem adoptiuum, nisi si hereditarium aes alienum fuerit; de eo enim, quid ipse pater adoptiuus aut coemptionator heres fit, directo tenetur iure; is uero qui se adoptatum dedit quaeue in manum conuenit, desinit esse heres; de eo uero quod proprio nomine eae personae debuerint, licet neque pater adoptiuus teneatur neque coemptionator, et ne ipse quidem qui se in adoptionem dedit uel ipsa quae in manum conuenit maneat obligatus obligataue, quia scilicet per capitis deminutionem liberetur, tamen in eum eamue utilis actio datur, rescissa capitis deminutione;... . This is corroborated in IV, 38: Praeterea aliquando fingimus aduersarium nostrum capite deminutum non esse. ... sed ne in potestate eius sit ius nostrum corrumpere, introducta est contra eum eamue actio utilis rescissa capite deminutione, id est in qua fingitur capite deminutus deminutaue non esse.

engineer an *adrogatio* and the female a *conuentio in manum* to avoid paying their debts. Kaser does not attempt an explanation: «Aber davon wissen unsere Quellen nichts«[66] but supposes that there must have been something before the Edict to protect the creditors[67]. Even if this assumption is understandable it does not necessarily imply that *adrogatio* and *conuentio in manum* of a woman *sui iuris* did not involve *capitis deminutio,* but it should be noted that the condition of *capitis deminutio* can be suspended.

(iii) revocatio emancipationis. This is implied in Gaius I, 162:[68]

> Minima est capitis deminutio cum et ciuitas et libertas retinetur, sed status hominis commutatur; quod accidit in his qui adoptantur, item in his quae coemptionem faciunt, et in his qui mancipio dantur quique ex mancipatione manumittuntur; adeo quidem ut, quotiens quisque mancipetur aut manumittatur, totiens capite deminuatur.

b). Those *alieni iuris (vel contra)* who become *sui iuris:*

(i) emancipatio after *manumissio ex mancipatione.* The very confused text by Gaius I, 162 on this point finds some clarification in Paulus in D. IV, V, I:

> Emancipatio filio et ceteris personis capitis minutio manifesto accidit, quum emancipari nemo possit, nisi in imaginariam seruilem causam deductus.

Since three fictitious sales were necessary to emancipate a son, it is not clear whether the son reverted *in potestate* after the first and second stages of the process and, consequently, whether there were three *capitis deminutiones* or whether *patria potestas* was held in suspense[69]. The daughter, after the *capitis deminutio* became *sui iuris* since she could not be sold *in mancipium* more than once[70]. It is interesting to note that emancipation is in League's opinion the essence of capitis *deminutio minima* because the other cases such as *adoptio, conventio in manum* and *adrogatio* presuppose a previous emancipation[71].

Emancipation can prove or refute the theory that *capitis deminutio* is a change *in deterius.* The emancipated child becomes *sui iuris* and, therefore, a

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[66] *Ibid.* p. 82.

[67] *Ibid.* p. 83. *cf.* Alan Watson, *The Law of Persons in the Later Roman Republic,* Oxford 1967, p. 87.

[68] Already quoted page 62, Moyle, *op. cit.* p. 157 declares that there is *capitis deminutio minima* when a person *sui iuris* becomes *alieni iuris* by *adrogatio* or *legitimatio. Legitimatio* seems to fit comfortably in the pattern but we do not include it because the jurists have not done so.

[69] League, *Roman Private Law Founded on the Institutes of Gaius and Justinian,* London 1967, p. 147.

[70] This interpretation, i.e. that there are as many *capitis deminutiones* as *emancipationes* is based in the reading of Studemund of Gaius I, 162. For Savigny, *op. cit.* p. 448, the key words are almost illegible.

[71] *Op. cit.* p. 147.

full citizen enjoying all the rights concomitant with its status. But emancipation could also be a punishment for an impious child, since the family links and support could be severed and the child ceases to be *suus heres* entitled to inheritance in case of intestacy [72].

(ii) release of *manus* by means of *diffarreatio* is not mentioned clearly in texts [73] but in an inscription [74] dated later than the accession of Commodus there is mention of a priesthood *confarreationum et diffarreationum.* In P. L.Corbetts opinion [75] when *manus* was the result of *coemptio* or *usus*, remancipatio of the wife took place after the dissolution of the marriage. Corbett, prudently, says «probably» whereas Bonfante, undisturbed by the absence of evidence supposes the existence of a *capitis deminutio* [76] as does Kaser [77]. The situation of a wife whose husband has been *capite minutus in deterius* is also open to speculation. The marriage remains after adrogation, adoption, emancipation of the spouse [78] but we do not know what happens after *noxiae datio* or *mancipium.*

2. Change of family.

a) A person *alieni iuris* passes *in potestatem* of another person. This includes:

(i) adoptio by a *paterfamilias* of a son *in patria potestate.* A triple *manumissio* was necessary for the adoption to become irreversible [79]. The son

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[72] Moyle, *op. cit.* p. 83 fails to see this point when, arguing against the idea that *capitis deminutio* was a deterioration, he says no matter how tentatively :»...in many cases of *capitis deminutio minima* (e.g. often in adoption) the agnatic rights which were lost were more than outbalanced by the rights acquired in the new family.»

[73] Ulpian, *Reg.* 9, talks only of *confarreatio* and in a very fragmentary way.

[74] *C.I.L.* 10, 6662.

[75] *The Roman Law of Marriage,* Oxford 1929, p. 223.

[76] *Op. cit.* p. 168: E facile supporre che dovesse aver luogo una *capitis deminutio minima* anche nella *remancipatio* e *diffarreatio* delle donne uscenti dalla *manus,* cioè nelli atti inverse della *coemptio* e della *confarreatio:* essa non è ci attestata dalle fonti solo perchè di questi due istituti arcaici, specialmente del secondo non abbiamo che una fugace menzione.

[77] «Zur Geschichte ...» p. 84. Also in *Das Römische*...p. 68: «Die *manus* über die Ehefrau wird aufgehoben durch die *remancipatio* bei der Scheidung». He provides no textual evidence. *cf.* also p. 272.

[78] Kaser, *Das Römische...* p. 325.

[79] R.W. League, *op. cit.* explains how the son in *potestate* undergoing *capitis deminutio* for the purpose of adoption does not become a paterfamilias thus requiring *adrogatio*: «Investigation of the procedure of *adoptio* is instructive: *the patria potestas* was lost by the third sale; *the mancipium,* however kept the child *alieni iuris* so that the *cessio* was effective to give the new *pater potestas* and the child its new familia.» p. 147. Kaiser, *Das Römische...* explains the triple *manumissio* in a more convicing way: «Die dreimalige *mancipatio* war erforderlich, damit nicht nach Tod oder *capitis deminutio* des Adoptivvaters die *patria potestas* des leiblichen Vaters wiederauflebte.» p. 67, n. 19.

breaks his agnatic links but if the adoptee himself has children the question arises whether the children follow the status of their natural father or remain under the *potestas* of their grandfather[80].

(ii) coemptio of a woman. Gaius talks of *coemptio* in one passage and in another of *conuentio in manum* although the husband is mentioned as the *coemptor*. Ulpian, oh the other hand, uses the more generic *conuentio in manum*. It is legitimate to ask why Gaius is so restrictive, especially at a time when formal ways of marriage were falling into disuse. It must be noted also that there is no specification whether the woman is *sui iuris* or not. Savigny, on the basis of the texts quoted above and on Cic. *Top.* 4[81], claims that only the woman *sui iuris* underwent *capitis deminutio*[82]. This statement is based on an *argumentum ex silentio,* which I consider admissible only if no better explanation can be offered.

(iii) children of the adrogatus. Gaius I, 107:

> Illud proprium est adoptionis quae per populum fit, quod is qui liberos in potestate habet, si se adrogatum dederit, non solum ipse potestati adrogatoris subicitur, sed etiam liberi eius in eiusdem fuint potestate tamquam nepotes.

This is confirmed by *D.* IV, V, 3. Paulus *libro XI ad edictum:*

> Liberos, qui adrogatum parentem sequitur, placet minuit caput, quum in aliena potestate sint, et cum familiam mutauerint.

Consistent with his view that capitis *deminutio minima* occurred only in two cases: a) when a person *sui iuris* passed into some else's *potestas* or *manus,* or b) when a *filiusfamilias* or a woman *in manu* were conveyed into *mancipium* in order to be emancipated or given into adoption, Savigny asserts that the children of the *adrogatus* did not suffer *capitis deminutio* when they passed into the new family with their father. This is to ignore Paulus' words about *mutatio familiae* which we cannot discard even if he is not supported by other jurists. Also Savigny interprets *placet* as an expression of personal opinion, which is not self-evident.[83]

b) A person *alieni iuris* suffers *capitis deminutio* without changing family in case of *noxae datio.*[84] This situation should be considered even if it is, presumably, a temporary one and after *emancipatio* the son or daughter will revert to the *patria potestas.*

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[80] John Crook, *Law and Life in Rome,* London 1967, p. 113 addresses only the situation of the son without mentioning the possibility of his having children. The parallelism with the position of the *adrogatus* could suggest that the children may follow their natural father, but it is not certain. *cf. D.* 38, 1 4 and 38. 1, 7.

[81] Quoted infra p. 67.

[82] *Op. cit.* p. 463: Gaius, qui décrit avec détail ces diverses formalités, parle de la dégradation passagère pour l' adoption; mais il ne dit pas un mot pour la *coemtio (sic).*

[83] *Op. cit.* p. 468.

[84] Kaser, «Zur Geschichte...» p. 84.

The testament of a woman.

There is another facet to *capitis deminutio minima* namely the fact that it was required for the validity of a womans will. On this matter a classical text is preserved. Cic. *Topica* IV, 18:

> Ab adiunctis: Si ea mulier testamentum fecit quae se numquam capite deminuit, non uidetur ex edicto praetoris secundum eas tabulas possessio dari. Adiungitur enim, ut secundum seruorum, secundum exsulum, secundum puerulorum tabulas possessio uideatur ex edicto dari.

A woman was required to undergo *capitis deminutio* for her testamentary instructions to be implemented. If that was not the case, according to Cicero, the will would be unactionable as if void. This rare Republican piece of information is confirmed by Gaius I, 115a:

> Olim etiam testamenti faciendi gratia fiduciaria fiebat coemptio. tunc enim non aliter testamenti faciendi ius habebat, exceptis quibusdam personis, quam si coemptionem fecissent remancipataeque et manumissae fuissent. sed hanc necessitatem coemptionis faciendae ex auctoritate diui Hadriani senatus remisit.

Gaius leaves us in no doubt about the procedure by mentioning the *coemptio, manumissio* and *remancipatio.*The reason for this requirement is not obvious. *Prima facie* it seems that the law was attempting to prevent the assets of a woman leaving the family. This obstacle would have been welcomed by the agnates, who would have preferred the laws of intestacy to operate unimpeded. If the permission of the tutor was also necessary[85] this theory would be unchallenged in the case of *tutela legitima* and we could also find another argument in favour of the theory that *capitis deminutio* has as its main purpose the breaking of agnation. There are some problems. Cicero does not specify whether the woman was sui *iuris* or *alieni iuris* or, if *in tutela*, what sort of tutor she had. To argue that Livy (39.9.7) does not mention capitis *deminutio* when saying that Faecenia Hispala, a freedwoman who was not in *tutela legitima,* made a will is hardly conclusive. It could be argued that it was so self-evident that Livy did not need to mention the process or that the *manumissio* already undergone was enough of a capitis deminutio.[86]

Jane F. Gardner in her most authoritative book states: »... and by entering into *manus* she had undergone *capitis deminutio,* a change of status, she could make a will without the need of a further *coemptio.*»[87] This is utterly commonsensical but Gardner seems to forget that the woman married *manu* becomes *loco filiae* to her husband and thus she acquires a new set of agnates.

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[85] Gaius II 112.

[86] Watson, *op. cit.* pp. 153-4, suggests that originally women were not allowed to make a will, even with the tutors consent, until the emergence of *testamentum per aes et libram* and that later on they were allow to do so when their heirs in intestacy were not their natural relatives. This not supported by documentary evidence.

[87] *Woman in Roman Law and Society,* London 1986, p. 12.

If *capitis deminutio*is required to break agnation (a fact that is far from conclusively proven), the woman *in manu* needs that *capitis deminutio* to write a will. Of course, all this is guesswork and, if I were untrammelled by the tyranny of the sources or their absence, I would restrict *capitis deminutio* to the woman *sui iuris* married *manu* and I would make this original *capitis deminutio* sufficient for the writing of a will and I would be closer to Gardner's position.

Conclusion

I have tried to quote all the important Roman references about *capitis deminutio minima* and discuss what the most eminent scholars have to say about them. I have reached no consistent overview and a number of inconsistencies survive.

To list the most glaring:

- There is no unity in the three types of *capitis deminutiones*. The *maxima* and the *media* can be grouped together, but the *minima* remains in a class of its own.
- *Libertas, civitas* and *familia* have no common features. If Paulus classes them together, he is the only one who does so.
- If change of family involved *capitis deminutio*, why do not all the texts mention that the children of the *adrogatus* who changed family accompanying their father did suffer *capitis deminutio*.
- If the purpose of *capitis deminutio minima* is to break agnation, it is hard -even for Labeo- to explain why the Vestals and the flamen Dialis were exempt from *capitis deminutio* and became *sui iuris* when their paterfamilias was still alive.
- The requirement for a woman to undergo *capitis deminutio* in order to write a will presuppose that *capitis deminutio* broke agnation, a fact not definitively proven.
- If agnation and *capitis deminutio* are related, freedmen and freedwomen who do not have agnates should have been exempted from *capitis deminutio*.[88] There is no conclusive evidence of this.
- The texts do not specify whether the *capitis deminutio* required for *conuentio in manum* applied both to women *sui iuris* and *alieni iuris* or whether the *capitis deminutio* concomitant with *conventio in manum* had a lasting effect that allowed a woman to write her will. If this is not the case, it could mean that a woman *in potestate* who married *manu* could require three *capitis deminutiones* [89]in order to write a will. This seems somewhat excessive.

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[88] If this were the case, it is possible to explain Livy's silence about *capitis deminutio* when he mentions Faecenia Hispala.

[89] When emancipated from *patria potestas*, when undergoing *conventio in manum* and when writing her will.

Scholars who have given answers more or less ingenious [90], more or less convincing to these questions have operated along two tracks, historical and logical.The former have postulated a historical development which we can only surmise based on very scanty documentation. The latter, departing from known legal practices, have devised coherent systems through deduction and have filled gaps and eliminated irregularities. These endeavours are unquestionably praiseworthy but it should be kept in mind that reality frequently defies logical cogency and that historical reconstruction can have very shaky fundations.

Capitis deminutio is insistently present in the Roman legal texts and we have looked at them closely. The job has been laborious. We can offer more of a recension that a satisfactory conclusion. But the fact that *capitis deminutio* remains an elusive protean figure resisting apprehension and classification does not detract from its importance. This paper is an invitation to further exploration.

[90] Sometimes not so ingenious. Savigny declares Paulus mistaken, Bonfante blames Justinian for our confusion as far as *capitis deminutio* goes.