SUMMARY

The amendment of the Civil Law of 1971 concerning divorce is the reason for the presentation of this investigation.

The question I asked myself was, in what way marriage and divorce were formed legally in Rome and whether under the Roman law the legal arrangement was known, in which divorce was admitted, on the request of both parties.

In answering these questions I restricted myself to the republican period. This choice imposed me a number of restrictions; from this period no sources of law are passed down; emperor August was the first person to provide by law the rules in the field of marriage and divorce. Therefore one is dependent on literary sources to visualize a picture, of the way in which in the oldest, archaic times, marriage and divorce were arranged formally. The same goes for legal sources, which are from a late date too, but they are also very scant with information on the republican period. It was my aim to visualize a picture as complete as possible of the oldest times and the republican period and to find an answer to the question whether divorce by mutual consent of the married couple, had been possible in that period of Roman history.

The outline of marriage and divorce from the ancient time, led me to the conclusion that divorce, as expressed in the last phrase, was not within the bounds of possibility in Rome, at least not in the period investigated. This conclusion I have founded as follows: The person- and family law in Rome was originally under the direction of the customary law, the *mos maiorum*. This customary law rooted in the divine law and therefore was little flexible. The guardians of this customary law were the priests, united in colleges, who were not at all interested in modulations of this customary law. Alterations in this law were only allowed with great reservation. This image fits in with the social and economic situation of ancient Rome: a small-scale community, strong hierarchical structured and agricultural active. In this society the man occupied a dominant position. When married he was the authority in the marriage; he was absolutely authorized to his wife and children.

The authority to wield his power on his wife he derived from *manus*, the marital power which fall to him at the moment of marriage. For that, so is my argument, a judicial act had been required. He was granted absolute power to his children by the *patria potestas*.

At the onset, a marriage could only be concluded with these balances of power. Already before the law of the Twelve Tables the possibility existed to conclude a marriage without marital power; then the wife was legally independent and wished to remain so during her marriage, or she was still...
under her father’s authorization and the latter wished to maintain that qualified position.
In later times this form of marriage gained popularity. In our investigation we found several causes: as a result of the numerous wars Rome waged, and the large number of perished and missing people this involved, many families were left fatherless. The progress of social and economic life asked for decisions, which by absence of the husband, had to be taken by the wife. Subsequently the customary law as a unique source of law became subject to stress the more Rome extended its territory: this was caused by contact with other people, inhabitants of the conquered territories and by getting to know other cultures and religions. Particularly getting acquainted with the Greek ideas after the conquest of Achaea, caused a growing interest of the humanitas-thought of politicians and executives in Rome. Under the influence of these facts, among others, the interpretation of the obsolete perfect marriage was adjusted to a more modern one.
The increasing popularity of marriage without marital power did not result in the fact that traditional marriage with marital power passed out of use completely. As already argued, this form of marriage which could be concluded during a sacral ceremony (confarreatione) by means of spurious purchase (coemptione) or by prescription (usu) kept its right to exist, but to a lesser degree. The marriage concluded by a confarreatione was traditionally the privilege of the patricians.
When the ban of marriage between patricians and plebeians was lifted, the patricians kept this form of marriage. Notifications have been found that this form still existed during the principality. The question whether the Roman marriage could be ended by means of divorce and if so, under what conditions an circumstances, brought us to the conclusion that this was not possible for every marriage. It was impossible for a marriage concluded confarreatione. Generally it was accepted in Rome that marriage was for life. This applied all the more so to those marriage ceremonies taken place under special protection of Jupiter and in the presence of the High Priest (Pontifex Maximus).
For marriages cum manu which were concluded differently, dissolution of the marriage contract was possible; although strict conditions and procedure directions were applied.
On the conditions, also called grounds, it is noticed that Rome acknowledged a limited number of grounds. For all grounds it applied that the wife was found guilty of a deed that infringed on the purity of the marital relationship, like using alcohol, leaving the marital home without her husband’s knowledge and vice and adultery, even when the wife played a passive part.
Lack of children was also justification for divorce the wife was blamed for that as well.
A procedure prescription stated that a termination (repudium) should take place. It is established that the Twelve Tables law contained such an obligation. At first it stated that this message had to be conveyed by word of mouth, later on mediate representation was permitted too. A second prescription was the obligation for the husband to call together a family council, before executing the prescribed punishment on his ex-wife. This family council is an institute sui generis: though in our view its working field concerns criminal law, its activity falls within the field of familia and gens.

As argued we have to do with a relict of Roman’s ancient history, when the gens held a supreme position and they preferred to solve things like divorce and other problems which could harm their reputation within their own ranks. Originally it was the function of the family council, which was composed of members of the husband’s and the wife’s family, to advise to the man who presided the council. The facts and circumstances were tested and the intended punishment was judged if it was rightful. Later on confidants of the family (amici) could be part of the family council and the judgement of the council became standard for the punishment. Still under principality the family council is mentioned.

The consequences of divorce were serious for the wife: when she had married with marital authorization, she lost her position in her husband’s family, including the contact with her children. An important effect was her dowry. Giving a dowry was in Rome a moral obligation imposed on the bride’s family. Originally this dowry was permanent at the husband’s disposal and was part of his possessions. In olden times the wife could not legally claim the dowry, or part of it, when she was to blame for the divorce. When a marriage was arranged without marital authorization, then a dowry was also given, but was the wife legally independent then she could provide a dowry herself with the reservation that the donation would only be a separate part of her possessions; the other part was kept out of her dowry and remained her possession.

In later times, when marriage without marital authorization became popular, a new development arose: on the occasion of an agreement of marriage, often the engagement, it was stipulated that the dowry should be given back when the marriage ended: the cautio provided for restitution to the giver of the dowry.

This legal remedy would avail of nothing for the wife, unless she gave the dowry herself. Did she not provide the dowry herself, or when she failed to make a condition, then the husband kept the dowry. The legal development provided for in this gap by establishing the actio rei uxoriae, a by the praetor established action, on behalf of the wife; she could take this action in case of divorce or on death of her husband. The action was controlled by good faith. The complete dowry or part of it could be at stake, which part was subject to
the discretionary power of the judge. The husband could make up a defence and make valid so called detention rights, when he was able to prove that he had suffered a loss by his ex-wife and when the children came to his support. In this case too the judge decided on the size of the deductions.

It was emphasised that the justiciables had shown an interest in the right of property side of the marriage, the dowry, whereas the marriage itself and the divorce were kept out of reach of the formal legislation.

The character of the dowry, which changed dramatically in the course of time, has been examined extensively. The husband had to take in account that the dowry should have to be given back to the giver at any moment and that he had to answer for correct management of that property.

It has become clear that divorce was only admitted on clearly specified grounds. These grounds always concerned misbehaviour or deficit (childless) of the wife. Consequently she was pointed out exclusively as the guilty party. ‘Guilt’ dominated the complete examined period of the divorce, guilt she was blamed for and to which punishment was implemented.

Mutual consent to come to a divorce assumes innocence: parties back and forth do not blame each other for culpable behaviour and want to separate in harmony. In the time of the republic divorce was a unilateral act in Rome: it was the man, the husband or the *pater familias* who broke up the marriage and repudiated the wife.