The Magic of *Mancipatio*[1]

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The purpose of this article is to examine ritualistic and supernatural elements of archaic Roman law and their influence in the classical period through the example of *mancipatio*[2].

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[1] The article forms a part of a larger project on archaisms and primitivisms in the Roman legal tradition. Early drafts of this paper have been presented at the meeting of the Association of Ancient Historians, the meeting of the SIHDA, and the XVII Finnish Symposium on Late Antiquity, and the meeting of the REUNA network in Rome, all in 2008. I wish to thank everyone for their comments at those events. Dr Philipp Scheibelreiter and Dr Katariina Mustakallio read the draft and offered constructive criticism, for which I am in their debt.

[2] B.W.LEIST, *Mancipatio und Eigenthumstradition*, Jena 1865; G.F.PUCHTA, *System und Geschichte des römischen Privatrechts,* in *Cursus der Institutionen*, (8th ed.), Leipzig 1875, pp.194-202; A.BECHMANN, *Der Kauf nach gemeinem Recht*, Erlangen 1876, pp.47-233; A.LONGO, *La mancipatio*, vol. I, Firenze 1887; C.BREZZO, *La Mancipatio*, Roma 1891; R.VON JHERING, *Geist des römischen Rechts II*, (10th ed.), Aalen 1993 [1906], pp.518-527; W.STINTZING, *Über die mancipatio*, Leipzig 1904; A.HÄGERSTRÖM, *Der römische Obligationsbegriff I*, Uppsala 1927; W.KUNKEL, *Mancipatio*, RE 14.1 (1928), pp.998-1010; G.HUSSERL, *Mancipatio*, ZRG 50 (1930), pp.478-487; K.F.THORMANN, *Der doppelte Ursprung der mancipatio*, München 1943; R.HERBIG, *Mancipatio*, Museum Helveticum 8 (1951), pp.223-227; M.KASER, *Vom Begriff des Commercium,* in *M. LAURIA (ed.), Studi in onore di Vincenzo Arangio-Ruiz II*, Napoli 1952, pp.131-167; K.F.THORMANN, *Auctoritas. Ein Beitrag zum römischen Kaufsrechte*, Iura 5 (1954), pp.1-86; F.DE VISSCHER, *Auctoritas et mancipium*, SDHI 22 (1956), pp.87-112; V.ARANGIO-RUIZ, *Mancipatio e documenti contabili (da Ercolano a Piacenza)*, Parola del passato 12 (1957), pp.46-55; P.FUENTESECA DÍAZ, *Mancipium. Mancipatio. Dominium*, Labeo 4 (1958), pp.135-149; E.PÓLAY, *Die Obligationssicherheit in den Verträgen der siebenbürgischen Wachstafeln*, Klio 40 (1962), pp.142-158; C.S.TOMULESCU, *Nexum bei Cicero*, Iura 17 (1966), pp.39-113; C.S.TOMULESCU, *Autour de l'expression apochatum pro uncis duabus*, RIDA 16 (1969), pp.337-343; G.MACCORMACK, *Formalism, symbolism and magic in early Roman law*, TR 37 (1969), pp.439-468; C.S.TOMULESCU, *Les rapports de la mancipatio et de la monnaie dans l'ancien droit romain*, RIDA 16 (1969), pp.345-354; A.WATSON, *Cicero, Ad fam. VII,5,3*, Klio 52 (1970), pp.473-475; G.DIÓSDI,

The conventional wisdom has long been that the early history of Roman law was filled with curious ceremonies and ritual incantations; spears and sticks wielded to symbolically bestow rights and duties[3], while classical law was characterized by rational legal thinking. In contrast, Elizabeth Meyer writes in her recent book Legitimacy and Law in the Roman World how the writing of legal documents on wax tablets or tabulae was a ritual unitary act with magical connotations that continued until Late Antiquity. The act of making of a *stipulatio* or a *mancipatio* through the writing of legal *tabulae*, when performed with the correct ceremonies and utterances, made the desired act real. *Tabulae*, which were also used to record prayers, vows and curses, had an efficacy beyond the human realm but simultaneously carried a sanction attached to the *fides* of the drafter. Meyer's work has been met with a combination of praise and incredulity, her claim that

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Ownership in Ancient and Preclassical Roman Law, Budapest 1970, pp.62-72; C.S.TOMULESCU, *Le droit romain dans les triptyques de Transsylvanie. Les actes de vente et de mancipation*, RIDA 18 (1971), pp.691-710; C.S.TOMULESCU, *Paul, D.18.1.1pr. et la mancipatio*, RIDA 18 (1971), pp.711-722; C.S.TOMULESCU, *La mancipatio nelle commedie di Plauto*, Labeo 17 (1971), pp.284-302; M.KASER, *Das römische Privatrecht I*, (2nd ed.), München 1971, pp.43-48; B.BERGSMA-VAN KRIMPEN, *Etymologische verklaringen in de Institutiones van Gaius*, Hermeneus 44 (1973), pp.189-201; R.BROPHY, *Mancipium and mancipatio in Plautus. One specimen of Plautine legal humor and metaphor*, (diss. Michigan), Ann Arbor, 1974; C.S.TOMULESCU, *Le funzioni del nummus unus nella mancipatio*, RIDA 23 (1976), pp.223-237; A.CORBINO, *Mancipio asse aere dare (dicere) in TH 87, I e II*, Parola del passato 30 (1975), pp.463-467; A.CORBINO, *Il rituale della 'mancipatio' nella descrizione di Gaio*, SDHI 42 (1976), pp.149-196; H.J.WOLFF, *Ein Vorschlag zum Verständnis des Manzipationsrituals,* in *F. BAUR et al. (eds.), Beiträge zur europäischen Rechtsgeschichte und zum geltenden Zivilrecht*, München 1977, pp.1-9; V.ARANGIO-RUIZ, *La compravendita in diritto romano*, (2nd ed.), Napoli 1978, pp.19-38; T.MRSICH, *Mancipationsgestus und Altertumswissenchaften*, ZRG 69 (1979), pp.272-289; O.BEHRENDS, *La mancipatio nelle XII Tavole. I fondamenti della libertà di disporre nella mancipatio delle XII Tavole. Riflessioni sugli scopi e la funzione di un negozio giuridico (XII Tab. vi.1)*, IURA 33 (1982), pp.46-103; J.G.WOLF, *Die mancipatio, Roms ältestes Rechtsgeschäft*, Jahrbuch der Heidelberger Akademie der Wissenschaften 1984, p.41; F.WIEACKER, *Römische Rechtsgeschichte I*, München 1988, pp.333-337; A.WATSON, *The State, Law and Religion: Pagan Rome*, Athens 1992, pp.34-36; J.G.WOLF, *Funktion und Struktur der mancipatio,* in *M. HUMBERT and Y. THOMAS, Mélanges de droit romain et d'histoire ancienne, hommage à la mémoire de André Magdelain*, Paris 1998, pp.501-524.

[3] W.W.BUCKLAND, *Ritual Acts and Words in Roman Law,* in *M. KASER, H. KRELLER, W. KÜNKEL, Festschrift Paul Koschaker I*, Weimar 1939, pp.16-28.

documents like *tabulae* would have had transcendental effects causing most of the resistance[4].

Many of the oldest Roman legal institutions such as *mancipatio*, *stipulatio*, and *vindicatio* contained elements that were interpreted as supernatural or religious, certain precise words had to be uttered, and ritual acts committed[5]. *Mancipatio* was the exclusive form of transmission in *ius civile* of, for example, certain types of land and slaves. In addition to the fact that it is one of the institutions discussed extensively by Meyer, *mancipatio* is good example of the effects of supernatural matters as it is an institution used well into the historical era, not an archaic curiosity, and there is a rich discussion on the impact of the transcendental in *mancipatio*.

In this article, I shall argue that through its archaic roots, Roman law had a strong supernatural element, though not as magic[6] is commonly understood, but instead a belief in the transcendental[7]. It should also be clear that neither the true original meaning of prehistoric Roman law shall be told nor a claim that Roman lawyers were in fact magicians shall be advanced. The aim of this article is more modestly to try to understand the historical consciousness of Roman jurists.

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[4] E.MEYER, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice*, Cambridge 2004. Reviews: G.ROWE, BMCRev 6.22 (2004); C.ANDO, Classical Journal 100 (2004-2005), pp.413-417; P.EICH, Historische Zeitschrift 281 (2005), pp.152-153; C.WILLIAMSON, JRA 19 (2006), pp.414-418; M.PEACHIN, Phoenix 60 (2006), pp.175-178; E.JAKAB, ZRG 122 (2005), pp.299-303. In fact, Meyer goes against two established truths in the history of early law: 1) early Roman law was secular and whatever religious and magical elements there might have been, were phased out very early, and 2) the institutions of law were based on oral transactions, and the use of writing was a later Hellenistic import. KASER, *Privatrecht, op. cit.*, p.27, pp.36-41, p.45.

[5] KASER, *Privatrecht, op. cit.,* p.27; M.BRETONE, *Storia di diritto romano*, Bari 1991, p.90; WATSON, *State, op. cit.*, p.33. As WIEACKER, *Rechtsgeschichte, op. cit.*, p.316, points out, these elements are commonly seen as remnants of earlier times and that the fundamental nature of the legal system was secular and rational.

[6] According to Encyclopædia Britannica Online, magic is "a concept used to describe a mode of rationality or way of thinking that looks to invisible forces to influence events, effect change in material conditions, or present the illusion of change. Within the Western tradition, this way of thinking is distinct from religious or scientific modes; however, such distinctions and even the definition of magic are subject to wide debate."

[7] In plain English, superstition, though that particular word is too laden with prejudice to be used.

1. The sources

As is the case with many of the archaic institutions of Roman law, the sources on *mancipatio* are quite recent and limited in number. The main texts are in Gaius' Institutes, while the Twelve Tables contain a passage relating to *mancipium*, the earlier form of *mancipatio*. Additionally, non-legal sources such as Plautus and Cicero mention *mancipatio* and there are a number of documents on *mancipatio*.

The history of *mancipatio* is both long and obscure; it is thought to be one of the oldest Roman legal institutions[8]. In the XII Tables, there is a reference to *mancipium*:

> XII Tab VI.1:
> *cum faciet nexum mancipiumque, uti lingua nuncupassit, ita ius esto.*
> When he shall perform *nexum* and mancipium, as his tongue has pronounced, so is there to be a source of rights. (Transl. Crawford)[9].

The significance of the text is unclear[10]. Did the clause simply affirm the legal validity of *mancipium*, or did it mean that the words and not the intention of the parties were significant in the interpretation, or something different? Watson presents a hypothesis that this clause may have given validity to verbal reservations added to the *mancipatio*[11].

The main text relating to *mancipatio* is Gaius' description in a long passage in the Institutes:

> Gaius 1.119:
> *Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam venditio: Quod et ipsum ius proprium civium Romanorum est; eaque res ita agitur: Adhibitis non minus quam quinque testibus civibus Romanis puberibus et praeterea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is, qui mancipio accipit, rem tenens ita dicit:* HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO ISQUE MIHI EMPTUS ESTO HOC AERE AENEAQUE LIBRA*;*

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[8] WOLF, *Mancipatio, op. cit.*, p.41. In Fragmenta Vaticana 50, Paul describes *mancipatio* as an institution confirmed by the Twelve Tables: *et mancipationem et in iure cessionem lex XII tabularum confirmat*; BEHRENDS, *op. cit.*, p.72; FLACH, *op. cit.*, p.144.

[9] M.H.CRAWFORD (ed.), *Roman Statutes*, vol. II, London 1996, p.654.

[10] BEHRENDS, *op. cit.*, p 51.

[11] A.WATSON, *Rome of the XII Tables: Persons and Property,* Princeton 1975, pp.144-145. See also Cic. *Off.* 3.16.65.

deinde aere percutit libram idque aes dat ei, a quo mancipio accipit, quasi pretii loco.

Mancipation, then, as we have said earlier, is a sort of imaginary sale; it is also part of the law peculiar to Roman citizens. It is carried out as follows. There are brought together not less than five witnesses, adult Roman citizens, together with another of the same status, who holds bronze scales and is called the 'scale-holder'. The person who is taking by mancipation, while holding the object says the following words: 'I declare that this man is mine by quiritary right and let him be bought to me with this bronze and bronze scales'. Then he strikes the scales with the bronze, and gives it to him from whom he is taking by mancipation by way of price. (Translation by Gordon and Robinson)[12].

As a text, the passage is relatively unproblematic and there have not been many arguments made about changing the composition of the text, though Corbino has argued that one should read '*aes tenens*' instead of '*rem tenens*'. As this interpretation deviates from the Veronese text and there is little evidence to speak for it, it has not been generally accepted[13].

Gaius explains the use of the scales as belonging to a time when no money was used and instead of coins, raw metal was used as money[14]. Paul, speaking of barter, reminds his readers that there once existed a time when no money existed and barter was the form of trade used[15]. Elsewhere in the Institutes, Gaius describes at length the many uses of *mancipatio*, such as *coemptio* and emancipation[16]. He also lists the things that are to be mancipated (*res mancipi*), such as slaves and free men and women, certain animals such as cattle and horses, and Italian land, both urban and rural. Only land can be mancipated *in absentia*, all movables have to be present to be touched by hand in order to be mancipated (*manu res capitur*)[17].

In Gaius' description, the act of *mancipatio* consists of 1) the five adult citizen witnesses, 2) the scale-holder or *libripens* who holds bronze scales, 3) holding the object in the hand, 4) ritual words or

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[12] *The Institutes of Gaius*, translated by W.M.GORDON and O.F.ROBINSON, London 1988, pp.79-81.
[13] DIÓSDI, *op. cit.*, p.65 sums up the arguments for and against. See also CORBINO, *Mancipatio, op. cit.*; CORBINO, *Rituale, op. cit.* See also Boethius, *Top.* 322.
[14] Gaius. Inst.1.122.
[15] Paul D.18.1.1pr; TOMULESCU, *Paul, op. cit.*
[16] Gaius. Inst.1.113-114; 1.117-118; 1.132.
[17] Gaius. Inst.1.121.

incantation, and 5) ritual acts of striking the scales with the bronze, and giving it to the seller. As De Zulueta has maintained, there is an interesting discrepancy within the formula: "Its first clause appears to state an untruth, its second to confess the untruth." Because the acquirer who speaks the quoted words is not yet owner the second clause ought to be historically the first, which led De Zulueta to suppose that it may have been added later for a particular purpose such as emphasizing the payment of the price[18].

Plautus uses *mancipatio* as a legal reference in a number of his plays, showing that the institution was sufficiently common at the time to support such references. There are limits to Plautus' legal accuracy, since it would appear that in the play Trinummus he describes the use of *mancipatio* but forgets that he has situated the play in Greece, making *mancipatio* invalid in that case[19].

Nexum[20], the enigmatic archaic form of pledge by debtors, was closely connected with *mancipatio*. Gaius explains that what in the old language was called *nexum* is now called *mancipatio*, and, for example, Cicero sometimes uses the terms interchangeably[21]. Varro writes that according to Manilius, *nexum* could mean all acts performed *per aes et libram*, while Mucius said it did not mean *mancipatio*[22]. Varro also preserves the words *rauducsculo libram ferito* that were probably linked with the striking of the scales with the bronze in *mancipatio*[23].

Because *mancipatio* was abolished by the time of Justinian, there is scant evidence of its use in the Digest. Elsewhere, Ulpian writes that the use of *mancipatio* as an institution depended on whether the

[18] F.DE ZULUETA, *The Institutes of Gaius: Part II, Commentary*, Oxford 1953, p.59.
[19] TOMULESCU, *Plauto, op. cit.*, pp.292-293; BROPHY, *op. cit*.
[20] TOMULESCU, *Nexum, op. cit.*, pp.40-42 on the extensive literature on *nexum*.
[21] Gaius. Inst. 2.27; Cic. fam. 7.30.2 *cuius quando proprium te esse scribis mancipio et nexu*, top. 5.27 *mancipi est aut traditio alteri nexu*, Parad. 5.35 *non enim ita dicunt eos esse servos ut mancipia quae sunt dominorum facta nexu aut aliquo iure civili*, but see Mur. 2.3, Rep. 1.17.27, de orat. 1.37.173. TOMULESCU, *Nexum op. cit*., p.113; DIÓSDI, *op. cit*., p.64.
[22] Varro *ling.* 7.105. See also VON LÜBTOW, *op. cit.*
[23] Varro *ling.* 5.163; Festus 265.

parties involved had *commercium*, meaning that its use was restricted exclusively to citizens, Latin colonists and Junian Latins[24].

In Rome, formal and ritualized legal acts were known both in oral and in written form. Although *mancipatio*, as Gaius described it, was an oral act, there are written documents that record a *mancipatio* and name the participants such as the *libripens*. Though *mancipatio* was arguably in the course of extinction, the fact that there are legal documents on *mancipatio* as far apart as Dacia and Egypt in the Imperial period show that it was hardly an archaic curiosity. For example, the testament *per aes et libram* of Antonius Silvanus found in Egypt that dates from AD 142 lists the witnesses and the libripens. The sale of the slave Apalaustus from the same year, documented in a triptych in Transylvania, is followed by a *mancipatio*. *Mancipatio* is also recorded in Herculaneum Tablets from the first century AD. *Mancipatio* documents generally list the parties, the object of sale and a description of its condition, and the witnesses. Whether the ritual described by Gaius was actually performed or whether the document in which the ritual is mentioned was simply drafted is naturally impossible to know[25].

The strength of *mancipatio* as a legal ritual is witnessed by its innumerable uses in institutions modelled after it, such as emancipation, *coemptio*, adoption, real security of *fiducia*, *nexum* and the testament *per aes et libram*. It was pragmatically adapted to new

[24] Tituli ex corpore Ulpiani 19.4 *Mancipatio locum habet inter cives Romanos et Latinos coloniarios Latinosque iunianos eosque peregrinos, quibus commercium datum est*. KASER, *Commercium*, *op. cit*., pp.134-135.

[25] FIRA 3.47 (*testamentum Antonii Silvani equitis*), 88 (*emptio pueri*); TH 61; MEYER, *op. cit.*, pp.139-142; TOMULESCU, *Triptyques, op. cit.*, p.708. JAKAB, *op. cit.*, p.302, has pointed out that TH 61 is problematic as *mancipatio* in this context meant the transfer of ownership. See also G.CAMODECA, *Tabulae Herculanenses riedizione dell'emptione di schiavi TH 59-62,* in *U. MANTHE and C. KRAMPE (eds.)*, *Quaestiones Iuris: Festschrift Joseph Georg Wolf*, Berlin 2000, pp.66-70. Other mancipatory documents, see FIRA 3.87-90, examples in MEYER, *op. cit.*, p.115, pp.139-140. *Libripens* appears in documents of sale as late as the Ravenna papyri, Pap. Marini 118 (538 AD) and Tjäder 30.37-38 (539 AD). G.MARINI, *I papiri diplomatici raccolti ed illustrati dall'abate Gaetano Marini*, Roma 1805; J.O.TJÄDER, *Die nichtliterarischen Lateinischen Papyri Italiens aus der Zeit 445–700, vol. II: Papyri 29–59*, Lund 1982, pp.44-58. I am grateful to Mr Timo Korkeakivi for pointing this out.

uses, to the extent that Watson describes it as the great success story of legal opportunism[26].

There are also a number of stone reliefs that have been interpreted as representing a *mancipatio* ritual, mostly depictions of pairs of people, one holding the other by the shoulder[27]. Whether or not this is accurate, they add little to our knowledge of *mancipatio*.

Of the scant sources that are available on *mancipatio*, there are none that could expressly be interpreted as describing a magical or supernatural act. Even the ritual nature of the institution rests mainly on the evidence provided by Gaius.

2. Interpretations

The interpretations of the original meaning of *mancipatio* have been many, though the majority are quite mundane. Transcendental or supernatural elements have played a minor role in the history of interpretations. Most scholars have subscribed to either of the two views that Gaius' texts naturally lead to, that *mancipatio* was either: 1) originally an imaginary sale, or 2) originally a real sale, explaining the weighing of bronze necessary before standardized coinage. There are also a number of theories that claim that *mancipatio* was 3) originally something completely different[28]. It is this third category that explores the ritual and transcendental dimensions of *mancipatio*.

The first explanation follows a literal reading of Gaius; the theory coined by Leist that *mancipatio* is and was an imaginary sale that was used to pass on property enjoyed brief success. Due to the fact that archaeological evidence supports the use of scales for weighing the bronze before the introduction of coinage, there are currently very few significant supporters of this theory. Even Kunkel and Arangio-Ruiz, who could be held to be the supporters of the imaginary sale theory, are simply claiming that the *mancipatio* ritual was just the conclusion of the real process of sale[29].

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[26] WATSON, State, *op. cit.*, p.35. On *mancipatio nummo uno*, see TOMULESCU, *Nummus*, *op. cit.*

[27] HERBIG, *op. cit.*; MRSICH, *op. cit.*

[28] DIÓSDI, *op. cit.*, pp.64-72.

[29] LEIST, *op. cit.*, pp.126-134, pp.152-158; BREZZO, *op. cit.*, pp.75-76; KUNKEL, *RE, op. cit.*, p.998; ARANGIO-RUIZ, *op. cit.*, p.37; DIÓSDI, *op. cit.*, p.66. Wolf's theory of *mancipatio* as an original act of affirming ownership is in a sense a literal reading of Gaius, but he comes to very different conclusions. WOLF, *Funktion, op. cit.*, p.506.

According to the transition theory, *mancipatio* was originally a trade in barter (a real sale), in which a thing was publicly exchanged for another. Kaser is the most noteworthy of the recent supporters of the second explanation, outlining the development of *mancipatio* as the primal form of the so called libral acts, the family of legal institutions that was defined by the use of the scales, such as *nexum*. Though he emphasizes the contentious and unclear early history of the institution, there are curious details that are not easily explained. *Mancipatio* is separated from pure barter by the seller's passivity, as Kaser points out[30].

The explanation that *mancipatio* was a real sale that later evolved into an imaginary one is arguably the most plausible and it would seem to be the current view of the majority. Rudolph von Jhering, though he had a number of ideas on the symbolical background of the ritual, was firmly of the opinion that *mancipatio* was originally a barter of goods traded for metal, which later on was transformed into fictitious play-acting[31]. This view was developed by Bechmann and supported by Stintzing and the majority of scholars since[32]. In addition to Kaser, the transformation theory is supported by Wieacker and Tomulescu, who both see the development of the ritual from the initial actual weighing of the bronze to the later simulated act following its form[33].

As can be imagined, the "something completely different" explanation has produced the most fantastic interpretations over certain aspects of the ritual, such as the holding of things in the hand, the use of witnesses, and the sale of land. These interpretations were also aimed at explaining why the cumbersome ritual was still used in the classical period and what this ritual meant. Jhering's theory of *mancipatio* connected the use of the hand to grasp the object of sale to the acquisition of authority over the object. A number of authors have deduced from this that there might have been an original act of taking things by force. Puchta linked early acts of acquisition to warriors and spears, whereas Thurmann saw the roots of *mancipatio* in the clash between the invading Indo-European warriors and peaceful local

[30] KASER, *Privatrecht*, *op. cit*., pp.43-45.
[31] JHERING, *op. cit.*, p.533, pp.537-538.
[32] BECHMANN, *op. cit.*, pp.47-48, p.74; STINTZING, *op. cit.*, pp.3-5.
[33] TOMULESCU, *Monnaie, op. cit.*, pp.350; WIEACKER, *Rechtsgeschichte, op. cit.*, pp.326-335.

inhabitants, represented by the scales that measured compensation[34]. The critics of these theories have emphasized the element of violence and the pointlessness of this kind of original ceremonial robbery, no doubt as a reaction to the dramatic language employed by the racially charged theories, such as Thormann's, that they criticize. Tomulescu rightly maintains that barter quite often takes the form of simultaneous abandonment of the objects of barter, making the one-sided taking of things just an element in the barter, not robbery or violence[35].

Among the theories, some of the more creative are Levy-Bruhls's idea that the piece of bronze represented the praetor in a magico-legal role as a symbol of authority and the often-presented theory that the five witnesses represented the original five tribes of Rome. Watson has importantly pointed out that the use of witnesses, notwithstanding whether or not they represented anyone but themselves, is common in the transactions of important property such as land. It is a way to ensure that sale is public and publicized[36].

This is not the first time that the complicated rituals were linked to the fact that *mancipatio* was the institution used to transfer Roman land. Westrup claimed that because land was the property of the family unit, its sale was governed by the use of complicated and public proceedings to guard against recklessness. More recently, Behrends sees the introduction of *mancipium* in the Twelve Tables as an upheaval in the freedom of contract that for the first time made possible the sale of land. Behrends links this to the timocratic reforms and the rise of the plebs during the early Republic[37].

Axel Hägerström promoted the link between *mancipatio* and magic, though he built on a foundation laid by a number of prominent scholars such as Jhering. He claimed that the ritual produced a magical bond between the buyer and the object of sale. He felt that the rationalising attempts at explaining the ritual were misguided in that they tried to explain away the magical elements of the *mancipatio*.

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[34] THORMANN, *Ursprung, op. cit.*, pp.106-107 et passim.

[35] TOMULESCU, *Paul, op. cit.*, p.720. DIÓSDI, *op. cit.*, pp.68-69 offers a standard criticism of the *Zugriffsakt* hypothesis. M.MAUSS, *The Gift: forms and functions of exchange in archaic societies*, London 1990 [1924], elaborates on the abandonment hypothesis.

[36] Theories LEVY-BRUHL, *op. cit.*, p.143, et passim, see also WOLFF, *op. cit.*, pp.5-9; WATSON, *State, op. cit.*, p.35.

[37] C.W.WESTRUP, *Introduction to Early Roman Law,* vol. II, Copenhagen 1934, p.66; BEHRENDS, *op. cit.*, p.103. Similarly, WOLF, *Funktion, op. cit.*, p.515.

The declaratory words created a new reality, making the buyer the undisputed owner of the object. Unseen forces were moved to instil authority over an object, much like one manipulates the unseen world of gods with magical *formulae*[38]. For the main part, scholars did not embrace his theory of legal magic[39].

Levy-Bruhl's idea of the coercive significance of the bronze has a similar foundation; it rests partly on the religious sanction of *damnatio* that is imbedded in the *nexum*[40]. Von Lübtow criticised Hägerström for giving too little attention to the psychological, sociological and ethnological foundations of the influence of magic in archaic Roman thought[41].

Even Thormann, whose racial theories reflected the intellectual climate in Germany when the work was originally published in 1943, held that Hägerström was talking nonsense. According to Thormann, magical trickery was hardly a practical way to coerce someone to honour his contractual obligations, whereas armed force, provided by the family and associates of the offended party, would prove more effective. Kunkel and a number of others felt that there might be a possibility that belief in the magical forces of the spoken word could provide additional force to the contract[42].

Olivecrona held that most of the objections to Hägerström's thesis stem from the fact that jurists are prone to identify Roman legal thinking with our own modern legal thinking, and conversely, to think that magic is the realm of the most primitive of men[43].

MacCormack criticizes authors writing about *mancipatio* and magic for conceptual ambiguity. Authors like Kaser, Hägerström and Levy-Bruhl have presented conflicting, though vague and unclear,

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[38] HÄGERSTRÖM, *op. cit.*, pp.35-41. On Hägerström's theoretical background, see M.LYLES, *A Call for Scientific Purity: Axel Hägerström's Critique of Legal Science*, Stockholm 2006.

[39] W.KUNKEL, *Rec. Hägerström, Der römische Obligationsbegriff*, ZRG 49 (1929), pp.479-490.

[40] LEVY-BRUHL, *op. cit.*, pp.144-146. Gaius. Inst.3.175 *Similiter legatarius heredem eodem modo liberat de legato, quod per damnationem relictum est, ut tamen scilicet, sicut iudicatus condemnatum se esse significat, ita heres testamento se dare damnatum esse dicat. de eo tamen tantum potest heres eo modo liberari, quod pondere numero constet, et ita, si certum sit. quidam et de eo, quod mensura constat, idem existimant.*

[41] VON LÜBTOW, *op. cit.*, p.249.

[42] THORMANN, *Ursprung, op. cit.*, pp.52-54.

[43] K.OLIVECRONA, *The Acquisition of Possession in Roman Law*, Lund 1938, p.1.

concepts of the symbolic nature of *mancipatio* and its magical effects[44].

The most common explanation in the literature is that *mancipatio* was just a ceremonial ritual of sale[45]. Meyer's theory reintroduces the transcendental element in *mancipatio* in a new form, though she employs a similar technique, that of demonstrating the similarity of legal and magical or transcendental rituals. The lack of direct Roman evidence linking *mancipatio* to the supernatural is compensated by the abundance of circumstantial evidence.

3. Analysis

In order to understand the different strands in the scholarship on *mancipatio*, a division should be made between the ancient and modern traditions of interpretation. There is scant hope of re-creating the original meaning of *mancipatio* as a legal institution predating the Twelve Tables, because, even to the Romans, *mancipatio* was a historical relic from earlier times that was being used instrumentally for a specific purpose with little thought of its original meaning or provenance. In modern legal scholarship, *mancipatio* has served different purposes, in legal formalism as a point of origin, and in legal realism as an example of the influence of magic.

The development of the debate on *mancipatio* is permeated by elements that stem from assumptions on the nature of early Roman society, archaic law and primitive culture. In the following, three controversial concepts that are central to the understanding of the debate, religion, ritual and magic, will be discussed in turn. Finally, a tentative solution to the problem is presented.

It is common knowledge that the Romans incorporated in early law modes of action from the sacral sphere[46]. The normal course of scholarship assumed that there was a process of rationalization taking place. Early scholars, such as Jacob Grimm, wrote how the early symbolism of *mancipatio* and *stipulatio* drew its effect from

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[44] MACCORMACK, *op. cit.*, pp.452-453.
[45] WATSON, *State, op. cit.*, p.35.
[46] Pomp. D.1.2.26; JHERING, *op. cit.*, p.9, p.17; M.BRETONE, *Diritto e tempo nella tradizione europea*, Bari 2004, p.164; WIEACKER, *Rechtsgeschichte, op. cit.*, pp.320-331.

imagination and artistic impression[47]. This archaic form was later supplanted by reason and reflection and the importance of will in the making of a contract. Finally, the Romans would have come under the influence of the will theory of contracts which brought about the transfer of the archaic public ritual to the classical meeting of the minds. As the idea that the Romans would have been the supporters of the modern will theory of contracts has come under criticism[48], it is a time to take a new look at the underlying assumptions of traditional scholarship.

Archaic rituals form an integral part of our understanding of early Rome. The early discussion of ritual, religion, symbolism, and magic in Roman law has, according to MacCormack, been dominated by the conviction that there existed an earlier, primitive Roman mode of thought that, like the 19th century anthropological constructions of primitive thought that it emulated, was dominated by magic and supernatural powers. That led the early Romans to adopt formalistic modes of action in the religious and legal systems[49]. Because the existence of a universal model of primitive thought has been universally and definitively refuted, it is high time to reanalyse the role of religion, ritual and magic in *mancipatio*.

The most common explanation of the religious and ritualistic nature traces of *mancipatio* the origins of contractual rituals to the effect of priestly jurisprudence during the Republic. According to this explanation, contracts between men were fashioned after religious ceremonies that in turn were understood as bargains between humans and gods[50]. Conversely, students of Roman religion have claimed that the formality and legalism of Roman religion was adopted from

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[47] J.GRIMM, *Von der Poesie im Recht*, Zeitschrift für geschichtliche Rechtswissenschaft 2 (1816), pp.74, 79-80; BRETONE, *Diritto, op. cit.*, p.111.

[48] See, for example, the keynote address of Professor M.SCHERMAIER at the meeting of the SIHDA on 24 September 2008 (Now in: P.PICHONNAZ (éd.), *Autour du droit des contrats*, Zürich 2009).

[49] MACCORMACK, *op. cit.*, p.440 et passim. See also C.LEVI-STRAUSS, *The Savage Mind*, Chicago 1973.

[50] WIEACKER, *Rechtsgeschichte*, *op. cit.*, pp.318-321; S.TONDO, *Appunti sulla giurisprudenza pontificale,* in *D. MANTOVANI (ed.), Per la storia del pensiero giuridico Romano da Augusto agli Antonini*, Torino 1996, pp.1-15.

private law[51]. It is difficult even to talk about religion in the Greco-Roman world, since it has been claimed that the concept of religion as a coherent and unified system of beliefs did not really exist either in Greece or Rome[52].

The impact of religion is one of the more contested sides of *mancipatio*. Watson claims that there is not one sign of religion in *mancipatio*, though the promissory words produced a religious commitment[53]. Wieacker sees *mancipatio* as an example of the techniques of priestly jurisprudence, and that the orality of early law meant that the legal effect was produced by the incantation of words[54]. Even in the concrete world of archaic Roman law and its lack of interest in abstract conceptions, it is the gesture that supports the words[55].

Despite the criticism of the effect of religious formalism on early Roman law by MacCormack, the evidence for it is strong. For example, the verbal acts and speech acts described by Fabius Pictor and quoted by Gellius on the grasping of the prospective Vestal virgin by the hand and the incantation that accompanied it, or the ceremonies and religious restrictions of the priests of Jupiter are indicative of the similarities between sacral and civil law[56].

The formality of early Roman law and its adherence to formulae and ritualized procedure received its share of ridicule from Cicero. In pro Murena, he describes the procedure *legis actio sacramento* that began with the claimant's formula: *Fundus qui est in agro qui Sabinus vocatur. Eum ego ex iure Quiritium meum esse aio*. (A property that is in Sabine country I declare to be mine under Quiritary law.), and then: *Inde ibi ego te ex iure manum concertum voco*. (I summon you to that place to join issue with me according to the law.) After that, Cicero imagines, if the defendant did not have a counsel with him, the

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[51] G.WISSOWA, *Religion und Kultus der Römer* (Handbuch der Klassischen Altertums-Wissenschaft, 5. Bd., 4. Abt.), p.394; K.LATTE, *Römische Religionsgeschichte*, München 1967, p.64.

[52] J.B.RIVES, *Religion in the Roman Empire*, Malden 2007, p.13; C.R.PHILLIPS, *The Sociology of Religious Knowledge in the Roman Empire to A.D. 284*, ANRW 2.16.3, pp.2677-2773; G.DUMÉZIL, *Archaic Roman Religion: with an appendix on the religion of the Etruscans I-II, (transl. P. Krapp)*, Chicago 1970.

[53] WATSON, *State, op. cit.*, p.33.

[54] WIEACKER, Rechtsgeschichte, *op. cit.*, p.327.

[55] WOLF, *Mancipatio, op. cit.*, p.41; VON LÜBTOW, *op. cit.*, p.246.

[56] Gell.1.12; 10.15.

claimant's counsellor would switch sides like a Latin flutist and pronounce the defendant's lines: *Unde tu me ex iure manu concertum vocasti inde ibi ego te revoco*. (From the place where you have summoned me, I summon you to that place.) Then the praetor would pronounce: *Suis utrisque superstitibus praesentibus istam viam dico; ite viam*. (The witnesses of both parties being present I formally indicate the road. Proceed to the road.) The parties would then ceremonially leave, until they were re-summoned by the herald: *Redite viam*. (Return by the road.) Then the parties would return to the praetor, who would say: *Quando te in iure conscipio. Anne tu dicas qua ex causa vindicaveris?* (I formally recognize your presence in the court. On what grounds does your claim to that property rest?) Cicero wonders whether this would not have struck even "our bearded ancestors" as ridiculous[57].

The traditional scholarship on Roman law insisted that Roman law was throughout rational and secular even in its early stages. This view was based mostly on the writings of the jurists of the classical period and the later use of Roman law as the foundation of the Western legal tradition[58]. This aversion to the supernatural was complemented by the widespread views on ancient Roman religion that emphasized the ritualistic nature of traditional Roman religion and the lack of importance of personal belief[59]. However, acts and rituals aimed at gaining supernatural favours were performed meticulously even during the Empire. The rigid and complicated rituals involved with the state religion are well known and need not be repeated here. The penetration of the rituals, religious and otherwise, to the Roman way of thinking is illustrated by the rituals and prayers involved in the ritual cleansing before the tilling of land, as described by Cato[60].

The traditional secular view of archaic Roman law is correct in demonstrating that there is no evidence of religious elements in the law or legal acts themselves. The sources of *mancipatio* contain no references to the supernatural. Though Hägerström makes a strict

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[57] Cic. *Mur.* 11.25, 12.26-27, 13.28.
[58] F.SCHULZ, *History of Roman Legal Science*, Oxford 1946, pp.26-27.
[59] A view spread by WISSOWA, *op. cit.*
[60] Cato *agr.* 139-142. See also A.M.TUPET, *Rites magiques dans l'Antiquité romaine*, ANRW 2.16.3, pp.2591-2675; See also M.MEYER and P.MIRECKI (eds.), *Ancient magic and ritual power*, Leiden 1995. WISSOWA, *op. cit.*, p.405, like *ius civile*, pontifical sacral law was valid only on Roman territory.

separation between legal and religious magic, he fails to produce real evidence for the claim that legal rituals would have been paired with sacral acts. The question that underlies the inquiry is that either legal formalism was derived from religious and magical forms, or that it was in itself magical. Conclusive proof in this case is lacking[61].

The similarities that can be observed between law and religion are similarities of ritual, which should be the next step in the inquiry. Kaser holds that the correct fulfilment of ritual is an essential part of archaic Roman law because the sacral purity would be compromised without it. When correctly performed, the rituals of *mancipatio* and *vindicatio* produced superior power over the object[62].

Both *mancipatio* and *nexum* are examples of the most rigid form of formalism, where the will and the content are meaningless for the creation of commitment. It is separate from the formalism of interpretation, which is based on the abstract definition of concepts[63].

Describing the *legis actio* procedure, Gaius recalls how using the wrong formula or reciting the formula wrong would lead to the dismissal of the whole case[64]. Contemporary scholarship has not held word formalism to be as absolute in Roman law as previously thought, but the basic principle has remained the same[65]. In many ways, the question one faces is how 'primitive' does one imagine the archaic Romans to have been?

Rituals are also a staple of modern formalism. From a wider cultural perspective, rituals can be seen as symbolic behaviour guided by formalism and traditionalism. It has been noted in cultural studies in widely different contexts that the exact fulfilment of ritual acts, such as the precise utterance of certain phrases, is often vital to the effectiveness of the ritual, as the slightest mistake can be interpreted as making the whole process invalid. Ritual transformation of this kind is an often observed anthropological phenomenon[66].

Returning to the archaic Romans, the trouble with all such very old legal provisions is that we have, in practice, no sources from the earlier periods; for example, the *mancipium* passage of the XII tables

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[61] KUNKEL, *Rec, op. cit.*, p.480, p.482, p.484.
[62] KASER, *Privatrecht*, *op. cit.*, p.25.
[63] BRETONE, *Storia, op. cit.*, p.92.
[64] Gaius. Inst.4.11. Contra WATSON, *State, op. cit.*, p.32.
[65] WATSON, *op. cit.*, p.37.
[66] WATSON, *State, op. cit.*, p.37; CHASE, *op. cit.*, pp.115-117.

is preserved in Festus[67]. Stipulation, the promise that formed a legal obligation, is also almost unequivocally described as a legal instrument predating the XII Tables[68]. However, the sources for it are also rather recent.

Though incantations and gestures as described by Gaius are normally held to be the conventional form of ritual formalism in Roman law, Meyer states that it is actually the ritual act of writing on tablets in combination with the act itself that produces the efficacy of the act, though Meyer refrains from using the word magic. She claims that the non-literary phase of Roman law is, for the main part, a later fiction and in fact the Romans were constantly using written documents as a part of these unitary acts[69]. Whether or not that is true is not really relevant since the use of rituals in itself does not preclude literary procedure.

MacCormack asserts that the connection between formalism and magic in Roman law scholarship has been vague, but defined by two claims: 1) formalism in law is a product of magic that simply persevered after the magic had vanished, and 2) that words, through incantation, produce magical effects. According to MacCormack, both of these propositions have been proven false by new research in anthropology[70].

MacCormack's criticism of the supposed formalism of early Roman law and religion has two significant drawbacks. The first is that the British functionalist anthropology that his criticism derives from is as bad a foundation to be building up arguments about archaic Roman law as early Rome was to finding arguments about the Zande in Africa. It should also be noted that functionalist anthropology has in turn been subjected to criticism for overlooking important cultural elements. The second, and perhaps more serious, criticism comes from the effect of feedback resulting from the immense effect that the Roman legal tradition has had in the social sciences. Max Weber, still the leading theorist of legal formalism and rationalism, derived his concept of legal rationality from the history of Roman law, with the category of substantive rationality formulated after early Roman law and the category of formal rationality after classical Roman law.

[67] Festus, Lindsay, 176.
[68] WATSON, *State, op. cit.*, pp.32-33.
[69] MEYER, *op. cit.*, pp.36-43.
[70] MACCORMACK, *op. cit.*, pp.440-445.

According to Weber, even early Roman law is highly formal and rational[71]. Though MacCormack's anthropological data may prove that early legal formalism linked with religion and a conception of magic is not a universal phenomenon, it does little to discredit claims that are restricted to the Roman context and resting on Roman sources.

In order to proceed with the analysis, we must first separate ritual and religion. That has been the case in the recent scholarship on law and ritual, with one definition of ritual being symbolic behaviour that is socially standardized. In another way, rituals are defined by formalism, traditionalism, disciplined invariance, rule governance, sacral symbolism and performance. As such, rituals operate on a shared community of belief[72]. As the religious aspect is thus removed, the definitions fit *mancipatio* with striking accuracy.

Scholars in the nineteenth century already noted how the solemn symbolic actions of the gestures were an indispensable part of the ritual effectiveness of *mancipatio*. The allegorical actions had a powerful expressive function to convey the meaning of the actors[73].

Anthropologists have also noted that rituals have powerful effects beyond their immediate function. According to Turner, symbols and rituals are evocative devices for emotions, for the participants as well as spectators, as well as a way of ordering the cognitive universe. In rituals, formalized speech acts operate with a different language than regular speech, the formalized speech being itself a sign of authority. Formalized speech acts utilize an impoverished language, such as the archaizing legal formulas of *mancipatio*[74].

The term 'magic' has long been relegated to the ever-growing dust-heap of outdated concepts from the history of beliefs. It has been rightly claimed that words like magic and superstition are laden with prejudice against non-Western and non-monotheistic beliefs because they were once used to denote the irrational others lower down in the evolutionary ladder[75]. The use of such modern concepts as magic and

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[71] M.WEBER, *Economy and Society, an outline of interpretative sociology*, Berkeley 1978, pp.656-657, pp.792–797. JHERING, *op. cit.*, p.518 famously claimed that formalism is a trait that defines the entire Roman world.
[72] CHASE, *op. cit.*, pp.114-115.
[73] LANGO, *op. cit.*, p.57; M.VOIGT, *Die XII Tafeln*, Leipzig 1883, p.136.
[74] V.TURNER, *The Ritual Process*, New York 1997, pp.42-43; M.BLOCH, *Ritual, History and Power*, London 1989, p.25.
[75] J.G.GAGER, *Curse Tablets and Binding Spells from the Ancient World*, New York 1992, pp.24-25.

religion when discussing the ancient world is also difficult in the sense that to define something as belonging under one or another heading is quite arbitrary because both can be loosely understood as attempts at manipulating unseen forces. Even the use of the Roman concept of magic is difficult, since the magical sphere contained such diverse elements as the *malum carmen* of the XII Tables and the later, clearly Hellenistic, imports[76].

The fact that Hägerström was writing of magic can be linked to the fact that magic was a topic of considerable interest at the time. Bronislaw Malinowski, Marcel Mauss and a number of other anthropologists were writing of primitive man and Roman history, and like Henry Sumner Maine previously, had little qualms in equating the archaic and primitive cultures. According to von Lübtow, to rationalize the archaic Romans is to deny them their essential qualities as a primitive people holding a worldview based on the existence of supernatural forces and magic. Magical causality ruled that even the most concrete actions were laden with magical implications. As the Egyptians, ancient Mesopotamians, Babylonians, ancient Indians, the Germans and even contemporary indigenous peoples held this animistic view, von Lübtow asks why should we think that the Romans were any different[77]?

Magic was even then a difficult concept, not the least because different schools of thought tended to use their own conceptions, which often were diametrically opposed. Legal realists like Hägerström used it to demonstrate that law is not purely formal logical thinking, that there were irrational elements involved, but they were mostly interested in legal magic in modern society separate from religion.

Important figures of the American Legal Realism movement, such as Jerome Frank, claimed that modern law was as bound to rituals, word magic and ceremonies as primitive law. Frank's conception of modern legal magic was a logical development from the use of magic

[76] G.LUCK, *Magie und andere Geheimlehre in der Antike*, Stuttgart 1990, pp.1-6; F.GRAF, *Magic in the Ancient World*, Cambridge 1997, pp.36-60. See PHILLIPS, *op. cit.*, pp.2718-2732, for the philosophical and conceptual controversies that have enveloped the discussion on ancient magic.
[77] VON LÜBTOW, *op. cit.*, pp.248-249.

in primitive societies, as ways of ritually dealing with and attempting to manipulate things beyond one's control[78].

It is not necessary to decide on how much magic was a part of the Roman worldview and religious ideas. Nor should the concept of a closed universe be applied or the animistic ideas of manipulation of the world by magic be pondered at length. It is hardly necessary if one adopts a simple definition of magic that involves the belief that a certain act can have effects beyond the immediate sphere of action.

Hägerström's theory of legal magic implied that the rituals contributed to the psychological effect of transfer. Hägerström's own attempt at linking *mancipatio* with Roman cultic or magical institutions was weak and failed at a convoluted reading of the ritual words that ran counter to the established interpretation of the Latin words[79]. Olivecrona held that the touch was required for the magical act of possession to take place. Similar linkages between the touch and the magical effect of possession have been made both in early legal anthropology and studies on early Roman law[80].

The concept of magic used by the scholars of the interwar period is almost identical to the idea of a performative ritual. Such as the handshake as a ritual act, *mancipatio* was clearly a ritual that could be defined as word magic without the slightest hint of the supernatural.

Legal acts of various kinds were seen by Meyer to evoke the *fides* or trust, the quasi-religious virtue essential in Roman society[81]. According to Polybios, the trustworthiness of the Romans was legendary. In contrast with the Greeks, says Polybios, the Roman could generally be trusted not to lie and cheat, whereas even the complicated forms of using witnesses and written documents did not improve the equally legendary unreliability of the Greeks one bit[82]. The Roman *fides* was a formidable force.

According to Meyer, the unitary act of drafting legal *tabulae* combined the transcendental efficacy and finality of writing on

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[78] J.FRANK, *Courts on Trial: Myth and Reality in American Justice*, New York 1969, pp.42-44. OLIVECRONA, *op. cit.*, p.1 concurs.
[79] HÄGERSTROM, *op. cit.*, pp.370-388 (all in one footnote); KUNKEL, *Rec, op. cit.*, pp.485-486.
[80] OLIVECRONA, *op. cit.*, p.12; S.TONDO, *Aspetti simbolici e magici nella struttura giuridica de la manumissio vindicta*, Milano 1967; H.CAIRNS, *Law and anthropology*, Columbia Law Review 41 (1931), p.43.
[81] MEYER, *op. cit.*, pp.156-157.
[82] Polyb. 6.56.13-15

tabulae, the gestures and incantations of the ceremony and a bond tying the *fides* of the participants into the affair. The tablets, when correctly used in this unitary ritual, had the power to make things happen, be it census, legislation, contract, or a curse[83].

The Roman legal ritual of *mancipatio* can be seen as a combination of both factors: the legal rituals have both a demonstrative and a performative function. This solution still leaves open the question why a ritual such as *mancipatio* is being followed after it has become a historical curiosity?

For the sake of intellectual exercise, it might be useful to return to the much berated word 'magic'. As Malinowski already wrote on the basis of his studies in Melanesia, magic has some strict conditions, such as the exact remembrance of a spell and the unimpeachable performance of the rite[84]. Folk magic and beliefs are cultural phenomena with manifestations beyond the strict boundaries of rationality[85]. What is called believing in magic does not necessarily mean a belief in supernatural forces but rather a psychologically explainable cultural convention[86].

Divine sanctions worked as abstract threats in the same way as oaths and similar institutions are used now. Magic does not need to work; it simply needs to be believed in. This linkage between ritual and obligation helps to establish how the jurists of the classical period used archaisms and rituals to create commitment and obligation among contractual parties.

The Romans tended to opt for layering instead of renewal in their legal practices, using their legal past and the rituals that were handed down to them. The original meaning of things like *mancipatio* is hopelessly lost in the prehistory of Roman law. What is not lost is how the Romans of the historical age dealt with it. As Levy-Bruhl

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[83] MEYER, *op. cit.*, pp.91-92. On the uses of curse *tabulae*, see GAGER, *op. cit.* and TUPET, *op. cit.*, pp.2601-2606.

[84] B.MALINOWSKI, *Magic, Science and Religion*, Westport 1984, p.85.

[85] Like children writing to Santa Claus, knowing at a rational level that he does not exist but wanting to be on the safe side, or adults reading their horoscopes while fully aware that the movements of celestial objects have no bearing on their lives.

[86] Agatha Christie's well-known fictional Belgian detective Hercule Poirot gave the phenomenon the following description: "I, too, believe in the force of superstition, one of the greatest forces the world has ever known." A.CHRISTIE, *The Adventure of the Egyptian Tomb,* in *Poirot Investigates*, London 2006 [1924], p.130.

wrote, even the Romans of the classical era had little knowledge of the original meaning of the ancient institutions[87].

Legal rituals were used even during the classical period to bind the participants to the agreement in a way that could have resembled religious or magical acts to the lay observer[88]. Even though the origins of these rituals are obscure, their survival is based on continued use and relevance. As Tomulescu has pointed out, without the weighing, there is no function for the *libripens*[89]. The complicated formulaic ways of making a legal act could be seen as a part of seeking a moment when an agreement has been reached and that both the parties and the outside observers agree to that there is a legal ritual such as *mancipatio* being performed.

A number of troubling puzzles prevent concluding the historical inquiry with a simple solution. There is no way of knowing whether *mancipatio* was used only out of custom or whether it had deeper implications in magic or religion. Hägerström's theory that the magical bond created by *mancipatio* between men and an object contained a kernel of truth. As with prayers, the objective was to obligate a party whose actions could not be directly controlled. One fundamental problem with both Hägerström and Meyer is that the connection between the obligation and *fides* is more assumed than proven, as is the connection between magic and obligation.

To claim that the Romans may have used magic as a way to make obligations work requires an argumentation through analogy: similar actions would have similar motivations. Similar acts and rituals were used in legal institutions and prayers, vows and curses; likewise, there were similarities in the use of *tabulae* to record these acts. To place these under the common heading of magic stipulates that magic is understood in the same way as American legal realists understood it, as magical tricks to convince the uninitiated. Such a description fails, if we use the Hellenistic definition of magic that was held by the educated Romans of the Late Republic and Principate[90].

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[87] LEVY-BRUHL, *op. cit.*, p.150.

[88] BECHMANN, *op. cit.*, p.54: "…wurde die Mancipation gerade auch zu dem Zwecke vorgenommen, um specifische obligatorische Wirkungen zu erzeugen, die mit dem formlosen Kaufe in dieser Weise gar nicht verbunden waren…" See also TONDO, *op. cit.*

[89] TOMULESCU, *Monnaie, op. cit.*, p.348.

[90] Plin. *nat*. 28-30.

4. Conclusions

Whether or not *mancipatio* was a sign of magic used in archaic Roman law, there is little conclusive evidence available. There is evidence for the theory that *mancipatio* was a Roman ritual that continued in use because it served a distinct purpose in the legal tradition. Magic, though it has an impressive presence in the history of science, is a word damned by its pejorative connotations, which is why the old farmers' magic that Cato describes is normally portrayed as a religious ritual. There are interesting similarities in the rituals used in law and Roman religious practices. However, a direct connection that would prove conclusively that there was a direct link between *mancipatio* and supernatural elements has not been found.

The description of *mancipatio* given by Gaius as a ritual act is the sole basis for claiming that *mancipatio* had a significance other than an act of sale. Most interpretations reflect this, and the transformation theory that *mancipatio* was originally a sale in barter that later became a form of transmission has become the *communis opinio* in literature.

The transcendental argument rests on three, at times, conflicting foundations: religion, ritual and magic. The religious aspect is founded on the similarity of religious and legal word formulations and rituals, and the idea that early law civil law and sacral law would have been entwined. The fact that *mancipatio* was a ritual is well proven, if ritual is understood as a standardized symbolic behaviour that is defined by things like formalism, traditionalism, symbolism and performance. If it is a ritual that is not religious, should it be called magic? *Mancipatio* was a performative ritual that was used to transfer property, and as such it employed symbols and word magic to evoke in the senses of the participants a solemn, even magical act. The fact that this legal ritual did not refer to the supernatural realm does not mean that its psychological effect would not have resembled that of magic.