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CONSIDERATIONS ON PARENTAL AUTHORITY IN ROMAN LAW

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Abstract: In Roman law, parental authority (patria potestas) signified the power which the father (pater familias) exercised on his offsprings. This power was not exercised in the interests of his offsprings, as occurs currently, but in the interests of the father, as head of the family. Practically, parental authority gave unlimited and perpetual power to the head of the family over his offspring.
In this study we have sought to conduct an analysis on how parental authority was exercised during a time when Roman jurists created institutions of law that have remained unchanged until today. Moreover, it is difficult to imagine and accept a legal construct as barbaric and primitive as patria potestas was.

Keywords: family, parental authority, pater familias, son of the family, rights

A. Preliminary definitions

In the old Roman law, the concept of „family"[1] was different from what it is today, as it had a much more complex content. Thus, family entailed an authority that always pertained to the head of a family and which united all of the members thereof (called *manus*). This Roman family included slaves found on the property of the head of the family, his wife and his children. The authority of the head of family was not exercised solely on these categories of persons, but also on any tangible property which family members would acquire.[2]

The Roman family was patriarchal and had the following characteristics[3]: the absolute authority of the father, a high degree of dependence for wife and children, kinship defined only on the paternal agnatic line[4].

The power exercised by the head of family on his descendants was called parental authority and was known as *patria potestas*, or, quite simply, *potestas*[5].

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[1] Etymologically speaking, the term „family" is derived from Latin, where it meant the entirety of members in a house or gens (See Gh. Guțu, *Dicționar latin-român*, Editura Științifică, București, 1973, p. 282).

[2] See V. Hanga, *Drept privat roman*, Editura Didactică și Pedagogică, București, 1971, p. 122-123.

[3] See C. Stoicescu, *Curs elementar de drept roman* (reprinted after the "3rd edition, revised and enlarged, București, 1931"), Editura Universul Juridic, București, 2009, p. 92.

[4] Agnatic kinship (*agnatio*) or civil kinship designated the relationship between the *pater familias* and all those under his authority (see V. Hanga, *op. cit.*, p. 117).

[5] *Potestas* was strongly related to the idea of property, the right to dispose of all other people in the family and their assets (see V. M. Ciucă, *Lecții de drept roman*, vol. I, Editura Polirom, București, 1998, p. 182).

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The subjects of parental authority were, thus, any descendants of the head of the family, namely sons (*filii familias*), daughters (*filiae familias*), nephews and their wives (married *cum manu*), wives of sons (married, in their turn, *cum manu*), nieces (until their *cum manu* marriage), as well as any adopted[6] or legitimized[7] persons.

Such persons were regarded as *alieni iuris*, that is, subject to a foreign power.

The head of the family, called *pater familias*, was always a male ascendant, meaning the father, grandfather or great-grandfather[8]. These were not regarded as the father of a family, and pertained to the category of *sui iuris* persons[9], meaning persons who were not under the authority of another person. *Pater familias* was the sole owner of family property, the only judge and the only priest of the ancestral family cult[10].

Parental authority was perpetual: for this reason, the son of the family was regarded as *alieni iuris* until the death of *pater familias*, regardless of his age and the political position he held in the state. If, however, the grandson was under the grandfather's authority, he did not become a *sui iuris* person upon his death, but remained under the authority of his father. Instead, if the father predeceased the grandfather, the grandson became *sui iuris* person upon the latter's death. Thus, as long as the head of the family was alive, he exercised parental authority over his descendants, regardless of their age, as in Roman law coming of age was not recognized in the same sense as it is used today.

Parental authority also had an unlimited character, in the sense that the *pater familias* freely disposed of the person and property of his son.

Patria potestas could be extinguished for natural or artificial causes. Thus, the first category of causes included: the death of the *pater familias* and the death of the *filius familiae*; and the second category of causes included the following events: the transfer of a daughter to a different authority (when the daughter married *cum manu* was transferred under the authority of another *pater familias*), the appointment of the son of the family to high religious positions (such as that of bishop), emancipation[11] and the change of that son's legal status (*capitis deminutio*[12]).

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[6] By adoption (*adoptio*), persons who pertained to another family group were introduced within a family that did not have descendants. Practically, this institution of Roman law consisted of transferring a son of the family from under the authority of one *pater familias* to that of another *pater familias* (see V. Hanga, *op. cit.*, p. 140-141).

[7] Legitimization (*legitimatio*) was an act by which the natural father acquired *patria potestas* over his children born out of wedlock. There were three ways to do this, namely: *per subsequens matrimonium* (through subsequent marriage), *per rescriptum* (by imperial order), and *per obligationem curiae* (by showing before the municipal council). See V. Popa, R. Motica, *Drept privat roman*, 3rd edition, revised and enlarged, Editura Mirton, Timișoara, 1999, p. 163.

[8] In the doctrine, it has been stated that an unmarried man or even a child could be a *pater familias* (for details, see E. Molcuț, *Drept roman*, Editura Edit Press Mihaela S.R.L., București, 2000, p. 96).

[9] In the old doctrine, *sui iuris* referred to "A Roman who was the master of his house, who was not subject to any foreign power, regardless of whether he had reached the age of puberty or not. This independent citizen was called *pater familias*, as defined by Ulpian: *qui dominium in domo habet"* (in this sense, see I. C. Cătuneanu, *Curs elementar de drept roman*, 2nd edition, Editura Cartea Românească, București, 1924, p. 133).

[10] See V. Hanga, *op. cit*., p. 123.

[11] Emancipation meant removing the son of the family from under the parental authority. This occurred by fictive sale. Thus, the *pater familias* sold his son three times to a third party, and after the third sale, he released him, and the latter became a *sui iuris* person(see V. Hanga, I. F. Moldovan, I. Trifa,*Drept privat roman*, Editura Cordial LEX, Cluj Napoca, 2010, p. 146-147).

[12] The phrase *capitis deminutio* or civil death designated the loss of legal capacity or personality. This was of three kinds, depending on the element that was lost, thus: *capitis deminutio maxima* (when freedom was lost – *status libertatis*); *capitis deminutio*

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B. The rights of *pater familias* regarding the persons of those under his authority

During the early period of the Republic[13], the position of a son of the family was no different from that of a slave. He was regarded as an object of law, and *pater familias* could dispose of his existence, sell him, abandon him, punish him, and even keep for himself any property acquired by the son of the family.

The right of life and death (*ius vitae necisque*) conferred the *pater familias* the prerogative to freely dispose of the lives of his descendants, but only after prior counsel with close relatives and friends composing the domestic tribunal. Their endorsement was not mandatory, as it had a formal character, as long as it was presided by the *pater familias*[14].

With the evolution of Roman society, the power of the *pater familias* was gradually reduced. The right of life and death was limited, and the father who killed his son was punished; later, under Emperor Constantine, this right was prohibited by law.

The right of sale conferred to the *pater familias* the possibility to sell the son placed under his authority. According to the Law of the Twelve Tables[15], he could sell his son for a period of 5 years, after which the son returned under the authority of the *pater familias*. The sale of a son of the family could only be done three times, and after the third sale the son was removed from parental authority for good. In the case of daughters or nephews, one sale was enough for the *pater familias* to lose parental authority over them[16].

To prevent the abandonment of newborns, emperor Constantine allowed their sale, but only in cases of extreme poverty of the *pater familias,* who preserved the right to ransom his son by repaying the price or by giving slaves in exchange, of an equal value to the sum received for the child.

The right of exposition allowed the father to decide whether the newborn child would be kept in the family or abandoned. Since many heads of families abandoned their children because of extreme poverty, Emperor Constantine granted aids in food and clothes for those children. The *pater familias* could exercise this right after the birth of the child, in the form of noxal abandonment. For example, if the son of the family committed a crime by which he caused damage to a third party and could not repair it, then the *pater familias* was obliged to pay for the damage. The *pater familias* could free himself from this obligation by abandoning his son to the damaged party (noxal abandonment), for the purpose of working for this person until compensating for the damage.

The right of punishment (*ius verberandi)* was unlimited in the old age of Roman law, and in time it was subject to restrictions, so that in case of bad treatments applied to the sons, they could have recourse *extra ordinem* to magistrates. During the reign of Emperor Trajan, the father who mistreated his son was obliged to emancipate him and automatically lost the right to inherit his

media (when citizenship was lost – *status civitatis*); *capitis deminutio minima* (when family rights were lost – *status familiae*). See V. Hanga, *op. cit.*, p. 148.

[13] The period comprised (according to the dominant opinion) between the years 509 BC and 27 BC.

[14] See V. M. Ciucă, *op. cit*., p. 201.

[15] The Law of the Twelve Table was the first Roman law, passed in 450 BC, and became a source of private and public Roman law (*fons omnis publici privatique iuris*).

[16] See V. M. Ciucă, *op. cit*., p. 165.

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property. In time, however, he was recognized the right to apply light punishments, and for more severe punishments he had to request the judge to apply them.

Thus,within the family, the *pater familias* exercised lifetime despotism. He could control his son regardless of the latter's age. He could oppose the marriage of his son, or could constrain him to divorce. During the Republic, and even afterwards, he could force him into marriage[17].

În the old age of Roman law, the *pater familias* could establish, based on a physical examination (*ex habitu corporis*), the marriageable age of the sons under his authority. Ever since the end of the Republic, this prerogative was lessened, and eventually, marriageable age was established by law (12 years old for girls and 14 years old for boys).

In addition to these rights, the *pater familias* was also recognized the right to give consent to the adoption of the child.

To recover his child from the hands of whoever might have had him, he could bring an action for recovery, proof of the fact that the child was regarded rather as an object, „an element of property, along with slaves and material assets"[18].

Also in the old age of Roman law, any obligation of the *pater familias* toward the children placed under his authority was excluded, but later, in the classic age, the alimony duty was instituted between parents and children. Initially, the *pater familias* had this obligation only towards children born after divorce, in whose case the mother could prove that they had been conceived during the legitimate marriage. Subsequently, however, the alimony right was extended to children whose parents were not divorced, or were born after the death of the *pater familias*, as well as children born out of wedlock.

Gradually, the obligation to provide alimony was assigned, in turn, to paternal grandparents, the mother and maternal grandparents. The obligation for children to provide alimony to the father, mother, maternal and paternal ascendants was also recognized, in case they were in need and the children had the possibility of helping them.

C. The rights of the *pater familias* regarding the property of the persons placed under his authority

Parental authority was unlimited even with regard to the goods acquired by the son of the family. The latter did not have any distinct property, but whatever he acquired would be included in the property of his father[19].

The son of the family could conclude legal documents only to the extent where, by their effect, they improved the situation of the *pater familias*. These documents were not concluded in the son's own name, but by borrowing the personality of the head of the family.

[17] See W. W. Bukland, Arnold D. McNair, *Roman Law & Common Law. AComparison* in *Outline*, Cambridge University Press, 1952, p. 40.
[18] See V. Popa, R. Motica, *op. cit*., p. 155.
[19] See C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit*., p. 365.

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Later, it was admitted that the son of the family could take a pledge in his own name, thereby also binding the *pater familias.*

Gradually, the power of the *pater familias* over the property of his son was restricted, to the extent where, during the reign of Justinian, the rights of the father over the property of his son had become the exception, and the rule was that the son was the owner. Thus, the son of the family acquired certain property, in the form of *peculii* (*peculium profecticium, peculium castrense, peculium quasicastrense, bona adventicia*).

The *peculium* was defined in the doctrine[20] „as being a right of use and administration, conceded by the head of the family to the son, over a mass of assets, initially in the name and exclusive interests of the *pater familias*." From the end of the Republic onwards, the *peculium* was regarded as a property that ensured economic independence for the son of the family, as well as the possibility to become a subject of law.

a) *Peculium profecticium*

Peculium profecticium comprised assets that the *pater familias* entrusted to the son for the purpose of administration according to his needs. However, the *peculium* did no pertain to the son of the family, but to the *pater familias* and could be removed from the son at any time.

Initially, the *peculium* consisted of a herd of small cattle, and later it could be formed of slaves, merchandise and other movable assets, or even money. The son of the family could consume some of these assets, could loan them away or even store them with a third party. In addition to acts of administration, he could also conduct business that had the *peculium* as an object, but could not donate it or free the *peculium* slaves.[21]

b)Peculium castrense

Peculiul castrense composed the entirety of assets acquired by the son of the family during military duty. Such assets were: his soldier's pay and spoils of war, as well as liberalities made to him in this period by his wife, relatives or friends. These formed the property of the son of the family, who could dispose of them by *inter vivos* acts (e.g. free the slaves in the *peculium castrense*) and by testament[22].

b) *Peculium quasicastrense*

This *peculium* was introduced during the time of Emperor Constantine and was initially constituted of the assets which the son of the family acquired as functionary at the imperial court, or by imperial donation. Subsequently, the *peculium* was extended to assets gained by the son of the family, as a lawyer, deacon or priest, or as functionary of the State.

c) *Bona adventicia*

[20] See V. M. Ciucă, *op. cit.*, p. 205.
[21] Ibid.
[22] The son of the family could dispose by testament of the assets forming the *peculium castrense* only as long as he was a soldier, and later, during the reign of Emperor Hadrian, dismissed soldiers and veterans could also dispose by testament. In absence of a testament, the *peculium* returned to the father, not as inheritance (*jure hereditario*), but as *peculium* (*jure peculii*). See C. Stoicescu, *op. cit.*, p. 93.

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This *peculium* emerged during the reign of Emperor Constantine and pertained to the son or daughter of the family. It consisted, initially, of assets obtained as inheritance from his or her mother (*bona materna*), and then of assets obtained from successions or by *inter vivos* acts from maternal relatives (*bona materna generis*). Likewise, this *peculium* could also include assets acquired by the son or daughter of the family from his or her spouse or betrothed. During Emperor Justinian, this *peculium* also comprised other assets acquired by liberalities, from any person, except from the *pater familias*, including assets earned by labor, but different from those included in the *peculium castrense* and *quasicastrense.* On these assets the son of the family only had legal ownership, and the usufruct and right of administration pertained to the *pater familias*, who, upon the death of the son, acquired *jure peculii.*[23] The son of the family or daughter could conclude documents among the living, having the *peculium* as an object, only with the consent of the *pater familias*, but not testaments

Conclusions

After having conducted an analysis of parental authority in the Roman family, it can be seen that this is fundamentally different from the parental authority exercised in contemporary families. This difference is given by the fact that the Roman family was patriarchal, which means that the father, who was the head of the family, had absolute power over his descendants, and they were in a state of dependence towards him.

There was no equality between spouses in the Roman family, as the wife was subordinated to the husband, and she was not a free person like the *pater familias.* He alone exercised parental authority, and not for the purpose of protecting his descendants, but in his own personal interests.

The conclusion of this endeavor, which desires to be scientific, is that, although we are referring to a period in Roman law when institutions of law were created that still last to this very day, parental authority (*patria potestas*) has remained a primitive and barbaric legal construct.

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[23] C. Stoicescu, *op. cit.*, p. 94.

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