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PATRIA POTESTAS IN PERSONAL AND PROPERTY LEGAL POINT OF VIEW

Abstract: To the detriment of the human race, it can be concluded that the surviving material on Roman law is often insufficient for its complete understanding. This problem extends through the topic of this work, which is represented by one of the perhaps most important institutes of Roman family law. How did the Romans get to the stage of the family where everything is subordinated to one person? This work tries to portray the personality of the father of the family, the so-called *pater familias*, and to explain the role of everyone who was under him in the Roman family.

Keywords: *patria potestas*, *pater familias*, manus marriage, adoption, adrogation, *peculia*, father

INTRODUCTION

The father figure is a prominent figure in many world nations, cultures, and traditions. In the southeast of the European continent, the specific role of the father in the family has remained until today, so it is not unusual, especially in Balkan areas, to meet a family in which everything is subordinate to the father, who plays the role of the head of the house and the so-called "boss" in the family. Historically, in most cultures, the family was patriarchal, that is, one dominated by men.

However, it is wrong to compare today's view and today's concept of the father's supremacy in the family, or even to put it in the same context as the Roman institution of *patria potestas*, which represents one of the most important specificities of family law in Rome. In Roman times the family was still patriarchal, but polygamy was not practiced, and in general, the status of women was somewhat improved over that suggested in the Hebrew *Bible*, although they were still not allowed to manage their own affairs. The Roman family was broad, just like the family as it existed in medieval Europe: male-dominated and broad, that is, it included persons outside the definition of the modern heterosexual family.

The family represents one of the pillars of Roman society, but not because they may have appreciated the importance of the father and mother, but because the family in its evolution went through numerous stages in Roman law, and was also an important factor for many other branches of law, such as which is, for example, inheritance law.

In this paper, the Roman institution of *patria potestas* will be studied, as well as its effects and consequences in personal and property terms, which represents the fields where this specificity of Roman law was the most impressive.

1. The term of *patria potestas*

The first pillar of the Roman family, marriage, may appear to modern eyes to be startlingly underdeveloped and unsupported in Roman law. The second pillar, *patria potestas*, is established powerfully in contrast; in fact, it is one of the most defining features of the Roman legal tradition.

Most legal systems share the understanding that young children need constant supervision from their parents, who have broad authority to reprimand them and manage their property thanks to social and legal norms. Roman law is unique in that paternal influence did not terminate when children reached adulthood or maturity. On the contrary, this dominance persisted, with a few exceptions, as long as the child had any live ancestor in a direct male line.¹

Patria potestas represents one of the most important characteristics of both Roman law and Roman culture for the entire time of the existence of the Roman state. This term denotes the authority of the head of the household over persons and family property, and all members of a family were subject to this authority, regardless of gender and age, and no distinction was made regarding blood and agnatic kinship.² The Romans considered the bonds of family and kinship to be biologically based but not biologically determined.³

Parental authority, which is very clear in its concept, to the extent that it has survived to this day with almost the same legal intentions, represents the authority that the Romans civilly legitimized, the authority of a father towards his children.

From various fictions created over time, doubts arise as to whether parental authority belonged to the father over any free person subordinate to him, or exclusively over his children. On the one hand, it is known that this would be exclusively for his children, but that the Romans were generally indifferent to clarifying this difference, because the concept of children was much looser, not necessarily related to blood relations, but to the power of the father.⁴

Every *pater familias* (father of the family) has *patria potestas*, and this institution does not exist without the *pater familias*, represented by every male who is a Roman citizen who is *sui iuris*, regardless of how he became one (death of predecessor or emancipation), regardless to old age and regardless of whether he wants it. Women could not be *pater familias* or have *patria potestas*.⁵

Under paternal authority came all those who are members of the *domus*, which would mean the children of the *pater familias* who were born in a legal marriage, adopted or

¹ Bruce W. Frier, Thomas A. J. McGinn, Thomas A. McGinn, *A Casebook on Roman Family Law*, London, Oxford University Press, 2004, p. 189.

² Ante Romac, *Rimsko pravo*, Zagreb, 1989, p. 116.

³ Richard P. Saller, *Patriarchy, Property and Death in the Roman Family*, Cambridge University Press, Cambridge, 1994, p. 43.

⁴ Academia Lab, <https://academia-lab.com/2018/01/10/patria-potestas-in-the-roman-law/>, accessed: 20.03.2022.

⁵ *Rimsko pravo - Beleške o predavanjima Dragomira Stojčevića*, Izdanje Odbora za udžbenike Strukovnog društva studenata prava, Beograd, 1947, p. 111.

legitimized, as well as his grandchildren and great-grandchildren from his sons.⁶ His wife and the wives of his sons and grandsons also fall under his authority, but in this case, she is called *manus*. Slaves, who otherwise represented members of the Roman family in the broadest sense of the word, do not come under the authority of the *patria potestas*. According to them, the authority of the father of the family is called *dominica potestas*.⁷

A family, within the meaning of Roman civil law, means an agnatic family, i.e. the aggregate of all those who are bound together by a common *patria potestas*. Agnates are all those who stand under the same *patria potestas* or would have done so, if the common ancestor were still alive. Agnatio is not produced by blood-relationship by itself. A mother, as such, is not an agnate of her own children; she only becomes so, if, in consequence of her marriage, she passes into the *manus*, i.e. the *patria potestas*, of her husband, and is thereby united with her children under the same *patria potestas*. She then becomes an agnatic sister of her own children. A man's grandchildren by his daughter are not his agnatic relations, because they fall under the *patria potestas* of their own father, or paternal grandfather, as the case may be, so that there is no *patria potestas* to connect them with their maternal grandfather.⁸ This relates to one of the two most important characteristics of this institute, explained further below.

Patria potestas has two significant characteristics: it is lifelong and absolute. It is lifelong because in principle it lasts until the death of the holder of this authority. Persons who are *personae alieni iuris* will, regardless of their age, be under the authority of the same *pater familias* until his death. The Romans, therefore, did not know the institution of adulthood in the way modern, contemporary and positive legal legislation knows it, just as they did not know the possibility of automatic emancipation either. The absolute character of *patria potestas* is reflected in the fact that subordinates do not have any personal or property rights toward the *pater familias*, which will be discussed in more detail later in the paper.

1.1 The emergence of *patria potestas*

The scope of Roman *patria potestas* is significantly different from the paternal authority in today's law, and especially from the parental right, which in the legal order in which we live belongs to father and mother. *Patria potestas* had primarily the character of large and extensive personal and property authority, and not so much the character of fatherhood and care for children.⁹ These functions were entrusted to Roman mothers.

This institution could be created in two ways - by birth or by legal work. By birth, only children who were born in a valid Roman marriage, i.e. legitimate children born during the marriage, came under paternal authority. A newborn child could only enter his family with

⁶ Cornelia B. Horn, John W. Martens, "Let the Little Children Come to Me": *Childhood and Children in Early Christianity*, CUA Press, Washington, 2009, p. 16.

⁷ Sir Patrick MacChombaich Colquhoun, *A Summary of the Roman Civil Law: Illustrated by Commentaries on and Parallels from the Mosaic, Canon, Mohammedan, English and Foreign Law*, William Benning, 1849, p. 446.

⁸ Rudolf Sohm, Bernhard Erwin Grueber, *The Institutes of Roman Law*, London, Clarendon Press, 1892, p. 356.

⁹ Marijan Horvat, *Rimsko pravo*, "Školska knjiga Zagreb", Zagreb, 1977, p. 81.

the consent of the *pater familias*. In ancient times, this consent was given symbolically. Children born in a marriage without *connubium*, where the marriage was recognized only *iure gentium* and not *iure civili*, were *fili iniusti*, and were only in a cognate relationship with their father. Children from concubines and other illegitimate children also had no legal ties to the father, but were related to the mother and her relatives.¹⁰

As far as legal affairs are concerned, two types are distinguished, namely *adrogatio* (*adrogatio*) and adoption (*adoptio*). *Adoptio* represents the bringing into the family of a person who was already *alieni iuris*, which therefore only changes the *paterfamilias*. It is a very old and widespread legal institution.¹¹ It was possible to adopt both male and female children. In Justinian's time, a distinction was made between complete and incomplete adoption, by taking into account the amount of rights the adoptee receives, as well as whether all relationships with the previous family are severed. On the other hand, *adrogatio* represents an older form of adoption that entails more legal consequences than adoption. *Adrogatio* meant the adoption of a person who was one's own. Unlike adoption, this was a public law act, for the reason that one legal subjectivity was extinguished. Women and children could not be *adrogated* because, as was said, women could not be *paterfamilias*, and children could not do so before reaching maturity. They did not even have access to *curiat* assemblies, the places where the *adrogatio* itself took place. *Adrogatio* was allowed only to persons over 60 years of age without children of their own, and in order to imitate parental relations, the *adrogatio* was required to be 18 years younger than the *adrogant*.

The original function of adoption was precisely to provide labor to the *gens*, that is, the dying family community, and thus to strengthen the work and defense power of the entire gentile collective. In Rome, the extinction of the family was considered a misfortune, because there would no longer be anyone to maintain the cult of the ancestors, so these legal affairs also found a religious justification, for the sake of regeneration and extension of the family by introducing new persons from outside.¹²

A special form of acquiring *patria potestas* is legalization, i.e. legitimation of illegitimate children, which appeared in the post-classical era as a way to reduce the number of concubines. There were three forms of legitimation: *legitimatio per subsequen matrimonium*, *legitimatio per oblationem curiae* and *legitimatio per rescriptum principis*.¹³

1.2 Termination of *patria potestas*

As mentioned in the previous text, paternal authority is a permanent institution that is maintained as long as the father of the family, or *pater familias*, is alive. Only with his death did his subordinates acquire the ability to become *paterfamilias*, regardless of the fact that they potentially had conceived their own families earlier, and the wife from a *manus* marriage fell under guardianship.

¹⁰ M. Horvat, *ibid*, p. 84.

¹¹ Dragomir Stojčević, *Rimsko privatno pravo*, "Savremena uprava", Beograd, 1979, p. 80.

¹² M. Horvat, *op. cit.*, p. 84.

¹³ A. Romac, *op. cit.*, p. 122.

Patria potestas also ends with marriage to a *manus*, coming to a certain position (Jupiter's priest, Vestal woman), or emancipation. Emancipation represents liberation from paternal authority and is accomplished through the triple sale.¹⁴ It is a way of voluntary termination of paternal authority. Although the emancipated person, on one hand, became *sui iuris*, he lost, according to the old law, on the other hand, the right of legal succession, but this was later mitigated. Emancipation served as a way of opening the way to man's personal and property independence, which was completely non-existent before that, i.e. he was personally and property subordinate to the *paterfamilias*.

It was also perhaps because of *patria potestas* that the Romans acknowledged the fact that all citizens were not equal.¹⁵ Rome existed as an empire of unequals, which extended through all spheres of life of a Roman citizen, regardless of whether he was a full-fledged citizen or not.

2. *Patria potestas* in personal point of view

Paterfamilias does not rule the family based on the authority he has as the oldest member of the family, but on the basis of the authority that is recognized by law. That authority extends over the family as a whole, both over members and over the property.¹⁶

As for the content of *patria potestas* in a personal sense, this authority was extremely large in ancient times, only to decrease over time and eventually end up with an extremely small number of characteristics that it shared with its version of the old law. The family elder had various powers over other family members, the most important of which was originally the right to decide on their life and death (*ius vitae ac necis*). He could throw away the newborn if he suspected it was not his. He could sell the members of his *domus*, and he could sentence them to various other punishments, which included marrying against their will.

However, it should be pointed out that the *paterfamilias* did not in any case use these rights only at his discretion and whenever he wanted, because the customs dictated that before imposing severe punishments, the house council of that family, made up of the adult men of that house, should first meet. Therefore, it cannot be said that the father of the family used all his rights arbitrarily. Over time and the development of the state, the powers of the *paterfamilias* were gradually narrowed, and eventually, a stage was reached where the death sentence he imposed was treated as murder, and he no longer even had the right to independently decide on punishments for serious crimes, but about family members who were subordinate to him, he could only submit a report to the state authorities.¹⁷

Patria potestas also contained *ius vendendi*, i.e. the right to sell children. *Twelve Tables Codex* says that after the third sale, paternal authority is lost, which only testifies to how common the sale of children was, and later it was completely prohibited (unless it was giving in *nox*). *Ius vindicandi* represents the father's right to demand the extradition of his children

¹⁴ Obrad Stanojević, *Rimsko pravo*, "Dosije", Beograd, 2001, p. 144.

¹⁵ Beryl Rawson, *The Family in Ancient Rome: New Perspectives*, Ithaca, Cornell University Press, 1987, p. 133.

¹⁶ Antun Malenica, *Rimsko pravo*, Univerzitet u Novom Sadu, Novi Sad, 2006, p. 61.

¹⁷ A. Romac, *op. cit.*, p. 117.

from third parties who would keep the children, and this was what the lawsuit *vindicatio filii* served for. In principle, the consent of the *patris familias* was required for the marriage of children.

From all of the above, it is easy to see that the household members were subordinate to the pater familias in almost every sense and in almost every sphere of life, which resulted not only from his rights and powers, which were given to him by his title, but also from the deep-rooted reverence for the father, to the head of the family, who held in his hands both rights and responsibilities towards the family in relation to which he had *patria potestas*.

3. *Patria potestas* in property view

Like slaves, *fili familias* were considered property-incompetent persons. Only the father of the family had the right to dispose of the family property, and that right was inviolable. The adult children were capable of business, but everything they acquired belonged to their father.¹⁸ They couldn't sell, receive, or inherit any property – all of it had to belong to the father.¹⁹ Therefore, *personae alieni iuris* could not dispose of their acquired property²⁰, even though they had legal personality, were of legal age and had legal and business capacity. This property included all things acquired by work, gifts, inheritance and spoils of war.

Subordinated persons could not bind their superior by contract, but only by delict, and conditionally. He could pay for the damage that his household member or animal did to another, but he was not obligated to do that either. Noxal liability allowed the paterfamilias, instead of monetary compensation, to hand over the perpetrator to the injured party.²¹ Gradually, the position of the subordinates began to change, so praetorian law introduced several lawsuits called *actiones adiecticiae qualitatis*, through which the father was responsible for the contractual obligations of the household children, so this finally enabled third parties to enter into contractual relations with the subordinates.

A further form of independence of household children developed near the end of the Republic and during the Principate era, and it is linked to the institution of Roman law called *peculium*, i.e. *peculia*. *Peculia* represents part of the property that the paterfamilias would give to a son or another family member to manage independently. That management, of course, had limited capacities, because this property still legally belonged to the father, but the son managed it, although he did not have the right to give it away or dispose of it by will.

There is another type of *peculia*, which is related to military service. From the beginning of the era of the Principate, the emperors gave various privileges to the soldiers, and thus first enabled them to dispose of the property they acquired during their service by will. Over time, the separation of the soldier from the father of the family became

¹⁸ M. Horvat, *op. cit.*, p. 82.

¹⁹ Myles McDonnell, *Roman Manliness: "Virtus" and the Roman Republic*, Cambridge, Cambridge University Press, 2006, p. 173.

²⁰ William Ramsay, *A Manual of Roman Antiquities*, C. Griffin, 1894, p. 292.

²¹ O. Stanojević, *op. cit.*, p. 143.

pronounced, so the *peculium castrense*, i.e. special property acquired during military service, was created. Later, gifts and inheritances began to be included in this property, so the soldier was given powers over this property as well. Three groups of property were created: *peculium castrense* - military property, *peculium quasicastrense* - property acquired outside the army, but with the same legal characteristics, and *bona materna* – a property that children of the household acquired from their mother or mother's relatives.²²

Emperor Constantine strives in the imperial legislation to enable the child to acquire property for himself, and not for the father, which he receives from third parties, and not from the father or through *peculia*. In this way, the concept of *bona adventitia* was created. Ownership of this property belonged entirely to the children, with the father having the right to manage this property for life.

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CONCLUSION

At the very end, it is necessary in some way to justify the existence of something like this in the law of any time, because we are in a time when the gender equality is being strived for, and the total power in the hands of one male member of the family directly contradicts this.

It is necessary to keep in mind that the Roman state was initially weak and relied on found institutions, among which religion and the family certainly occupy an important place. The concentration of power in the hands of one man, even if it was only within one family, meant a certain amount of stability and centralization, and even security. The cult of the father of the family was continuously revered and nurtured throughout Roman history, although the scope of his authority naturally narrowed over time. *Paterfamilias* is the owner of the family estate, the local authority and the priest of the family cult, so it is no wonder that he had such authority.

Paterfamilias and *patria potestas* are extremely interesting concepts for study, precisely because similar characteristics of the male head of the house are found in many traditions and societies of Roman contemporaries, including their predecessors and followers.

Although in today's law, we do not find the physical institution of *patria potestas*, we cannot say that its existence did not leave significant traces, not only in law but also in the entire social order. Almost the entire society of the twenty-first century lives in a state where patriarchy is still the dominant characteristic of social and hierarchical relations. This is the subject of the struggle of many groups, which take both the "male" and "female" sides, and it seems that the issue of the dynamics of relations and the rights of men and women will remain unresolved for many years to come, regardless of all the social and economic changes that occur globally.

²² A. Romac, *op. cit.*, p. 119.

¹¹ M. Horvat, *op. cit.*, p. 83.

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