THE POWER OF PATER FAMILIAS IN ROMAN LAW

Elena ANGHEL[*]

Abstract

In Roman law, the notion of „family" did not have the meaning we attribute today, a form of human community, but had a meaning that denoted the totality of slaves that were owned by a person or the totality of people and goods that were under the same person's power head of family. The head of the family was designated pater familias and exercised sole authority over all family members, but also over all their property.

In the primitive conception, the family was made up of the wife of pater familias, the sons and daughters born of the marriage, the grandsons of the sons (not the grandsons of the daughters), but also the slaves and persons in mancipio, as well as all the goods possessed by the head of the family. Considering the fact that the family also had the meaning of assets owned by the head of the family, we specify that a child could also become pater familias, in which case the family was made up of the assets owned.

*Thus, within the Roman family, the pater familias was **sui iuris**, having full legal capacity, and all other persons under his power were **alieni iuris**, having limited legal capacity.*

*Specific to the notion of parental power in Roman law is the fact that, as we will analyse in the present study, it was not exercised in the interest of the children, as prevails in modern law, but in the interest of the head of the family, which is why it did not end until his death, regardless of the age of the family son and his social position. Parental power named **patria potestas** was perpetual and unlimited.*

Keywords: *pater familias, sui iuris, alieni iuris, perpetual, unlimited.*

1. Introduction

The notion of „person" was very suggestively embodied in the ancient Romans. *Personna* designated the mask worn by an actor on stage, meaning that man plays various roles on the stage of life: head of a family, owner, landlord, creditor or debtor, etc. Therefore, in a legal sense, the role of the person is to undertake rights and obligations as a subject of law.

The capacity of a human being to participate in legal life, to have rights and obligations, is called personality or legal capacity. For the Romans, legal capacity was highly differentiated and was called „*caput*". In order for a person to have full capacity of use, 3 cumulative conditions had to be met: to be a free man - *status libertatis*; to be Roman citizen - *status civitatis*; to be head of the family - *status familiae*.

Therefore, only Roman citizens who were also heads of family had the full legal capacity, while all other categories of persons had limited legal capacity.

In Roman law, the head of the family - *pater familias* - is the central figure under whose power all the members of a family sit, as *alieni iuris* persons. The only one who has full legal capacity and does not depend on anyone's will, being *sui iuris*, is the pater familias[1].

From very ancient times, the Roman family was organised on a patriarchal basis. Specialised literature points out that the *domus* or the family, in a narrow sense, is a group with a religious nature because it implies a common cult; it is a political group because the pater familias is a kind of magistrate who has full authority over those who are in the house; it is also an economic group because, as we shall see, all the goods belong to the pater familias[2].

According to Jurisconsult Ulpian, the *pater familias* is the one who holds the power in the house, a power that brings under a single authority all the members, but also all the family assets. According to the information transmitted by means of the Digest of Emperor Justinian, „*the head of the family is the one who holds the power in the house, and is rightfully so called even if he has no son [...]: even an impuber can be called head of the family. And when the head of the family dies, all the individuals who were subject to him begin to own their own families, for they each fall into the category of heads of families*".

[*] Lecturer, PhD, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: elena_comsa@yahoo.com).

[1] The notion of „*pater familias*" does not evoke the idea of descent, for the definition of which the Romans used the term „genitor", but of power. V. Hanga, M. Jacotă, *Drept privat roman*, Didactică și Pedagogică Publishing House, Bucharest, 1964, p. 126.

[2] G. Dimitrescu, *Drept roman. Isvoare. Procedură. Persoane. Drepturi reale*, vol. I, Independența Prints, Bucharest, p. 303.

We note that, considering the meaning we attributed to the notion of family at the beginning of the presentation, even a young, unmarried child could be *pater familias*, in this case the family consisting of all the property owned[3].

2. Contents

Originally, the power exercised by *pater familias* over persons and property had a unitary nature and was designated by the word „manus" (hand, highlighting the idea of authority of the *pater familias*). Over time, this unitary power broke down into several distinct powers, so that in the evolved law, manus meant only the power that the man exercised over the married woman. Therefore, the power over descendants was called *patria potestas*.

Patria potestas or parental power is, therefore, the power exercised by the *pater familias* over his descendants: sons, daughters and grandchildren of sons. Grandchildren of daughters are not included in this category because they are under their father's power. Therefore, the *pater familias* could be the father, grandfather or great-grandfather: as long as the grandfather is alive, the grandchildren of the sons, together with their parents, are under the same power, as *alieni iuris* persons.

The woman married with manus also falls under the power of the *pater familias*.[4] Therefore, for Romans, marriage took two distinct forms: with manus and without manus. Without going into the details of the conditions required for the conclusion of a marriage, it should be noted that in the case of marriage with manus, the woman left the power of the *pater familias* of her family of origin and passed under the power of her husband. Once under the power of the husband (manus), the wife was considered to be his daughter, in full obedience to the new *pater familias*.

Marriage without manus appeared later, towards the end of the Republic, motivated by the fact that under the influence of Eastern mores, some Roman women chose to live in illegitimate unions. To put an end to this custom, the Romans created a new form of marriage, whereby the woman no longer came under the power of her husband, but remained under the power of the *pater familias* in her family of origin.

We emphasise as a distinctive feature the fact that the power of *pater familias* was not exercised in the interest of the *alieni iuris* persons, as it is conceived nowadays, but in his own interest as head of the family, which is why it did not cease until his death, regardless of the age of the son of the family and his social position. Thus, even if the son of the family had a high position in the state or was old age, he was *alieni iuris* as long as the *pater familias* was alive.

For the same reasons, things have been established in the same way in matters of guardianship. Therefore, although guardianship is defined as a legal institution designed to protect the factually incapacitated, in fact, it was originally established in the exclusive interest of the family (of the *pater familias*), so that the incapacitated person's assets would not be wasted, but would remain in the family and would go to the civil relatives entitled to his succession. Proof of this is the fact that, according to the Law of the Twelve Tables, civil relatives (agnates) came to the guardianship in the order in which they came to the succession, and those who had no agnates had no guardian. Later, it was established that the praetor would appoint a guardian to the incapacitated person who had no heirs or no guardian appointed by will. It is only since then that guardianship has become a legal procedure to protect the incapacitated person's interests[5].

In ancient Roman law, guardianship of women was also established in the interests of the agnatic family, specifically in the interests of the woman's presumptive heirs. Therefore, woman always needed the guardian's consent to dispose of more valuable assets, to conclude her will or other important legal act, legal acts that could have diminished the inheritance[6].

The Roman family was therefore centered around this unilateral power, which the *pater familias* exercised over all relatives under his power. We refer here to civil relatives, called agnates, because blood kinship, at that time, did not produce legal effects.

Therefore, in ancient times, civil kinship, called agnation, derived from the idea of power exercised by the *pater familias*: all those who were under the same power were relatives, even in the absence of blood kinship,

---

[3] Even a newborn child, the day after birth, if not subject to a power, is the head of a new family and is called *pater familias*. See G. Dimitrescu, *op. cit.,* p. 303.

[4] For further details, see C. Ene-Dinu, *Istoria statului și dreptului românesc,* 2nd ed., Universul Juridic Publishing House, Bucharest, 2023, p. 22.

[5] For further details, see E. Molcuț, *Drept privat roman. Terminologie juridică romană*, revised and supplemented ed., Universul Juridic Publishing House, Bucharest, 2011, p. 104; E. Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021, p. 173.

[6] E.E. Ștefan, *Drept administrativ Partea I*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2023, p. 146.

just as a blood relative excluded from the family ceased to be a relative. For example, an adopted child became related to the members of the family in which he or she was adopted, even though he or she was not related to them by blood, whereas an emancipated child, i.e. removed from parental power, although related by blood to the members of his or her former family, was not a civil relative of them.

Agnation is, therefore, a kinship exclusively through men, because the power implied by this kinship can only be exercised by men; upon the death of the *pater familias* only the sons, *i.e.*, the male descendants of first degree, shall become *pater familias*, and not the daughters or the wife.

Agnation produced important legal effects in matters of succession because, for five centuries, it was the only basis of succession, in the sense that only agnates could inherit from each other, and the succession was conferred in the order of the three categories of agnates[7]. Therefore if a person died and had no direct descendants (*heredes sui*), the closest heirs (*adgnatus proximus*) were called to succession, according to the Law of the Twelve Tables. The civil kinship did not stop here, because if there were no heirs from the second category, the Gentiles were called to succession. The Gentiles were those who could not directly prove their descent from a common ancestor, but who, on the basis of presumptions (they had the same surname, the same family cult), were called to succession as distant relatives.

Once with the changes in Roman society, the agnation was gradually replaced by blood kinship, called cognation, which also weakened the power of the head of the family and increased the independence of family members[8].

Essentially, parental power had two characteristics: perpetual and unlimited.

By virtue of its perpetual nature, as mentioned above, the power was exercised by the *pater familias* until his death, regardless of the age of the son of the family and regardless of his social position (the son of the family could be a senator, consul, praetor, etc., but if his father was alive, he was under parental authority, which meant that he had no patrimony of his own and could not conclude legal acts in his own name). There was no adulthood age established in Roman law.

On the death of the *pater familias*, the legal effects will be different, as follows: *alieni iuris* persons shall become *sui iuris*, with the mention that each son of the family becomes a new *pater familias* in his family. However, the children of sons shall not become *sui iuris*, because they will pass from the power of a *pater familias* (grandfather) to the power of another *pater familias* (the father), by keeping the capacity of *alieni iuris*. Slaves and in *mancipio* persons shall not be freed, but shall pass under the power of another master.

By virtue of its unlimited nature, the *pater familias'* power was exercised both over the persons under the *pater familias'* power and over the assets. Therefore, *pater familias* exercised full power of life and death over their descendants (*ius vitae necisque*), of abandonment, the right to sell his son, to drive them out of the house, to marry them without asking their consent. *Pater familias* could also claim them back, by using the action for the recovery of possession, namely the action that belongs to the owner; this reveals the similarity of the position of the descendants with the things that were found in the patrimony of the head of the family[9].

Regarding the right to life and death, in the old law, prior to sentencing, the *pater familias* was required to initiate consultations with the closest relatives and receive their approval, but the *pater familias* was not required to respect this opinion of the relatives. However, few examples have been reported on the killing of persons under parental authority, and they have intervened for serious acts such as the daughter's lack of chastity[10].

Another right exercised by the *pater familias* is that of abandonment or exhibition, and consists in the fact that the newborn could be recognized by the *pater familias* in the first 7-8 days after birth, by being lifted in the arms, otherwise it was considered abandoned.[11]

According to the Law of the Twelve Tables, *pater familias* also had the right to sell his son three times, each sale being valid for a period of five years; after the third sale, the son was definitively removed from parental power.

Parental authority could be created by marriage, adoption and legitimation.

The effects of marriage are different, depending on whether we refer to marriage with manus or without manus. A wife married to a *manus* had the status of daughter in the new family, if her husband had the status of *pater familias*, and the woman was considered a sister to her children. She became part of her husband's family,

---

[7] There were three categories of agnates: all who are now under the same power (for example: sons and daughters while their father lives); those who were under the same power in the past (for example: brothers after the death of their father); those who could be under the same power, if *pater familias* had lived (for example: two first cousins born after the death of their grandfather; if their grandfather had lived, first cousins would have been under the same power).

[8] For further details, see V. Hanga, M.D. Bocşan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, p. 131.

[9] *Idem*, p. 132.

[10] *Ibidem*.

[11] C. Ene-Dinu, *op. cit.*, p. 22.

became an agnate of her husband's agnates and was under the discretionary power of her husband, who could claim her as a thing, sell her or even condemn her to death.

From a patrimonial point of view, the dowry property became the husband's property, as the woman could not have her own property. The woman came to inherit in her husband's family, having a share of the inheritance along with the other heirs (in consideration of the fact that she contributed to the increase of the family patrimony), but lost inheritance rights in the family of origin. She remained cognate with the family of origin but, as stated above, for a long-time cognation had no effect on the succession.

In case of marriages without *manus*, the woman remained under the power of the *pater familias* of the family of origin. Therefore, her assets remain with his father, who exercised unlimited power over her. From a civil point of view, a wife married without a manus is a stranger to both husband and children. However, although strangers to each other, the spouses had the obligation to respect each other and could not call each other to court without the approval of the magistrate. The rights of correction remain with the father, but in case of adultery, the wife was more severely punished than the man, and until the time of Augustus, the man could himself punish his unfaithful wife.

From an inheritance point of view, a woman married without a manus does not acquire inheritance rights in the new family, but retains the right to collect the inheritance in the family of origin. The mother and children are not related to each other, as they are considered to belong to different families, so they do not inherit each other.

As far as the effects of adoption are concerned, the adopted child leaves the family of origin and comes under the power of the *pater familias* who adopted him, so that he breaks the civil relationship with the family of origin and becomes agnate with the agnates of the adopter. Because the civil relationship with the family of origin ceases, the adoptee loses inheritance rights in that family, but will come to inherit in the new family.

Legitimation is the legal act by which the child born out of wedlock is assimilated to the legitimate child, *i.e.*, born in wedlock. However, in what concerned Romans, as long as agnation was the basis of the family, the child born out of wedlock was not related either to its natural father (since it did not result from a marriage) or to its mother (since agnation was transmitted only through the male line). After the cognation removed the civil relationship, it was possible to establish the child's relationship to his mother (they were cognates), but not to his father. In order to establish paternity, the presumption was that the child's father could only be the mother's husband. Therefore, a child born within 10 months as of the dissolution of the marriage was considered legitimate.

Later, the legitimation of the natural son was made by the marriage of the natural parents concluded after the birth of the child; by *oblatio* to *curia*, namely by raising the natural son to the rank of member of the municipal senate; by imperial rescript.

Parental authority was extinguished by the death of the person under parental authority or by the death of the *pater familias*; if *pater familias* or *alieni iuris* person lost freedom, citizenship or family rights, as well as by emancipation.

Thus, naturally, parental power ceased with the death of the head of the family or when the *pater familias* lost his freedom or citizenship by committing a serious crime. Furthermore, if *pater familias* was adrogated[12], parental power ceased.

By artificial means, parental power was extinguished by emancipation, a legal act whereby an *alieni iuris* person became *sui iuris*. While at first emancipation was a punishment, over time it became a measure taken in the best interests of the child when he or she proved that he or she had the capacity to manage his or her own property.

The emancipated son acquires full legal capacity, has his own property and can conclude legal acts in his own name. However, due to the fact he leaves the *pater familias'* power, the emancipated son loses inheritance rights based on agnation. To remove this injustice, the praetor established a series of reforms by which he called upon the emancipated to inherit as a blood relative, on one *condition*: to report the assets, i.e. to add fictitiously to the estate all the property he has acquired as a *sui iuris* person.

[12] Adrogation is a legal institution by which a *sui iuris* person passes under the power of another *sui iuris* person. Therefore, in case of adrogation, a *pater familias* takes under his power another *pater familias*. In what concerns the adrogated person, he passed under the power of the adrogator as son and become agnate to the relatives of the adrogator, but lost all civil kinship to his family of origin. After adrogation, all the assets of the adrogated person become the property of the adrogator, because the two estates merge. For further details, see E. Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021, p. 129.

3. Conclusions

We note from the above that, in ancient Roman law, the legal status of the son of a family was not very different from that of a slave. Furthermore, in terms of the assets held, the son was merely an instrument of acquisition for the *pater familias* as he was allowed to conclude certain legal acts only to improve the patrimonial situation of the head of the family. Therefore, the son could not conclude legal acts in his own name, but only by borrowing the capacity of the *pater familias* and only on condition that by the effect of those acts, the situation of the *pater familias* became better from a patrimonial point of view, *i.e.*, he became creditor or owner and not debtor.

The situation of the son of the family is improved in classical law when he is recognized as having the right to conclude legal acts in his own name, but, not having a right of ownership in his own right, he is liable only for the assets of his *peculium*. The *peculium* consisted of the assets that the *pater familias* offered him for use and management, but not for ownership, the head of the family being the sole owner of the entire estate. By the time, the son of the family also obtained the right to acquire title to his own property, consisting of *peculium castrense* (the assets acquired as a military man, which he could dispose of either by deed between living persons or on death), *peculium quasi-castrense* (the assets acquired as a civil servant, lawyer, priest or by imperial donation) or *bona adventicia* (assets acquired by the child from the mother or the mother's relatives).

In Justinian's time, it was accepted that whatever the son of the family received, he acquired for himself and not for the head of the family.

The right of life and death (*ius vitae necisque*) could be exercised, from the 2nd century A.D., only after the accused father and son appeared for a hearing before the prefect or provincial governor. Constantine incriminates the killing of the child by the father and thus puts an end to the right to life and death; the age of Justinian only knows the possibility for the parent to apply a correction to the child within reasonable limits, identical to that applied in master-slave relations.

Alieni iuris persons could complain to the magistrate about the conduct of *pater familias*; *pater familias* who killed his son for insulting him was deported, and the one who mistreated his child was obliged to emancipate him; the sale of the son of the family has become rare, with the practice of renting out his work instead; exhibition and marriage of children against their will is prohibited.

Once with the emergence of the idea of reciprocity of relations between parents and children, it was admitted that the power of the *pater familias* also entailed obligations towards *alieni iuris* persons and the obligation to provide food for the son in need, as well as the obligation to constitute a dowry for the daughter.

References

- Anghel, E., *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021;
- Cătuneanu, I.C., *Curs elementar de drept roman*, Cartea Românească Publishing House, Cluj Bucharest, 1927;
- Ene-Dinu, C., *Istoria statului și a dreptului românesc*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2023;
- Dimitrescu, G., *Drept roman. Isvoare. Procedură. Persoane. Drepturi reale*, vol. I, Independența Prints, Bucharest;
- Molcuț, E., *Drept privat roman. Terminologie juridică romană*, revised and supplemented ed., Universul Juridic Publishing House, Bucharest, 2011;
- Molcuț, E., *Drept roman*, Press Mihaela SRL Publishing House, Bucharest, 2002;
- Tomulescu, C.St., *Drept privat roman*, Typography of the University of Bucharest, 1973;
- Hanga, V., Bocșan, M.D., *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006;
- Hanga, V., Jacotă, M., *Drept privat roman*, Didactică și Pedagogică Publishing House, Bucharest, 1964;
- Ștefan, E.E., *Drept administrative*, Part I, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2023.