

## Chapter 2

# **A historical overview of the legal nature and development of parental authority in Roman, Germanic, Roman-Dutch and South African law**

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### **1 INTRODUCTION**

As indicated earlier,<sup>1</sup> this chapter consists of a historical overview of the legal nature and development of the concept “parental authority” in Roman, Germanic, Roman-Dutch and South African law. Parental authority in Roman law (from the beginning of the Monarchy in 753 BC to the death of emperor Justinian in 565 AD<sup>2</sup>) will be dealt with first, followed by parental authority in Germanic law. Attention will be given to the position after the reception of Roman law in Holland and the rest of the Netherlands in the 15th and 16th centuries. Lastly, the transposition to and reception of Roman-Dutch law (specifically the law relating to the concept “parental authority”) in South Africa since 1652, as well as its further development in South Africa until modern times, will be investigated.

### **2 ROMAN LAW**

In this section, reference will be made to different periods in the development of Roman law. The following periods are distinguished in the historical development of Roman law: (The relevant periods in the political development of the Roman state will also be indicated.)<sup>3</sup>

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<sup>1</sup> See ch 1 par 3 above.

<sup>2</sup> Kleyn & Viljoen *Beginner's guide* 31.

<sup>3</sup> See, in general, Kaser *Roman private law* 1 II; Van Zyl *Geskiedenis en beginsels* 1-7; Van Zyl *Geskiedenis* 13-18.

- The period of early Roman law extended from its obscure beginnings until the outbreak of the Punic Wars in the middle of the third century BC. The beginning of this period coincided with the beginning of the Monarchy (which extended from 753 BC to 510 BC). It ended in approximately 250 BC, and thus included the first two centuries of the Republican period (which extended from 510 BC to 27 BC).
- The pre-classical period coincided with the centuries of the later Republic, from the third to the first century BC (ie approximately 250 BC until the birth of Christ).
- The classical period coincided approximately with the times of the Principate<sup>4</sup> (which extended from 27 BC until 284 AD). This period started at the birth of Christ and ended in approximately 250 AD.
- The post-classical period extended from the third century until the end of the classical period of world history. The beginning of this period coincided approximately with the beginning of the Dominate in 284 AD, and included the reign of the emperor Justinian (527-565 AD). During the post-classical period, under Constantine the Great (307-337 AD), legal practice completely turned away from the classical tradition, and what is known as vulgar law developed.

After the death of Theodosius the Great in 395 AD, the empire split into a Western and Eastern Roman empire. In the Western empire the vulgarisation of Roman private law advanced relentlessly. After the fall of the Western empire in 476 AD, Roman subjects of the Germanic succession states in the West, continued to be governed by Roman law according to the principle of personality.<sup>5</sup> In the West,

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<sup>4</sup> The Principate marked the beginning of the Empire, which consisted of two periods, ie the Principate (27 BC - 284 AD) and the Dominate (284-527 AD) (Van Zyl *Geskiedenis en beginsels* 4).

<sup>5</sup> The principle of personality refers to the rule that everybody, wherever he or she may be domiciled, be judged at law according to his or her nationality (Kaser *Roman private law* 3 III 2).

although in the form of the “debased vulgar law”, Roman law survived the downfall of the Roman empire, and later formed (together with Germanic legal thought) the basis of medieval legal development in Italy, Southern France and the Iberian Peninsula.

In the Eastern empire, vulgarisation was partly checked and superseded by a swing towards a classicist tendency, which attempted to preserve the legacy of the classical legal literature. This tendency originated in the law schools. The work of the eastern law schools reached its climax in the sixth century when the *Corpus Iuris Civilis* of Justinian was promulgated. In this code (especially in the *Digesta* and the *Institutiones*), Justinian preserved material parts of the legal writings of the classical age in their original wording. In the *Codex* many imperial constitutions from the time of the Principate were retained.

The law of the *Corpus Iuris Civilis* was greatly stimulated by the revival of legal science in Italy which originated in Bologna at the end of the eleventh century. The school of the Glossators subjected the *Corpus Iuris*, especially the *Digesta*, to a thorough theoretical study. However, this school failed to utilise this wealth of legal knowledge for the daily legal life of its own time. In the fourteenth and fifteenth centuries the theoretical attitude of the Glossators was replaced by the school of the Commentators. The commentators turned to practical aims and endeavoured to make use of Roman jurisprudence in the interest of contemporary administration of justice.

## 2.1 Definition of concepts

In this paragraph the fundamental concepts underlying parental authority in Roman law, namely *potestas* (including *patria potestas*), *sui iuris*, *alieni iuris*, status and proprietary capacity will be defined. The concept *potestas* denotes the almost unfettered and

complete legal power of the head of the Roman family, the *paterfamilias*. This power (*potestas*) is characterised by absolute rights over the persons and things belonging to the household. The power over the children of the house (*fili* and *filiae familias*) was called *patria potestas*, the power over the wife to whom the *paterfamilias* was married *cum manu*<sup>6</sup> was called *manus*, and the power over slaves was called ownership (or, according to Van Zyl,<sup>7</sup> *dominicia potestas*).<sup>8</sup>

It is important to note that Kaser<sup>9</sup> uses the term *potestas* as a general term which includes the three classes of power referred to above. Van Zyl, on the other hand, uses the term *patria potestas* as the general term denoting the power of the *paterfamilias*.<sup>10</sup>

It appears that *patria potestas* was not the only form of *potestas* in Roman law. Van Zyl<sup>11</sup> indicates that the power of less important officials was also known as *potestas*. Since *potestas* had a wider meaning than *patria potestas* it is probably better to use the term *patria potestas* as general term for the power of the *paterfamilias*, and to reserve the term *potestas* as a general term denoting all kinds of *potestas*, including *patria potestas*.

The classification of persons as either *sui iuris* or *alieni iuris* was a characteristic of the Roman law of persons. If a person was *sui iuris*, that person was completely independent, in the sense that he or she had no male ancestors on his or her father's side.<sup>12</sup> The *sui iuris*

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<sup>6</sup> See ch 2 par 2.3 below.

<sup>7</sup> Van Zyl *Geskiedenis en beginsels* 82 fn 44.

<sup>8</sup> Kaser *Roman private law* 12 I 2(b), 4 I 1(b).

<sup>9</sup> Kaser *Roman private law* 12 I 2(b).

<sup>10</sup> Van Zyl *Geskiedenis en beginsels* 82 fn 44.

<sup>11</sup> Van Zyl *Geskiedenis en beginsels* 13-14.

<sup>12</sup> Van Zyl *Geskiedenis en beginsels* 82.

person was thus “free from power”. This included the *paterfamilias*, the single man, and the single woman. All other persons were “in power”. This included the wife *in manu*, *fili* and *filiae familias* and slaves.<sup>13</sup>

A person who was *sui iuris* was totally independent, and had all the legal capacities of a Roman citizen. Where the *sui iuris* person was an adult male, he also had virtually unlimited power over persons who fell under his *patria potestas*. A person who was *alieni iuris* was totally dependent upon the person in whose power he or she was, and, subject to certain exceptions,<sup>14</sup> this person had no status in private law (see below).<sup>15</sup>

At the death of the *paterfamilias*, the following persons under his *potestas* became *sui iuris*:<sup>16</sup>

- his wife with whom he was married *cum manu*<sup>17</sup>
- his sons, married or unmarried<sup>18</sup>
- his unmarried daughters<sup>19</sup>
- his daughters who were married without *manus*, and who had been part of

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<sup>13</sup> G 1.48-49; *Inst* 1.8 *pr*. Also see Kaser *Roman private law* 12 I 3; Thomas *Institutes* 24.

<sup>14</sup> See ch 2 par 2.6 below.

<sup>15</sup> Van Zyl *Geskiedenis en beginsels* 81 *et seq*. Also see ch 2 par 2.6 below.

<sup>16</sup> G 1.127; *Inst* 1.12 *pr*. Also see Kaser *Roman private law* 12 I 3, and ch 2 par 2.3 below.

<sup>17</sup> This form of marriage was called *conventio in manum*, and the power that the *paterfamilias* had over his wife, was called *manus*. *Manus* was no different from *patria potestas* (G 1.109). Also see Kaser *Roman private law* 58 V 1-2; Van Zyl *Geskiedenis en beginsels* 96.

<sup>18</sup> Married sons became *patresfamiliarum* of their own families (G 1.127). Also see Kaser *Roman private law* 12 I 3.

<sup>19</sup> Kaser *Roman private law* 12 I 3. A daughter who was married *cum manu* was subject to the *potestas* of her husband, or to the *potestas* of her husband's father if her husband was himself still subject to *potestas* (G 1.49, 1.109, 1.136). Also see Buckland *Roman law* 101-102 and ch 2 par 2.3 below.

his *potestas* before they got married.<sup>20</sup>

*Patria potestas* also came to an end with the emancipation of a son or daughter.<sup>21</sup> It thus follows that not only *patresfamilia* were *sui iuris*, but that some women and children were also *sui iuris*.

In Roman law the concept “status” denoted the legal condition of the human being in general.<sup>22</sup> Status was closely connected to the capacity of being the bearer of legal rights. Roman law regarded every human being as a person, that is, a subject capable of acquiring and bearing legal rights. This capacity of having rights was also called freedom in Roman law. Three kinds of “status”, or degrees of legal capacity were recognised in Roman law: the *status libertatis* (according to which men are either freemen or slaves), the *status civitatis* (according to which freemen are either Roman citizens or aliens), and the *status familiae* (according to which a Roman citizen (which did not extend to women) is either a *paterfamilias* or a *filiusfamilias*).<sup>23</sup>

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<sup>20</sup> In later Roman law, some marriages were contracted without *manus*. The marriage without *manus* was made possible by the fact that *manus* could be established by means of *usus*. The Twelve Tables provided that a wife who wished not to come under her husband's *manus* should stay away from his house for three nights in each year and thus interrupt the one-year period required for the establishment of *manus* by means of *usus* (G 1.111; Kaser *Roman private law* 58 II 2). In the marriage without *manus* the woman did not become subject to the *patria potestas* of her husband, but retained the status that she had before the marriage and remained in the family to which she had belonged. If she was thus *sui iuris* before the marriage, she remained *sui iuris*, and if she was subject to her father's *potestas*, she remained in her father's family (Buckland *Roman law* 101, 106; Kaser *Roman private law* 58 VI 2; Thomas *Institutes* 33; Van Zyl *Geskiedenis en beginsels* 96 et seq). This so-called “marriage free of *manus*” was at first only an exception - most marriages were *manus* marriages up to the first century BC. Later the frequency of *manus* marriages declined rapidly, until this form of marriage was completely displaced by the “free marriage” towards the end of the classical period (Kaser *Roman private law* 58 II 2). Also see ch 2 par 2.3 below.

<sup>21</sup> See ch 2 par 2.4 below.

<sup>22</sup> Kaser *Roman private law* 13 I 1.

<sup>23</sup> Kaser *Roman private law* 13 I 1, 2; Sohm *Institutes* 170-171.

In Roman law, persons had the following capacities: capacity to act (ie the capacity to perform juristic acts), proprietary capacity (which will be defined hereafter), and delictual capacity (ie the capacity to incur liability for unlawful acts).<sup>24</sup> Proprietary capacity was the leading characteristic of “persons” in Roman private law.<sup>25</sup> Proprietary capacity is also called the capacity of holding property, taking the word “property” in its widest sense to include both rights and debts. In other words, proprietary capacity means both the capacity to acquire and bear rights and the capacity to incur liabilities.<sup>26</sup> Sohm<sup>27</sup> explains the difference between proprietary capacity and capacity to act by means of the example of the *infans*. An *infans* may, like others, acquire rights and incur liabilities through his or her guardian. Capacity to act, on the other hand, means the capacity to acquire rights and incur liabilities by the manifestation of one’s own will. An *infans* therefore had proprietary capacity, although he or she had no capacity to act.

## 2.2 Persons vested with *patria potestas*

Every male person (women could not establish *patria potestas*) who was not under the authority of a *paterfamilias* was himself a *paterfamilias*, whatever his age. The *paterfamilias* was the head of the Roman family - he had *patria potestas* over the family. The *paterfamilias* was *sui iuris*, he had capacity to act, and he was not subject to the authority of another person.<sup>28</sup>

## 2.3 Persons subject to *patria potestas*

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<sup>24</sup> Sohm *Institutes* 228-231.

<sup>25</sup> Sohm *Institutes* 167.

<sup>26</sup> Sohm *Institutes* 164.

<sup>27</sup> Sohm *Institutes* 231.

<sup>28</sup> G 1.48; D 1.6.4. Also see Buckland *Roman law* 101-102; Thomas *Institutes* 25; Van Zyl *Geskiedenis en beginsels* 82 fn 43.

As indicated above, the *paterfamilias* was conferred with *patria potestas* over his family. The first person included in this was his wife if she was married to him *cum manu*.<sup>29</sup> As explained earlier, in early Roman law, marriages were concluded *cum manu* only. Entry into *manus* was effected by means of *confarreatio* (a sacral act performed by a priest in which bread was sacrificed to *Jupiter Farreus*), *coemptio* (the transfer of power over the woman to the husband by the father) or *usus* (the acquisition of power over the woman by her husband following one year's continuous residence in his house).<sup>30</sup>

The effect of marriage *cum manu* was to put a wife *in loco filiae* to her husband and as a sister to her own children. If she were previously *sui iuris*, she lost her proprietary capacity (ie capacity to own assets) and her assets became her husband's.<sup>31</sup> If she were *alieni iuris* prior to the marriage and thus had no proprietary capacity, she equally lacked that capacity when she got married *cum manu*.<sup>32</sup> If her husband was himself subject to *patria potestas*, the wife married *cum manu* was subject to the *patria potestas* of her husband's *paterfamilias*.<sup>33</sup>

In later Roman law,<sup>34</sup> marriage was concluded without *manus*. This means that marriage was concluded by informal consent, followed by the *traditio* of the woman to her husband. Unlike marriage *cum manu*, this informal marriage did not affect the general legal status

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<sup>29</sup> G 1.109. Also see Buckland *Roman law* 101; Sohm *Institutes* 502; Thomas *Institutes* 26-27.

<sup>30</sup> G 1.111-115b. Also see Buckland *Roman law* 118 *et seq*; Kaser *Roman private law* 58 V 2(a)-(c); Thomas *Institutes* 25-26; Van Zyl *Geskiedenis en beginsels* 96 *et seq*.

<sup>31</sup> G 3.83. Also see Thomas *Institutes* 25.

<sup>32</sup> G 1.49. Also see Kaser *Roman private law* 59 I 2(a)-(b).

<sup>33</sup> G 1.49, 1.109, 1.136. Also see Buckland *Roman law* 102.

<sup>34</sup> Marriage *sine manu* came into use during the time of the Republic. Marriage *cum manu* existed alongside marriage *sine manu* until marriage *cum manu* died out not long after Gaius in the classical period (during the Principate) (Buckland *Roman law* 121; Kaser *Roman private law* 58 II 2; Thomas *Institutes* 26). Also see ch 2 fn 20 above.



of the wife. She did not become subject to the power of her husband or his *paterfamilias*. If she was subject to her father's *patria potestas* (ie *alieni iuris*) before the marriage, she remained in that family. If she was *sui iuris* prior to the marriage, she remained *sui iuris* after the marriage. However, her husband had the *ius mariti*, which entitled him to determine all matters incidental to the common life of the spouses. He could thus decide issues such as household expenditure, education of the children and residence.<sup>35</sup>

The *paterfamilias* secondly had *patria potestas* over his legitimate children, their wives with whom they were married *cum manu*, and their descendants. If a daughter of the *paterfamilias* were married *cum manu*, she and her children were part of her husband's *potestas* (unless her husband was himself still under *potestas*, in which case the woman and her children were part of his father's *potestas*).<sup>36</sup> A daughter of the *paterfamilias* that was married without *manus*, formed part of her father's family (unless she was *sui iuris* prior to the marriage, in which case she remained *sui iuris*)<sup>37</sup> but her children did not fall under her father's family. If her marriage was a fully valid civil marriage they formed part of her husband's family.<sup>32</sup> If she had married a *peregrinus* not capable of civil marriage, or if she was not married at all,<sup>33</sup> her children were *sui iuris*, irrespective of age or gender.<sup>34</sup>

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<sup>35</sup> Hahlo *Husband and wife* 2.

<sup>36</sup> G 1.48, 1.55, 1.109, 1.136; *Inst* 1.9 *pr*. Also see Buckland *Roman law* 101-102; Thomas *Institutes* 26-27.

<sup>37</sup> As was indicated above, the marriage *sine manu* did not change the general legal status of the woman. She retained the status that she had prior to the marriage, whether *sui iuris* or *alieni iuris*. However, her husband had the *ius mariti*, which enabled him to control the common life of the spouses. See ch 2 fn 20 & fn 34 above.

<sup>32</sup> A valid civil marriage (*iustae nuptiae*) was a valid marriage between two persons who had *conubium* (ie the capacity to conclude Roman marriage). One of the effects of a valid civil marriage was that the children were in the *potestas* of the *paterfamilias* (G 1.55-56; Buckland *Roman law* 101, 104 *et seq*).

<sup>33</sup> Illegitimate children were *sui iuris* (G 1.64; Kaser *Roman private law* 61 II 1).

<sup>34</sup> G 1.64. Also see Buckland *Roman law* 101.

Thirdly, *patria potestas* existed in respect of the father's adopted children.<sup>35</sup> Adoption in the wide sense took place either by means of *adrogatio* (adoption of a person *sui iuris*) or *adoptio* (adoption of a person *alieni iuris*).<sup>36</sup>

*Adrogatio* was an ancient institution whereby a person with no heirs could artificially acquire one by taking into his *potestas* one who was himself a *paterfamilias*.<sup>37</sup> In the case of *adrogatio* the *adoptandus* (the person who was adopted) had to be *sui iuris*. *Adrogatio* was a legislative act effected by a decree of the *comitia curiata*.<sup>38</sup> Women could not be adrogated.<sup>39</sup>

*Adoptio* of a person *alieni iuris* was in no way a less artificial act than *adrogatio*. By means of *adoptio* a *paterfamilias* could transfer a person from his *potestas* to that of another. *Adoptio* had two phases. First of all the existing *patria potestas* was abolished by selling a son three times by *mancipatio* (one sale of a daughter or grandchild was sufficient). Thereafter the *adoptans* claimed the *adoptandus* as his child by means of *in iure cessio*.<sup>40</sup>

The only purpose of adoption in the wider sense (ie through *adrogatio* and *adoptio*) was to bring *patria potestas* into existence. Since women could not establish *patria potestas*, they were incapable of adopting. Although it was not its primary purpose, one of the

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<sup>35</sup> *Inst* 1.11 *pr.*

<sup>36</sup> *Inst* 1.11.1. Also see Schulz *Roman law* 143-144; Thomas *Institutes* 38 *et seq.*

<sup>37</sup> Thomas *Institutes* 38.

<sup>38</sup> The *comitia curiata* was the original Roman popular assembly (*volksvergadering*) (Kaser *Roman private law* 60 III 2(a); Van Zyl *Geskiedenis en beginsels* 8 *et seq.*

<sup>39</sup> Schulz *Roman law* 144-147.

<sup>40</sup> Schulz *Roman law* 146; Thomas *Institutes* 38-39. *In iure cessio* (cession before the court) was used for the transfer, cession or extinction of certain rights. It could also be used for other purposes, ie to establish *patria potestas* in the case of adoption (Kaser *Roman private law* 7 II 1-2).

consequences of *adrogatio* (adoption of a person *sui iuris*) was to legitimate illegitimate children. Illegitimate children were *sui iuris*. Consequently, adoption of an illegitimate child by means of *adrogatio* resulted in *patria potestas* being established over the child. The child thus became *alieni iuris*, and legitimate. Legitimation of illegitimate children distinct from *adrogatio* did not exist in classical law. During the Empire legislation was instituted to provide for the legitimation of illegitimate children.<sup>41</sup>

However, it was indicated above that women could not be adrogated. Consequently, a person could not adopt his illegitimate daughter. He could not adrogate her and *adoptio* in the narrower sense did not apply, since an illegitimate child was *sui iuris*, and only persons *alieni iuris* could be adopted by means of adoption in the narrower sense.<sup>42</sup>

## 2.4 Duration of *patria potestas*

*Patria potestas* was terminated on the death of the father who was vested with *patria potestas*, or of the person (*alieni iuris*) over whom *potestas* existed. On the death of the *paterfamilias*, those immediately below him in the family structure became *sui iuris*. This included his wife (if they were married *cum manu*) and his married and unmarried sons. Married sons became *patresfamiliarum* over their own families. Grandchildren of the *paterfamilias* were transferred to the *potestas* of their father.<sup>43</sup> Unmarried daughters of the *paterfamilias* became *sui iuris*.<sup>44</sup> Daughters who were married *sine manu* but who were still part of their fathers' families also became *sui iuris*.<sup>45</sup> Children under *potestas* were not

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<sup>41</sup> Schulz *Roman law* 143-147; Van Zyl *Geskiedenis en beginsels* 84.

<sup>42</sup> Schulz *Roman law* 146-147.

<sup>43</sup> G 1.127; *Inst* 1.12 *pr.* Also see Buckland *Roman law* 130; Schulz *Roman law* 157; Sohm *Institutes* 507; Thomas *Institutes* 42.

<sup>44</sup> Daughters who were married *cum manu* were subject to the *potestas* of their husbands. See ch 2 par 2.3 above.

<sup>45</sup> See ch 2 fn 20 & 34 above.

automatically freed from *potestas* upon reaching any particular age. *Potestas* existed until the death of the *paterfamilias*, unless he emancipated his children before his death.<sup>46</sup>

Secondly, *patria potestas* was terminated by emancipation. Emancipation was effected by the sale of the child to a trusted friend in order to terminate the *potestas* (a son three times, a daughter once).<sup>47</sup> After the third sale, the child was sold back to the emancipating father, who in turn freed the child by means of *manumissio*.<sup>48</sup> In the later Empire two simpler forms of emancipation were known, namely *emancipatio per rescriptum principis* (the so-called *emancipatio Anastasiana*)<sup>49</sup> and emancipation by entry on the judicial records (the so-called *emancipatio Justiniana*).<sup>50</sup> The child was not a party to the emancipation. His or her consent was not required. Nevertheless, if the child protested, the emancipation was void according to Justinian's law, except where it dissolved a mere adoptive relationship. With the exception of an *impubes adrogatus*<sup>51</sup> (who could, in certain circumstances insist upon being emancipated), a child under the *patria potestas* was never

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<sup>46</sup> Schulz *Roman law* 150; Sohm *Institutes* 507.

<sup>47</sup> *Inst* 1.12.6-10. The child was sold to a trusted friend because the Twelve Tables stipulated that three sales of a son by a father terminated his power. As in the case of *adoptio*, one sale of daughters and grandchildren was sufficient (Kaser *Roman private law* 60 IV 2(a)). Also see ch 2 par 2.3 above.

<sup>48</sup> Buckland *Roman law* 131; Schulz *Roman law* 158; Sohm *Institutes* 506-507. The child could just as well have been freed by the imaginary buyer. However, since the person that effects the last manumission acquires certain rights of succession and guardianship, the child was sold back to the father so that the father could effect the last manumission and acquire these rights himself (Buckland *Roman law* 131; Kaser *Roman private law* 60 IV 2(a); Van Zyl *Geskiedenis en beginsels* 89).

<sup>49</sup> This form of emancipation was used in cases where the child was absent. It was effected by means of a petition to the emperor, whose favourable answer resulted in the emancipation coming into effect automatically (Buckland *Roman law* 131).

<sup>50</sup> *Inst* 1.12.6. Also see Buckland *Roman law* 131; Sohm *Institutes* 507; Van Zyl *Geskiedenis en beginsels* 90.

<sup>51</sup> An *impubes adrogatus* was a child below the age of puberty who had been adopted by means of *adrogatio* (Buckland *Roman law* 126). Also see ch 2 par 2.3 above.

entitled to demand emancipation as a matter of right.<sup>52</sup>

The effect of emancipation was to release the emancipated person from *potestas*, and from the agnatic tie.<sup>53</sup> The emancipated child had no relations, until he or she had established a new agnatic relationship for himself or herself by conceiving children after the emancipation.<sup>54</sup> In early law every connection between the *emancipatus* and his or her old family was destroyed. The *emancipatus* lost all rights of maintenance and succession against his or her father and other relations. The emancipating *paterfamilias* was the emancipated child's "quasi patron", and had the same rights of intestate succession that a patron had towards his freeman.<sup>55</sup> Before the end of the Republic an *emancipatus* had acquired a certain right of succession against his or her father and other agnatic relations, which right was progressively improved.<sup>56</sup>

Thirdly, *patria potestas* was terminated by means of *adoptio*.<sup>57</sup> *Adoptio* and emancipation were effected by virtually identical procedures. Both were effected by selling the child *in causam Mancipii*. However, in the case of emancipation there was an *adsertor libertatis* to participate in the process with the father, instead of an adopter. In the case of *adoptio*

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<sup>52</sup> *Inst* 1.12.10. Also see Buckland *Roman law* 126, 131; Sohm *Institutes* 507.

<sup>53</sup> The relationship upon which the family was based in Roman law was not that of *cognatio* (blood relationship), but that of *agnatio*. Agnates were those who were in the *potestas* of a single male ancestor through the male line, either by birth or otherwise. Descendants through sons would be in the *pater's potestas*. However, though the daughter herself would be an agnate and in her *pater's potestas*, her own issue would be in the *potestas* of her husband or his family (Thomas *Institutes* 28).

<sup>54</sup> Buckland *Roman law* 132; Sohm *Institutes* 508. Children of the *emancipatus* with whom his wife was pregnant at the time of the emancipation (eg that were conceived prior to emancipation), remained in the previous *potestas*, but children that were conceived after the emancipation, formed part of the new family of the *emancipatus* (*Inst* 1.12.9).

<sup>55</sup> Buckland *Roman law* 132; Thomas *Institutes* 43.

<sup>56</sup> Buckland *Roman law* 132.

<sup>57</sup> See ch 2 par 2.3 above.

the child was transferred to the *potestas* of the adopter, whereas the child was released from the previous *potestas* and became *sui iuris* in the case of emancipation.<sup>58</sup>

*Patria potestas* was fourthly terminated if a daughter of the *paterfamilias* married *cum manu*. She then became subject to her husband's *potestas*, except if he was himself under *potestas*, in which case she became part of the *potestas* of his *paterfamilias*. If the husband of a wife *in manu* died, the wife became *sui iuris* and did not return to her father's *potestas*.<sup>59</sup>

*Patria potestas* was lastly automatically terminated by the acquisition by the child of certain dignitary positions. *Patria potestas* over a daughter was terminated if she became a *virgo Vestalis*, and over a son if he became a *flamen Dialis*.<sup>60</sup> Under Justinian's law *patria potestas* was terminated if the child acquired the dignity of bishop or *patricius*.<sup>61</sup>

## 2.5 The nature and content of *patria potestas*

### 2.5.1 *The ius vitae necisque (ie the power of life and death)*

Domestic discipline was in the hands of the *paterfamilias*. This implied even the right to kill the child. This *ius vitae necisque*, which was expressly mentioned in the Twelve Tables, was regarded by Roman lawyers as the core of *patria potestas*. It was maintained throughout the classical period, but was abolished in the post-classical period.<sup>62</sup> However,

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<sup>58</sup> Buckland *Roman law* 132; Schulz *Roman law* 158; Thomas *Institutes* 43.

<sup>59</sup> G 1.48, 1.109, 1.136. Also see Schulz *Roman law* 157-158.

<sup>60</sup> G 1.130. Also see Buckland *Roman law* 130; Schulz *Roman law* 157; Sohm *Institutes* 506.

<sup>61</sup> Sohm *Institutes* 506.

<sup>62</sup> See ch 2 par 2 above.

the father still had an obligation to kill a deformed child.<sup>63</sup> By the time of Justinian the father was allowed only reasonable chastisement.<sup>64</sup>

### 2.5.2 *The power to alienate the child*

*Patria potestas* also included the authority to sell those under *potestas* into slavery. This authority was also abolished in the post-classical period. However, the *paterfamilias* still had the power to sell new-born children into slavery under stress of poverty, subject to the right to redeem the child.<sup>65</sup>

### 2.5.3 *The power over the child's estate and juristic acts*

Subject to certain exceptions, any acquisitions by those under *patria potestas* automatically became the property of the *paterfamilias*. Initially only the *paterfamilias* was capable of concluding contracts in his own right.<sup>66</sup> The *paterfamilias* had the right to give his children in marriage even without their consent. In classical law, the consent of the child to the marriage was needed where he or she was competent to give it. The *paterfamilias* also had the right to dissolve the marriages of his children.<sup>67</sup> The *paterfamilias* could appoint tutors by will for his young children.<sup>68</sup> He also had the right to appoint an heir in his will to succeed a young child if the child died too young to make a will (ie if the child died

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<sup>63</sup> Kaser *Roman private law* 60 I 3(a).

<sup>64</sup> Buckland *Roman law* 103; Sohm *Institutes* 502-503; Schulz *Roman law* 151; Thomas *Institutes* 27.

<sup>65</sup> Buckland *Roman law* 103; Kaser *Roman private law* 60 I 3(c); Schulz *Roman law* 151-152; Thomas *Institutes* 27.

<sup>66</sup> Buckland *Roman law* 104; Sohm *Institutes* 504; Thomas *Institutes* 28. Also see ch 2 par 2.6 below.

<sup>67</sup> Buckland *Roman law* 103; Schulz *Roman law* 152; Thomas *Institutes* 27.

<sup>68</sup> *Inst* 1.13.3.

while still under the age of puberty).<sup>69</sup>

#### 2.5.4 *The power to institute proceedings to recover the child*

*Patria potestas* included the right to institute an action for recovery of a child against a third party who obtained possession of the child and exercised control over him or her.<sup>70</sup>

#### 2.5.5 *The absence of obligations between father and child*

Actionable obligations between father and child did not exist in principle, but from the second century AD a mutual liability for maintenance was recognised by imperial constitutions.<sup>71</sup>

#### 2.5.6 *A few general comments on the nature of patria potestas*

*Patria potestas* was essentially Roman. Both in content and in its lifelong duration, it had an intensity unknown to the forms of paternal power known in any of the legal systems with which Rome came into contact.<sup>72</sup> The archaic character of *patria potestas* was illustrated by the absolute power which the father had had over the person of his child *in potestate*. The status of a child in power was similar to that of a slave. *Patria potestas* was in no sense a form of guardianship. It did not cease to exist when the child reached a certain age,

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<sup>69</sup> Buckland *Roman law* 104; Schulz *Roman law* 152; Thomas *Institutes* 27.

<sup>70</sup> D 47.2.38.1; G 3.199. Also see Buckland *Roman law* 103.

<sup>71</sup> G 4.78. Also see Schulz *Roman law* 157.

<sup>72</sup> Buckland *Roman law* 102; Thomas *Institutes* 27.



but remained in effect as long as the father lived, unless he emancipated the child. *Patria potestas* existed entirely in the interests of the father. Its continuance depended, not on the child's need for protection and educational requirements, but simply on the life or decision of the father.<sup>73</sup>

It is surprising that this system of absolute control was, according to Schulz,<sup>74</sup> “preserved (with slight mitigation) in classical times in spite of the humanistic movement”.<sup>75</sup> The “slight mitigation” Schulz refers to presumably includes the following:

- The abolition of the *ius vitae necisque* and the right to sell family members into slavery during the post-classical period.<sup>76</sup>
- The mitigation, during the Empire, of the rule that the *filius* under *potestas* had no proprietary capacity.<sup>77</sup>
- The mitigation of the absolute power of the *paterfamilias* by the recognition in the second century AD of the mutual liability for maintenance between parent and child.<sup>78</sup>

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<sup>73</sup> Schulz *Roman law* 150; Sohm *Institutes* 507.

<sup>74</sup> Schulz *Roman law* 151.

<sup>75</sup> Since the classical period of Roman law started at the dawn of history and ended in approximately 250 AD (see ch 2 par 2 above), and the humanist movement occurred in the sixteenth century (see Van Zyl *Geskiedenis* 18), Schulz's use of the term “classical times” appears to be incorrect. However, his reference to “classical times” is presumably a reference to the attempts of the humanists in the sixteenth century to bring about a return to classical law (in the sense of pre-Justinian law) (Van Zyl *Geskiedenis* 18).

<sup>76</sup> See ch 2 par 2.5.1 above.

<sup>77</sup> See ch 2 par 2.6 below.

<sup>78</sup> See ch 2 par 2.5.5 above.

The explanation for the retention of the absolute control inherent in *patria potestas* can probably be found in the Roman feeling for authority and discipline which inspired the lawyers. Furthermore, the Roman respect for individual freedom rendered them loath to interfere with the internal management of the Roman home.<sup>79</sup> In the period of early Roman law<sup>80</sup> the State interfered little with the family. Moreover, the *paterfamilias* was judge in his own home and exercised absolute authority. The only checks on his absolute authority could be found in the following:<sup>81</sup>

- The influence exerted by the relations in the family council (*consilium domesticum*) which custom required him to appeal to in cases of gravity.<sup>82</sup>
- The fear of a *nota censoria*.<sup>83</sup>
- The threat of spiritual punishment - in early times the abuse of the power over family members was punished as sacral offences committed against the gods.<sup>84</sup>

## 2.6 The status of the child under *potestas*

### 2.6.1 Capacity to act in general

The sources do not deal expressly with the capacity to act (ie the capacity to perform valid

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<sup>79</sup> Schulz *Roman law* 151.

<sup>80</sup> See ch 2 par 2 above.

<sup>81</sup> Buckland *Roman law* 102-103; Sohm *Institutes* 502.

<sup>82</sup> Cases of gravity included the exercising of the *ius vitae necisque* and the sale of family members into slavery (Van Zyl *Geskiedenis en beginsels* 82).

<sup>83</sup> In the earlier Republic the *censor*, who exercised control and supervision of public morals, could interfere in cases of abuse by the *paterfamilias* of his far-reaching power over his family members, by publicly censuring the offender (*nota censoria*) (Kaser *Roman private law* 3 I 2(b); Van Zyl *Geskiedenis en beginsels* 18).

<sup>84</sup> Kaser *Roman private law* 3 I 2(b); Sohm *Institutes* 502.

juristic acts) of the child under *potestas*. The sources do, however, deal with the capacity to act of the child under *tutela* and *cura*. On logical grounds, it must be assumed that the position of children under *potestas* was the same as the position of children under *tutela* and *cura*. Dannenbring points out that the Roman-law background of our law is almost exclusively based on the law relating to persons *sui iuris*. He further points out that, during the late classical and post-classical periods, some of the rules applicable to children *sui iuris* were also applied to persons under *patria potestas*.<sup>85</sup>

As will be pointed out below,<sup>86</sup> children under the age of seven (*infantes*) had no capacity to act whatsoever.<sup>87</sup> Children under *tutela*, or *impuberes* (ie children above the age of seven, but below the age of puberty (14 for boys and 12 for girls)) who were *sui iuris* because of the death of the *paterfamilias* had limited capacity to act. They could conclude unilateral contracts without their guardian's consent, but the guardian's consent was needed for multilateral contracts.<sup>88</sup> Children under *cura*, or *minors* (ie children above the age of puberty, but below the age of 25) who were *sui iuris* because of the death of the *paterfamilias* initially had full capacity to act. Although the function of the *curator* was to assist the *minor* in the conclusion of juristic acts, the validity of the minor's contract was initially not dependent upon the consent of the *curator*. In the post-classical period the contract concluded by the *minor* without the assistance of his or her *curator* was sometimes regarded as void.<sup>89</sup>

The position can thus be summarised as follows (assuming, on logical grounds, that the capacity to act of children under *tutela* and *cura* was similar to that of children under

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<sup>85</sup> Dannenbring 1977 *THRHR* 316.

<sup>86</sup> See ch 2 par 2.7 below.

<sup>87</sup> Kaser *Roman private law* 14 II 1. Also see Dannenbring 1977 *THRHR* 317.

<sup>88</sup> *Inst* 1.21 *pr*. Also see Dannenbring 1977 *THRHR* 317; Thomas *Institutes* 54.

<sup>89</sup> Dannenbring 1977 *THRHR* 326, 328.

*potestas*): Children below the age of seven (*infantes*) had no capacity to act whatsoever. Children above the age of seven, but below the age of puberty (ie 14 for boys and 12 for girls), had limited capacity to act. They could thus conclude valid juristic acts with the assistance of their guardians. Children above the age of puberty, but below the age of majority (ie 25) initially had full capacity to act. However, in the post-classical period they apparently also had limited capacity to act.

### 2.6.2 Capacity to make a will

In principle, only Roman citizens who were *sui iuris* and mentally healthy could make wills. As was seen above,<sup>90</sup> the *filiusfamilias* (who was *alieni iuris*) could dispose of his *peculium castrense* and *quasi castrense* in a will. However, this was an exception to the general rule, and was dealt with as such. In early Roman law only male persons were allowed to act as testators. By the time of Justinian this restriction was removed, and women could also make wills.<sup>91</sup>

### 2.6.3 Capacity to marry

The *paterfamilias* had the right to give his children in marriage even without their consent. In classical law, the consent of the child to the marriage was needed where he or she was competent to give it. The *paterfamilias* also had the right to dissolve the marriages of his children.<sup>92</sup>

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<sup>90</sup> See ch 2 par 2.6.4 above.

<sup>91</sup> Van Zyl *Geskiedenis en beginsels* 211.

<sup>92</sup> Buckland *Roman law* 103; Schulz *Roman law* 152; Thomas *Institutes* 27. Also see ch 2 par 2.5.3 above.

## 2.6.4 *Proprietary capacity*

### 2.6.4.1 Introduction

The position of the son under *potestas* was similar to that of a slave. In early Roman law he had no proprietary capacity<sup>93</sup> whatsoever and was incapable of owning any property of his own. His position was one of involuntary representation: Whatever the *filiusfamilias* acquired passed, by operation of law, to the *paterfamilias*. The rigid position of early Roman law was mitigated during the Empire. The *filiusfamilias* gradually acquired proprietary capacity.<sup>94</sup> In the course of the development of Roman law, three types of property developed, namely *peculium profecticium*, *peculium castrense*, and *peculium adventicium*.

### 2.6.4.2 *Peculium profecticium*

*Peculium profecticium* was property derived from the father, or given to the son by a third person with the intention of conferring a benefit on the father. This property belonged to the *paterfamilias*, but the son could manage the property with the permission of the father.<sup>95</sup>

It is unclear what is meant by the term “manage” used by the sources.<sup>96</sup> Kaser<sup>97</sup> sheds some light on this question when he says that “sons could administer [*peculium profecticium*] independently, its income being used by the sons themselves”. According

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<sup>93</sup> See ch 2 par 2.1 above.

<sup>94</sup> G 1.86-87. Also see Sohm *Institutes* 185, 504.

<sup>95</sup> D 14.6.1. Also see Schulz *Roman law* 154, 156-157; Sohm *Institutes* 185, Spiro 1954 *THRHR* 256.

<sup>96</sup> See ch 2 fn 95 above.

<sup>97</sup> Kaser *Roman private law* 60 II 3(d).

to Schulz<sup>98</sup> “the son might manage this separate property (*peculium*, literally ‘property in cattle’) like an owner and even dispose of it or charge it with his debts”. Sohm<sup>99</sup> states that the son was competent to deal with the *peculium* he had received, and to bind his father by his contracts to the extent of the *peculium*. The son could only dispose of the property *inter vivos*. Disposition by means of a will was not possible.<sup>100</sup> In certain circumstances, creditors who contracted with the son could sue the father (and, in certain circumstances, the son - see below) and recover from him the extent of the *peculium*.<sup>101</sup>

From the above it appears that in early Roman law the concept “manage” also included the capacity to contract in respect of the property. However, as pointed out above, the son could only manage the property with the permission of the *paterfamilias*. The son thus had what is known in modern South African law as “limited capacity to act”.<sup>102</sup>

Sohm<sup>103</sup> points out that by the time of Justinian the son had full powers of disposition over *peculium profecticium*. Although the father remained the owner of *peculium profecticium*, the son was competent to deal with it and to bind his father by his contracts to the extent of such *peculium*.

The son could in certain circumstances be sued by creditors for contracts concluded in respect of the *peculium profecticium* (that belonged to the father). However, execution could not take place *durante potestate*. For this reason the *praetor* granted the creditor

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<sup>98</sup> Schulz *Roman law* 154.

<sup>99</sup> Sohm *Institutes* 446,506.

<sup>100</sup> Schulz *Roman law* 154.

<sup>101</sup> D 14.6.1. Also see Schulz *Roman law* 154, 156-157; Spiro 1954 *THRHR* 256 and ch 2 par 2.7 below.

<sup>102</sup> Van der Vyver & Joubert *Persone- en familiereg* 146 *et seq.*

<sup>103</sup> Sohm *Institutes* 185, 506.

several actions against the father (*actiones adiecticiae qualitatis*), by means of which execution could be obtained against the father to the extent of the *peculium profecticium*.<sup>104</sup>

#### 2.6.4.3 *Peculium castrense*

*Peculium castrense* was property acquired by the son while he was on active military service. The son's power over *peculium castrense* was more complete than his power over *peculium profecticium*. The son was the owner of this property,<sup>105</sup> and he could use and manage this property at his discretion and thus contract in respect of it, provided the contract was authorised by the father.<sup>106</sup> In the post-classical period *bona quasi castrense* (property acquired in a public capacity) was also recognised.<sup>107</sup> The son could freely dispose of *peculium castrense* and *peculium quasi castrense inter vivos* and in his will. Eventually such property no longer automatically reverted to the father if the son died without a will as was the case earlier, although the property could devolve upon the father by a right of succession.<sup>108</sup>

#### 2.6.4.4 *Peculium adventicium*

*Peculium adventicium* consisted of everything earned by the son, and everything acquired from other sources than from the father, and that was bequeathed or donated with the

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<sup>104</sup> Kaser *Roman private law* 49 I; Schulz *Roman law* 156-157; Sohm *Institutes* 506; Thomas *Institutes* 28.

<sup>105</sup> D 49.17. Also see Sohm *Institutes* 185, 504, *contra* Schulz *Roman law* 154.

<sup>106</sup> Sohm *Institutes* 446.

<sup>107</sup> *Inst* 2.11.6. Also see Kaser *Roman private law* 60 II 4(b).

<sup>108</sup> D 49.17; *Inst* 2.12 *pr*; *Inst* 2.11.6. Also see Buckland *Roman law* 280; Schulz *Roman law* 154-155; Sohm *Institutes* 504; Spiro 1954 *THRHR* 257; Thomas *Institutes* 28; Van Zyl *Geskiedenis en beginsels* 83 fn 48.

intention to benefit the son.<sup>109</sup> This included *bona materna* (ie property inherited by the son from the mother), *bona adventicia* (ie property derived from other sources than the father), and *bona adventicia irregularia* (property in respect of which the father's usufruct and control had been expressly excluded).<sup>110</sup>

The ownership of the *peculium adventicium* vested in the son, but the father retained the usufruct of the property (except if his usufruct and control had been expressly excluded, as in the case of *bona adventicia irregularia*). The father's usufruct was no ordinary one - it was not only a right of use, it also vested the father with the power of control and administration.<sup>111</sup> Kaser<sup>112</sup> speaks of a functionally divided ownership. The *paterfamilias* enjoyed a sort of ownership in that he could enjoy and administer the property (although he did not have the capacity to alienate the property). The son's right of ownership was restricted to the remaining functions. The child could not dispose of the property in his will, nor alienate it *inter vivos* without the consent of the *paterfamilias*.<sup>113</sup> Should the son die while still in *potestas*, the property automatically became the property of the father. Like *peculium castrense*, *peculium adventicium* reverted to the father on the son's death only by right of succession in the late post-classical period.<sup>114</sup>

#### 2.6.4.5 The proprietary capacity of the *filiifamilias*

In the preceding paragraphs, only the male pronoun is used. The reason for this is the fact

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<sup>109</sup> Van der Vyver & Joubert *Persone- en familiereg* 611.

<sup>110</sup> Spiro 1954 *THRHR* 257-258.

<sup>111</sup> Sohm *Institutes* 505; Spiro 1954 *THRHR* 257-258.

<sup>112</sup> Kaser *Roman private law* 60 II 4(c).

<sup>113</sup> Buckland *Roman law* 280; Kaser *Roman private law* 60 II 4(c); Sohm *Institutes* 505; Thomas *Institutes* 28.

<sup>114</sup> Spiro 1954 *THRHR* 257.



that the sources only refer to the proprietary capacity of the son (*filiusfamilias*).<sup>115</sup> Furthermore it is mentioned that the daughter (*filiafamilias*) could still not bind herself contractually in classical law, whereas the son in power was now capable of binding himself contractually in respect of all property.<sup>116</sup> According to Kaser<sup>117</sup> daughters in power, as well as the *uxor in manu* were probably altogether incapable of binding themselves, nor could they be sued.

### 2.6.5 Delictual capacity

Children *in potestas* were not liable for their delicts. The father was liable for the delicts of his children in *potestas*, but this was only a noxal liability in terms of which the father could hand over the child (*noxae datio*) instead of paying the penalty for the child's delict.<sup>118</sup> *Noxae datio* of daughters was obsolete long before the Empire, while *noxae datio* of sons was abolished by Justinian. It never applied to a wife *in manu*.<sup>119</sup>

## 2.7 Tutela and cura

In Roman law *patria potestas* was terminated by the death of the *paterfamilias*. The children of the *paterfamilias* became *sui iuris* at the same time, irrespective of age, unless they were under the authority of another person, for instance as a result of adoption. Though children *sui iuris* were capable of possessing rights and capacities, they were not necessarily capable of freely exercising them. If the children were not old enough to

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<sup>115</sup> See eg Schulz *Roman law* 156; Sohm *Institutes* 504 *et seq*; Thomas *Institutes* 27 *et seq*.

<sup>116</sup> Schulz *Roman law* 156.

<sup>117</sup> Kaser *Roman private law* 49 I.

<sup>118</sup> G 1.75 *et seq*.

<sup>119</sup> Buckland *Roman law* 104; Schulz *Roman law* 157; Sohm *Institutes* 502-503.

manage their own affairs, the institutions of *tutela* and *cura* assisted them in this regard.<sup>120</sup>

Children under puberty were put under the control of a *tutor*. The office of *tutor* could devolve upon a person in one of three ways:<sup>121</sup>

- The *tutor legitimus* was the oldest male agnate, usually an uncle or older brother of the child.<sup>122</sup>
- *Tutela legitima* was excluded in many cases by the testamentary appointment by the *paterfamilias* of a guardian.<sup>123</sup>
- If there was no *tutor legitimus* or *tutor testamentarius* certain officials<sup>124</sup> had the right to appoint a *tutor dativus*.<sup>125</sup>

Initially, the *tutor* was always a male person, but after 390 AD the mother could be appointed as *tutor dativus*.<sup>126</sup> The function of the *tutor* was principally to assist the person under supervision (the *impubes*<sup>127</sup>) in transactions which the latter (ie the *impubes*) personally carried out. The *tutor* also had to take care of the ward's support and education, and he had to administer the ward's property.<sup>128</sup>

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<sup>120</sup> *Inst* 1.13 *pr*; Thomas *Institutes* 44; Van der Vyver & Joubert *Persone- en familiereg* 634.

<sup>121</sup> Sohm *Institutes* 513-514.

<sup>122</sup> *Inst* 1.15 *pr*; 1.16.7.

<sup>123</sup> *Inst* 1.15 *pr*.

<sup>124</sup> Kaser *Roman private law* 62 II 3 speaks of "magisterial appointments". In early Roman law, it was done by the *praetor urbanus* in Rome, and by the provincial governors in the provinces.

<sup>125</sup> *Inst* 1.20 *pr*.

<sup>126</sup> Thomas *Institutes* 46.

<sup>127</sup> Kaser *Roman private law* 14 II 2(a).

<sup>128</sup> Kaser *Roman private law* 62 IV 1-4; Thomas *Institutes* 44.

Children under *tutela* (also called *impuberes infantia maiores* or, because they were under guardianship, *pupilli*) had limited capacity to act. *Impuberes* were persons above the age of seven, but below the age of puberty (ie 14 for boys and 12 for girls). They could conclude unilateral contracts without their guardians' consent, but the guardians' consent was needed for multilateral contracts.<sup>129</sup> If the *pupillus* concluded a multilateral contract without his or her guardian's consent, the contract was binding upon the other party, but not upon the *pupillus*.<sup>130</sup> However, the other party was protected by the *exceptio doli mali* and by a praetorian enrichment action if the *pupillus* was enriched by the transaction.<sup>131</sup>

*Tutela* came to an end when the *impubes* reached the age of puberty.<sup>132</sup> It was evident early on that not all children who were freed from tutelage when they reached the age of puberty, were capable of handling their own affairs.<sup>133</sup> Because of this, the early Roman law provided a penal action against one who defrauded a person under 25. Furthermore an *exceptio legis Plaetoriae* evolved, whereby the *minor*<sup>134</sup> could resist an action brought to enforce a transaction fraudulently concluded. Later the *Praetor* set aside, by means of *restitutio in integrum*, transactions concluded by persons under 25, which could be ascribed to the young person's lack of business acumen. In the first century of the Empire, the institution of *cura minorum* developed to protect persons under the age of 25.<sup>135</sup>

The function of the *curator* was to assist the minor below the age of 25 (ie *minor*) in the

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<sup>129</sup> *Inst* 1.21 *pr.* Also see Dannenbring 1977 *THRHR* 317; Thomas *Institutes* 54.

<sup>130</sup> D 19.1.13.29. Also see Dannenbring 1977 *THRHR* 318; Thomas *Institutes* 54.

<sup>131</sup> D 26.8.5.1; G 2.84. Also see Dannenbring 1977 *THRHR* 318 *et seq.*

<sup>132</sup> *Inst* 1.22 *pr.* Girls reached puberty at the age of twelve, and boys at the age of fourteen.

<sup>133</sup> Dannenbring 1977 *THRHR* 325 *et seq.*; Thomas *Institutes* 56 *et seq.*

<sup>134</sup> ie person above the age of puberty, but below the age of 25 (Dannenbring 1977 *THRHR* 317).

<sup>135</sup> *Inst* 1.23 *pr.* Also see Dannenbring 1977 *THRHR* 325 *et seq.*; Thomas *Institutes* 56-57.

conclusion of juristic acts. It is important to note that persons below the age of 25 enjoyed this protection even though they initially had full capacity to act.<sup>136</sup> Since the minor under *cura* (the *minor*) was above the age of puberty, the validity of the *minor*'s contract was initially not dependent upon the consent of the *curator*. During the classical period, the *minor*'s transactions were valid, whether the *curator* consented to them or not. Consequently, the *minor* could claim *restitutio in integrum* if certain transactions were to his or her detriment, regardless of whether the *curator* consented to the transaction or not.<sup>137</sup> In the post-classical period the contract concluded by the *minor* without the assistance of his or her *curator*, was sometimes regarded as void, resulting in restitution being unnecessary.<sup>138</sup>

Although *tutela* and *cura* had certain similarities, they were two separate institutions. *Tutela* was compulsory for persons below the age of puberty, whereas the *minor* was never compelled to obtain a *curator*. However, it was desirable for a *minor* to have a *curator*, but if he or she neglected to apply for the appointment of a *curator*, restitution could nevertheless be granted. *Cura* was only obligatory in exceptional cases, for example in litigation.<sup>139</sup> The function of the *tutor* was primarily to assist a child under the age of puberty in concluding juristic acts. The *curator*, on the other hand, at least in the late classical period, also had the function of administering the child's property.<sup>140</sup> *Cura minorum* was in later law simply an extension of *tutela* to the age of 25. The post-classical period was characterised by a growing equalisation of *impuberes* and *minores*.<sup>141</sup> Unlike

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<sup>136</sup> Dannenbring 1977 *THRHR* 325; Thomas *Institutes* 56-57.

<sup>137</sup> Dannenbring 1977 *THRHR* 326-327.

<sup>138</sup> Dannenbring 1977 *THRHR* 326, 328.

<sup>139</sup> *Inst* 1.23.2. Also see Dannenbring 1977 *THRHR* 329; Thomas *Institutes* 57.

<sup>140</sup> Kaser *Roman private law* 64 II 2(b).

<sup>141</sup> Dannenbring 1977 *THRHR* 328; Thomas *Institutes* 57.

*tutela*, a *curator* was always a magisterial appointment.<sup>142</sup>

### 3 GERMANIC LAW

#### 3.1 Introduction

Before dealing with Germanic law, it is essential to first deal with the concept “the reception of Roman law”. Hahlo & Kahn<sup>143</sup> indicates that the phrase “the reception of Roman law” may be used in a wider and a narrower sense. In its wider sense, as set out below, it coincides with the history of Roman law in Europe after the fall of the Western Roman Empire in 476 AD. In its narrower sense it refers only to the adoption of Roman law as a system (*in complexu*) in the German Empire and its feudal dependancies (including Holland) during the fifteenth and sixteenth centuries.

Four stages can be distinguished in the reception in its wider sense:<sup>144</sup>

- the infiltration of Roman law prior to the twelfth century (“pre-reception”)
- the intellectual rediscovery of Justinian Roman law in the twelfth century by the law school of Bologna and its subsequent elucidation by the universities of the Middle Ages
- the growing influence of Roman law on legal theory and practice during the thirteenth and fourteenth centuries (“early reception”)
- the reception of Roman law as a system (*in complexu*) during the fifteenth

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<sup>142</sup> Thomas *Institutes* 57.

<sup>143</sup> Hahlo & Kahn *Legal system* 485.

<sup>144</sup> *Ibid.*

and sixteenth centuries (reception in the narrow sense)

The extent and tempo of the reception varied from one country to the next. Germany had an “infiltration” and a reception *in complexu*, but not much of an “early reception”. The reception of Roman law was most comprehensive in Germany. It reached its consummation with the adoption of Roman law as a whole (*in complexu*) in the practice and courts of Germany during the fifteenth and sixteenth centuries. This transformed *deutsches* into *römisch-deutsches* law. The relevance of this reception to the history of Roman-Dutch law lies in the fact that Holland, like the other Dutch provinces, was a feudal dependency of the German Empire.<sup>145</sup>

When dealing with the development of the concept “parental authority” in Germanic law below,<sup>146</sup> the early Germanic period (from the dawn of modern history (ie the birth of Christ)) to the break-up of the Western Roman Empire in 476 AD<sup>147</sup>) and the Frankish period (476-843 AD<sup>148</sup>) will be dealt with in detail, but a few references to the Middle Ages (843-1581 AD<sup>149</sup>) will also be included.

### 3.2 Definition of the concepts *munt*, *sib* and “house”

The head of the family in Germanic law had authority (the so-called *munt* or *mundium*) over his family members. The family of early Germanic society was the *sib*. This term was used to denote both the extended family and the elementary family or “house”.<sup>150</sup>

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<sup>145</sup> Hahlo & Kahn *Legal system* 499-500.

<sup>146</sup> See ch 2 par 3.2 - 3.9 below.

<sup>147</sup> Hahlo & Kahn *Legal system* 330.

<sup>148</sup> *Ibid.*

<sup>149</sup> Hahlo & Kahn *Legal system* 330-331.

<sup>150</sup> Hahlo & Kahn *Legal system* 343.

In its wider meaning the term *sib* included all those who were related to each other by blood, no matter how distant the relationship. The “house” or family in the narrow sense corresponded broadly to the modern conception of the family. The extended family was ruled by the patriarch of the family assisted by a family council, made up of the heads of the various “houses”, whereas the family in the narrower sense (the “house”) was under the *munt* of the male head of the house (who was similar to the *paterfamilias* of Roman law).<sup>151</sup>

### 3.3 Persons vested with *munt*

The family in the narrower sense (“house”) was under the *munt* of the head of the household - the father, paternal grandfather, or father’s brother, as the case may be.<sup>152</sup>

### 3.4 Persons subject to *munt*

By marriage, the husband acquired the *munt* over his wife and any children born to her, regardless of whether or not he was their father. This is so because, in primitive society, the child was regarded as an economical asset that belonged to the man who has purchased the *munt* over the woman. The father’s power was thus not based on the fact that he had conceived the child, but upon his *munt* over the child’s mother. Adopted children were also subject to the *munt*.<sup>153</sup>

### 3.5 The duration of *munt*

In Germanic law, the father’s *munt* over his children ended, not with their attainment of a

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<sup>151</sup> Hahlo & Kahn *Legal system* 343-344. Hahlo & Kahn use the term *paterfamilias* to denote the male head of the household. However, to avoid confusion, I will only use the term *paterfamilias* in respect of Roman law.

<sup>152</sup> Hahlo & Kahn *Legal system* 344.

<sup>153</sup> Hahlo & Kahn *Legal system* 344; Huebner *History* 657, 659 *et seq.*

certain age, but with their departure from the paternal household.<sup>154</sup> However, fixed ages were laid down at which boys reached majority. These ages differed from one place to the next, but preference was given to the ages of 10, 12 (eg according to the *Lex Salica* and the *lex Frisionum*) and 15. As indicated above, paternal authority did not come to an end when children attained these ages. On attainment of the age, the young man became a major (*mondig*). As long as he remained under his father's roof, he remained subject to his father's power. However, his *mondigheid* enabled him to set up a household of his own, and if he did so he became completely independent (*selfmondig*), and his father's *munt* came to an end. This meant that he could now enter into juristic acts without his father's consent.<sup>155</sup> Unlike Roman law, Germanic law did not permit a father to retain a son in his power indefinitely.<sup>156</sup>

Daughters never became *mondig*. On marriage a girl was transferred from the *munt* of her father to the *munt* of her husband. Females were subject to perpetual tutelage.<sup>157</sup>

### 3.6 The nature and content of *munt*

Like the *patria potestas* of early Roman law, the *munt* was initially a complex of powers. The idea that the head of the family owed duties to those subject to his power developed only later, in the Middle Ages.<sup>158</sup> In Germanic law, legal capacity depended upon the

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<sup>154</sup> Brunner *Grundzüge* 229; Hahlo & Kahn *Legal system* 382-383; Huebner *History* 662-663. Against the background of these sources, the following statement of Van der Vyver & Joubert *Persone- en familiereg* 594 is confusing: "[d]ie ouerlike gesag oor die manlike kinders het tot 'n einde gekom by die mondigwording van die kind. Daar was in dié verband verskillende ouderdomsbepalings ...". The same applies to the statement of Spiro *Parent and child* 2: "[m]ajority ... brought the *munt* to an end".

<sup>155</sup> Hahlo & Kahn *Legal system* 345, 382-383; Huebner *History* 662-663; Wessels *History* 417 *et seq.*

<sup>156</sup> Hahlo & Kahn *Legal system* 345.

<sup>157</sup> Hahlo & Kahn *Legal system* 345, 383; Huebner *History* 663.

<sup>158</sup> Hahlo & Kahn *Legal system* 344; 446. Also see Huebner *History* 657-659.



capacity to bear arms. Since women and children were not capable of bearing arms, they were subject to *mnt*. The reason for the subordination of women and children was thus the physical helplessness of the woman or child. *Mun* had to be exercised in the interests of the woman or child. For this reason *mnt* gradually lost the characteristic of power, and became an obligation to care for the woman or child.<sup>159</sup>

*Mun* initially vested the head of the family with the right to kill his wife and children, the right to sell his wife and children into slavery, and the right to decide whom his children were to marry. Furthermore, the father held the son's property "absolutely in his hand".<sup>160</sup> He could dispose freely of his son's property, all the profits from the property went to the father, and as long as the father's *mnt* existed he was under no obligation to deliver anything from the child's estate when a third party had a claim against the child. The severity of his powers gradually disappeared in the Middle Ages, presumably under the influence of Christianity. The father's obligation to care for children, and to protect and support his children became more prominent. After the reception of Roman law,<sup>161</sup> the father's duty to care for his children was treated in the law of persons as the chief element of the *mnt*. It was required that he should exercise his power to educate his child, determine his or her religious faith, and appoint his or her guardians in the best interests of the child.<sup>162</sup>

Unlike Roman law, the mother in Germanic law enjoyed some authority over her children. In practice she had considerable say over the care and education of the children, although her position was never equated to that of the father.<sup>163</sup> Initially the *princeps* was the upper guardian of all minors. Later the courts exercised a right of control over minors (known as *obervormundchaft*), and was recognised as upper guardian of minors. This Frankish

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<sup>159</sup> Studiosus 1946 *THRHR* 33-34, 36; Wessels *History* 417 *et seq.*

<sup>160</sup> Huebner *History* 666.

<sup>161</sup> in its wider sense - see ch 2 par 3.1 above.

<sup>162</sup> Huebner *History* 657-659, 666 *et seq.*

<sup>163</sup> Huebner *History* 664-665.

practice was received in Holland (where the Court of Holland assumed the function) and the rest of the Netherlands in the middle ages.<sup>164</sup>

### 3.7 The status of the child under *munt*

Unlike Roman law, minors had the capacity to own property of their own in Germanic law. As long as the child lived in his or her father's house, the child's father administered his or her estate and was entitled to the usufruct.<sup>165</sup> The father held the child's property "absolutely in his hand".<sup>166</sup> He could dispose freely of his child's property, all the profits from the property went to the father, and as long as the father's *munt* existed he was under no obligation to deliver anything from the child's estate when a third party had a claim against the child. However, it remained the property of the child. The father was obliged to deliver it to the child unlesened in value upon the termination of his *munt*. The father was not permitted to alienate property belonging to the child without the latter's consent, which the child was unable to give before attaining majority.<sup>167</sup>

The child under *munt* was unable to dispose of his or her property. On the contrary, any juristic acts concluded were ineffective as against the father. Moreover, the child was not bound by juristic acts concluded during his or her minority.<sup>168</sup>

### 3.8 Guardianship

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<sup>164</sup> Huebner *History* 659; Van Apeldoorn 1938 *THRHR* 180; Van Heerden *et al* (eds) *Boberg* 500 fn 7; Wessels *History* 423-424. See further Labuschagne 1992 *TSAR* 353 and ch 4 par 2.1 below.

<sup>165</sup> The question whether the father was entitled to usufruct is controversial - see Hahlo & Kahn *Legal system* 383; Huebner *History* 665-666; Van Apeldoorn 1938 *THRHR* 165.

<sup>166</sup> Huebner *History* 666.

<sup>167</sup> Huebner *History* 666; Spiro *Parent and child* 2.

<sup>168</sup> Huebner *History* 666; Hahlo & Kahn *Legal system* 382.

If the father died before his son left the family home, or before his daughter got married, the nearest male agnate was automatically appointed as the child's guardian.<sup>169</sup> From the 13th century recognition was given to testamentary guardians and guardians appointed by public authorities.<sup>170</sup> In early Germanic law, the guardian controlled both the child's person and property. His legal relationship to the child corresponded exactly with that of a father to his son. The guardian was not a mere administrator of the child's estate, but he took the child's property into his power. For this reason he brought an action in his own name, and not in the name of the ward, against any third person who refused to deliver objects belonging to the estate.<sup>171</sup> The guardian was entitled to the usufruct, but he could not dispose of the substance of the estate. Any juristic acts were concluded in the guardian's own name, and he was liable for any debts.<sup>172</sup> The guardian was obliged to support the minor at his (the guardian's) own expense. He could use the profits of the minor's estate for the child's maintenance.<sup>173</sup>

From the 14th century the guardian's obligations were mitigated to mere administration of the minor's estate subject to an obligation of accounting.<sup>174</sup> The guardian was permitted to act in the minor's name, or the minor was permitted to act personally with the guardian's consent.<sup>175</sup> Guardianship came to an end when the son attained the age of majority, or when the daughter married.<sup>176</sup>

### 3.9 Differences between the Roman and Germanic concepts of parental

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<sup>169</sup> Huebner *History* 684-685.

<sup>170</sup> Huebner *History* 680, 687.

<sup>171</sup> Huebner *History* 690-691.

<sup>172</sup> Huebner *History* 691.

<sup>173</sup> Huebner *History* 692.

<sup>174</sup> Schröder *Lehrbuch* 768.

<sup>175</sup> Huebner *History* 691-693.

<sup>176</sup> Huebner *History* 693.

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## authority

The most prominent difference between the Roman and Germanic concepts of parental authority can be found in the nature of parental authority. In Roman law the *paterfamilias* was vested with a kind of quasi-ownership in respect of his children. This quasi-ownership is evident from the following: In early Roman law, the father had the *ius vitae necisque* in respect of those in his *potestas*, he could sell them into slavery, and he could claim possession of his child from a third person. Furthermore, the father could hand the child over as a *nox*a instead of paying the penalty for a delict committed by the child. In Roman law, parental authority was thus exercised in the interests of the *paterfamilias*. Its continuance depended on the life or decisions of the father, and not on the child's needs and interests.<sup>177</sup>

In Germanic law, on the other hand, legal capacity depended upon the ability to bear arms. Since women and children were incapable of bearing arms, they were subjected to *mund*. The reason for the subordination of women and children was thus not possible financial benefit for the father, but the physical helplessness of the woman or child. Parental authority had to be exercised in the interests of the child. For this reason the *mund* concept of Germanic law was gradually stripped of its power character, and became an obligation to care for the child.<sup>178</sup>

The second important difference between the Roman and Germanic concepts of parental authority lies in the duration thereof. The Roman *patria potestas* lasted until the death of the father, unless it was terminated before that date by emancipation, adoption or the marriage of a daughter. When a daughter got married *cum manu*, she was simply transferred from her father's *potestas* to the *potestas* of her husband. *Patria potestas* in Roman law can thus justly be regarded as a kind of perpetual authority over those in

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<sup>177</sup> Sohm *Institutes* 507.

<sup>178</sup> Studiosus 1946 *THRHR* 33-34, 36.

*potestas*.

In Germanic law, on the other hand, parental authority was exercised for the protection of the child. Consequently, the child was only subjected to the authority of another while physically dependent. That marriage makes a child of either sex a major is a doctrine unknown to the Roman law, though it was found in nearly all the branches of Germanic law. This was of course the case with regard to males, who became *self-mondig* as soon as they established their own households,<sup>179</sup> which was customarily associated with their marriage. A daughter, on the other hand, was upon her marriage merely transferred from the *mund* of her father to her husband's authority. She was thus regarded as a minor in the eyes of the law.<sup>180</sup>

The Germanic concept of parental authority thirdly differs from the Roman concept of *patria potestas* in the following respect: In Roman law *patria potestas* was exercised by the *paterfamilias*. The child's mother had no authority in respect of her children - she was subject to *potestas* herself.

In Germanic law, on the other hand, although also subject to her husband's *mund*, the mother had some authority in respect of her children. In practice, she had considerable say in the care and education of the children, although her position was never equated to that of the father. Studiosus<sup>181</sup> points out that the protection concept, which formed the basis of the Germanic *mund*, created opportunity for the development of the status of the woman. Due to the woman's inability to bear arms, the assembly of the tribe was forbidden territory, and thus she did not have full legal capacity. When an independent state authority was later instituted, the social conditions that initially led to the dependence of the woman fell away. This created an opportunity for the improvement of the woman's position.

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<sup>179</sup> See ch 2 par 3.5 above.

<sup>180</sup> Huebner *History* 662, Wessels *History* 417, 421.

<sup>181</sup> Studiosus 1946 *THRHR* 34.

## 4 ROMAN-DUTCH LAW

### 4.1 Introduction

The term “Roman-Dutch law” in its narrow sense refers to the law that originated from the reception of Roman law in the province Holland during the Middle Ages and thereafter. Since the reception of Roman law was not limited to the province Holland, but also took place in other parts of Europe, the term “Roman-Dutch law” should be used in its wider sense, which is the common law (*ius commune*) of Europe that developed from the *Corpus Iuris Civilis* of Justinian since the early Middle Ages, and not in its narrow sense (ie the law of the province Holland during the seventeenth and eighteenth centuries).<sup>182</sup>

When discussing the development of the concept “parental authority” in Roman-Dutch law below,<sup>183</sup> it will be indicated that Roman-Dutch law followed Germanic, rather than Roman law regarding parental authority. *Patria potestas* as it was known in Roman law, was never recognised in Holland and the rest of the Netherlands.<sup>184</sup>

### 4.2 Persons vested with parental authority, and persons subject to parental authority

In Roman-Dutch law, parental authority was shared by the mother and the father. Although the father acted as guardian of the children during the lifetime of the parents, both parents in Roman-Dutch law were vested with parental authority over the person of the child.<sup>185</sup> It

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<sup>182</sup> Van Zyl *Geskiedenis* 41-42, 290-291, 498-499.

<sup>183</sup> See ch 2 par 4.2 - 4.5 below.

<sup>184</sup> Grotius *Inleidinge* 1.6.3; Van der Linden *Institutes* 1.4.1. Grotius indicates that “[d]e groote ende zonderlinge macht der vaders over de kinderen onder haere hand staende is in deze landen onbekent”, and that children who had already reached the age of discretion, were free to do and act as they saw fit, and could dispose of their property by will to whomever they thought fit. Also see Wessels *History* 417.

<sup>185</sup> Voet *Commentarius* 1.6.3; *Calitz v Calitz* 1939 AD 56 61.

is for this reason that authors prefer the term “parental power” over the term “paternal power”.<sup>186</sup>

Although both parents were vested with parental authority over the person of the child, the mother’s position was subordinate to that of the father.<sup>187</sup> This is evident from the fact that, in cases of a difference of opinion between the parents on decisions regarding the duty of obedience of the children,<sup>188</sup> the children had to obey the orders of the father.<sup>189</sup> Furthermore, in cases of difference of opinion between the parents on decisions relating to consent to the marriage of a child,<sup>190</sup> the father’s wishes were conclusive.<sup>191</sup>

Parental authority over an illegitimate child vested in the child’s mother according to the maxim *een moeder maakt geen bastaard*.<sup>192</sup>

Initially the *princeps* was the upper guardian of all minors. Later the courts exercised a right of control over minors (known as *obervormundchaft*), and was recognised as upper

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<sup>186</sup> Voet *Commentarius* 1.6.3; DP 1938 *THRHR* 65; Studiosus 1946 *THRHR* 35, 42; *Meyer v Van Niekerk* 1976 1 SA 252 (T) 256; *contra* Aquilius 1938 *THRHR* 232.

<sup>187</sup> Voet *Commentarius* 26.1.1.

<sup>188</sup> On the duty of obedience of the children, see ch 2 par 4.4.2.1 below.

<sup>189</sup> Schorer *Aantekeningen* 1.3.8; *Calitz v Calitz* 1939 AD 56 62.

<sup>190</sup> On consent to the marriage of a child, see ch 2 par 4.4.2.3 below.

<sup>191</sup> Voet *Commentarius* 23.2.13. Voet gives three reasons for giving preference to the wishes of the father. First, the advice of the father is considered to be the best thing for his children. Secondly, the father is considered to be more observant of the position of the rest of the citizens than the mother. Thirdly, the power of a husband over his wife is considered so great that she can do nothing without her husband’s assent. Grotius *Belii ac pacis* 2.5.1 regards the superiority of the male sex as the reason for giving preference to the wishes of the father. Schorer *Aantekeningen* 1.3.8 questions this statement of Grotius and gives a different reason for giving preference to the wishes of the father, namely that a partnership cannot function properly if both members have the same capacities. This argument of Schorer does not explain why the *father’s* wishes are given preference. Also see *Calitz v Calitz* 1939 AD 56 62.

<sup>192</sup> Van der Linden *Institutes* 1.4.2.

guardian of minors.<sup>193</sup>

### 4.3 The duration of parental authority in Roman-Dutch law

Parental authority over a child was terminated when the child reached the age of majority (with the exception of the right of obedience owed to the parents).<sup>194</sup> In the 16th century men reached majority at the age of 25, and women at the age of 20.<sup>195</sup>

Parental authority also came to an end if the child was released from authority through marriage, or the granting of *venia aetatis* (declaration of majority by the sovereign).<sup>196</sup> Roman-Dutch law did not recognise adoption. An exception is Friesland, where adoption was recognised.<sup>197</sup>

### 4.4 The nature and content of parental authority in Roman-Dutch law

#### 4.4.1 *The nature of parental authority*

As will be indicated below, parental authority in Roman-Dutch law consisted not only of powers, but also of duties.

#### 4.4.2 *The content of parental authority*

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<sup>193</sup> See ch 2 par 3.6 above & ch 4 par 4.1 below.

<sup>194</sup> See ch 2 par 4.4.2.1 below.

<sup>195</sup> Van der Linden *Institutes* 1.4.3; Voet *Commentarius* 1.7.15; Hahlo & Kahn *Legal system* 446; Wessels *History* 420.

<sup>196</sup> Grotius *Inleidinge* 1.6.4; Voet *Commentarius* 1.7.11,13.

<sup>197</sup> Grotius *Inleidinge* 1.6.1; Van der Linden *Institutes* 1.4.2; Voet *Commentarius* 1.7.7.



#### 4.4.2.1 Power over the person of the child

Both parents were entitled to inflict moderate chastisement.<sup>198</sup> The children, on the other hand, had a duty of obedience towards both parents.<sup>199</sup> This duty of obedience did not come to an end when the children reached the age of majority.<sup>200</sup>

#### 4.4.2.2 Power over the estate and juristic acts of the child

As indicated above,<sup>201</sup> the father was the guardian of the children. In this capacity, he had to assist his children in the conclusion of juristic acts, he had to appear for them in court, and he had to manage all property which came to the children by inheritance or otherwise.<sup>202</sup>

#### 4.4.2.3 Power to consent to the child's marriage

Although the father had to assist the child in the conclusion of juristic acts, both parents had to consent to the marriage of a child. In cases of difference of opinion between the parents, the father's decision was conclusive.<sup>203</sup>

#### 4.4.2.4 Power to appoint testamentary guardians

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<sup>198</sup> Van der Linden *Institutes* 1.4.1; Van Leeuwen *Censura forensis* 1.1.9.4.

<sup>199</sup> Grotius *Inleidinge* 1.6.4; Van der Linden *Institutes* 1.4.1; Van Leeuwen *Censura* 1.1.10.1; Van Leeuwen *Commentaries* 1.13.1.

<sup>200</sup> Grotius *Inleidinge* 1.6.4. Grotius is silent on the question whether the parents still have the right to inflict chastisement after the children reach the age of majority.

<sup>201</sup> See ch 2 par 4.2 above.

<sup>202</sup> Grotius *Inleidinge* 1.6.1; *Calitz v Calitz* 1939 AD 56 61-62.

<sup>203</sup> Voet *Commentarius* 23.2.13. Also see ch 2 par 4.2 above.

Both parents were entitled to appoint a testamentary guardian to assist the surviving parent after the death of the other parent. However, one parent could not, by the appointment of a testamentary guardian, deny the other parent his or her control over the person of the child. On the death of either parent parental authority thus vested in the surviving parent, but the latter was assisted by a testamentary or appointed guardian. In addition to control over the person of the child (and the accompanying duty to care for the child, and right of chastisement), the surviving spouse had the capacity to make decisions regarding the marriage and education of the child without the assistance of the guardian. However, the guardian had to assist the child in the conclusion of juristic acts, and had to manage the child's estate.<sup>204</sup>

#### 4.4.2.5 Duties of the parents in terms of parental authority

Both parents had to care for their children.<sup>205</sup> This duty to take care of the child was not limited to the material needs of the child, but included nearly every aspect of the care of the child. It included the provision of food, clothing, accommodation, medical care and education.<sup>206</sup>

### 4.5 The status of the child under parental authority in Roman-Dutch law

Voet<sup>207</sup> indicates that the distinction between *peculium castrense*<sup>208</sup> and *quasi*

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<sup>204</sup> Grotius *Inleidinge* 1.7.8. Also see Studiosus 1946 *THRHR* 41-42.

<sup>205</sup> Voet *Commentarius* 25.2.4-6.

<sup>206</sup> Voet *Commentarius* 25.3.4. Also see Studiosus 1946 *THRHR* 38.

<sup>207</sup> Voet *Commentarius* 15.1.4. Also see Spiro 1954 *THRHR* 258.

<sup>208</sup> Property acquired by the son while he was in military service (see ch 2 par 2.6.4.3 above).

*castrense*<sup>209</sup> on the one hand, and *peculium profectici*<sup>210</sup> on the other hand, still applied in Roman-Dutch law. *Peculium castrense* and *quasi castrense* belonged to the child, who could use and manage the property as he or she saw fit, while *peculium profectici* belonged to the father, but the child could manage it with the father's consent. Property not derived from nor acquired for the father (known as *peculium adventici* in Roman law) belonged to the son, but the father retained management of the property, except if his control had been expressly excluded.<sup>211</sup>

However, a considerable amount of legal development took place in the field of *peculium* in Roman-Dutch law. First of all property that had been donated by a father to his child,<sup>212</sup> did not form part of the *peculium profectici* (ie property that belonged to the father). The reason for this is that the purpose of the donation was to secure such property against any liability of the parents. It thus formed part of the *peculium adventici* (ie the property of the minor).<sup>213</sup> Since property donated by a father to his son formed part of the *peculium profectici* (ie the property of the father) in Roman law, Roman-Dutch law differs from Roman law in this respect.<sup>214</sup> As far as donations by third parties were concerned, it depended on the intention of the donor whether the donation became the property of the father or the son.<sup>215</sup>

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<sup>209</sup> Property acquired in a public capacity (see ch 2 par 2.6.4.3 above).

<sup>210</sup> Property derived from the father, or given to the son by a third person with the intention of conferring a benefit on the father (see ch 2 par 2.6.4.2 above).

<sup>211</sup> Voet *Commentarius* 15.1.3,6.

<sup>212</sup> According to Grotius *Inleidinge* 3.2.8, donations between parent and child were prohibited, but Van Leeuwen *Censura* 1.4.12.8 indicated that, due to the fact that *patria potestas* (and the unity of assets between parent and child) no longer existed, this rule of Roman law no longer applied. Also see Conradie 1948 *SALJ* 63.

<sup>213</sup> Spiro 1954 *THRHR* 259.

<sup>214</sup> Conradie 1948 *SALJ* 63.

<sup>215</sup> Spiro 1954 *THRHR* 260. Voet *Commentarius* 15.1.4 indicated that donations by a godparent to a child formed part of the *peculium profectici*, except if the donor expressly indicated that he or she intended otherwise.

Secondly, unlike Roman law, in Roman-Dutch law the father no longer had an interest in the property of his child for as long as his parental authority lasted.<sup>216</sup> The parent was not entitled to the usufruct over property not derived from, nor acquired for the father (in Roman law known as *peculium adventicium*), unless the person by whom the property had been conferred had expressly granted the usufruct to a parent, or the parent needed the usufruct for the maintenance and upbringing of the child.<sup>217</sup> Roman-Dutch law differs from Roman law in this respect. Subject to certain exceptions, the father had an usufruct over the *peculium adventicium* in Roman law. The father's usufruct was not a right of use only, it also vested him with the power of control and administration.<sup>218</sup> However, neither in Roman law nor in Roman-Dutch law was the father entitled to alienate the child's immovable assets without an order of court.<sup>219</sup>

Property earned by minor children while they lived with their parents and while they were being supported by their parents, was *peculium profecticium* and belonged to the father.<sup>220</sup> This rule applied to property acquired by the children's services or out of their father's property. The reason for this was that parents had to be compensated from this property for the money they spent on the maintenance and education of their children.<sup>221</sup> When the child's earnings exceeded the cost of maintenance and education, the child was entitled to compensation when his parents' estate was divided.<sup>222</sup>

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<sup>216</sup> Grotius *Inleidinge* 1.6.3; Voet *Commentarius* 15.1.6.

<sup>217</sup> Voet *Commentarius* 15.1.6.

<sup>218</sup> Spiro 1954 *THRHR* 257-258.

<sup>219</sup> Grotius *Inleidinge* 1.8.6; Conradie 1948 *SALJ* 65-66.

<sup>220</sup> Grotius *Inleidinge* 1.6.1; Voet *Commentarius* 15.1.4.

<sup>221</sup> Voet *Commentarius* 15.1.4. Conradie 1948 *SALJ* 63 indicated that "the view that earnings of a child who is being maintained by the father or mother pass *by right of peculium profecticium* to the parents is also incorrect. It is true that the whole of the earnings must be paid to the parents, but such earnings are payable to the parents as *a set-off against the cost of maintenance and education*" (my italics).

<sup>222</sup> Voet *Commentarius* 15.1.5. Also see Conradie 1949 *SALJ* 63 (who erroneously quotes Voet *Commentarius* 25.1.5 as authority for this statement); Spiro 1965 *THRHR* 262.

## 5 CONCLUSION ON THE ORIGIN OF THE ROMAN-DUTCH CONCEPT OF PARENTAL AUTHORITY

From the above it is clear that parental authority in Roman-Dutch law differed radically from parental authority in Roman law, whereas there were numerous similarities between parental authority in Germanic and Roman-Dutch law. The Roman-Dutch concept of parental authority differs from the *patria potestas* of Roman law in the following respects:

- The most prominent difference between the Roman-Dutch and Roman concepts of parental authority can be found in the nature of parental authority. As indicated above,<sup>223</sup> parental authority in Roman law vested the *paterfamilias* with a kind of quasi-ownership in respect of his children. *Patria potestas* was exercised for the benefit of the *paterfamilias*, and its continuance depended on the life and decision of the father, and not on the needs and interests of the child.<sup>224</sup>

The protective character of parental authority in Roman-Dutch law is in sharp contrast with the absolute control which the *paterfamilias* had over his children in Roman law. In Roman-Dutch law, parents were obliged to care for and educate their children. The protective character of parental authority in Roman-Dutch law had its origin in Germanic law. As indicated above,<sup>225</sup> legal capacity in Germanic law depended upon the ability to bear arms. Since women and children were physically unable so bear arms, they were subjected to *mund*. *Mund* had to be exercised in the interests of the child.<sup>226</sup>

- The second difference between the Roman-Dutch concept of parental authority, and

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<sup>223</sup> See ch 2 par 2.1 & 2.5.

<sup>224</sup> Sohm *Institutes* 507.

<sup>225</sup> See ch 2 par 3.6 above.

<sup>226</sup> Sohm *Institutes* 507; Studiosus 1946 *THRHR* 33-34, 36.

the *patria potestas* of Roman law lies in its duration. The Roman *patria potestas* lasted until the death of the father, unless it was terminated before that date by emancipation, adoption or the marriage of a daughter.

In Roman-Dutch law, on the other hand, parental authority was automatically terminated when the child reached a certain age, or when the child got married. As indicated above,<sup>227</sup> the termination of parental authority when the child reached a certain age, or when the child got married, also has a Germanic origin.

- The third difference between the Roman and Roman-Dutch concepts of parental authority can be found in the person that exercises the authority. In Roman law *patria potestas* was exercised by the *paterfamilias*. The mother, who was herself subject to *potestas*, had no authority in respect of her children.

In contrast, parental authority over the person of the child was shared by both parents in Roman-Dutch law, while the father was vested with guardianship. As indicated above,<sup>228</sup> the origin of this rule can also be found in Germanic customary law.

It would thus appear that the conclusion reached by some authors<sup>229</sup> that parental authority as it applied in Roman-Dutch law was based on Germanic customs, and not on Roman law, is justified.

## 6 DEVELOPMENT OF THE CONCEPT “PARENTAL AUTHORITY” IN SOUTH AFRICA SINCE 1652

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<sup>227</sup> See ch 2 par 3.5 above.

<sup>228</sup> See ch 2 par 3.6 above.

<sup>229</sup> Spiro *Parent and child* 3; Studiosus 1946 *THRHR* 35; Wessels *History* 417.

## 6.1 Introduction

The history of South African law consists of the history of Roman-Dutch law on the European continent and its transposition to and reception in South Africa.<sup>230</sup> It was already indicated that the concept “Roman-Dutch law” should be used in its wider sense, which is the common law (*ius commune*) of Europe that developed from the *Corpus Iuris Civilis* of Justinian since the early Middle Ages, and not in its narrow sense (ie the law of the province Holland during the seventeenth and eighteenth centuries).<sup>231</sup>

When Jan van Riebeeck occupied the Cape of Good Hope in 1652 for the *Vereenigde Oost-Indische Compagnie* (VOC) Roman-Dutch law came to South Africa. For the next 150 years Roman-Dutch law was the law of the Cape. When the Cape came under British rule in 1806, Roman-Dutch law was and remained the basic common law. Modern South African law is Roman-Dutch law, modified to some extent by the influence of English law. The influence of English law could be seen mainly in the fields of civil and criminal procedure, law of evidence, and mercantile law (especially company law).<sup>232</sup>

## 6.2 Development of the concept parental authority

As indicated above,<sup>233</sup> Roman-Dutch law was the common law of the South Africa when the Cape came under British rule in 1806, and it remained so. Spiro<sup>234</sup> indicates that this is particularly true regarding the law of parent and child. He refers to the following decision in *Van Rooyen v Werner*.<sup>235</sup>

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<sup>230</sup> Hahlo & Kahn *Legal system* 329.

<sup>231</sup> See ch 2 par 4.1 above.

<sup>232</sup> Hahlo & Kahn *Legal system* 329-330, 575-576; Van Zyl *Geskiedenis* 420-421, 443 *et seq.*

<sup>233</sup> See ch 2 par 6.1 above.

<sup>234</sup> Spiro *Parent and child* 5.

<sup>235</sup> (1892) 9 SC 425 at 428 *et seq.*

“Firstly, as to the father, he is the natural guardian of his legitimate children until they attain majority. During his lifetime he alone may appoint tutors to take his place after his death, during his children’s minority ... He alone is entitled to their custody, has control over their education, and can consent to their marriage. On the other hand he is bound to maintain them until they can maintain themselves. He no longer enjoys a life interest in any part of their property, but where they have means of their own, derived either from their own earnings, or otherwise, he can recoup himself for his expenses of maintenance out of such means. He has the right to administer their property, but he may lose this right by allowing them to live apart from him, and openly to exercise some trade or calling. Until they have thus been virtually emancipated, or until they become majors, either by marriage, or by attaining the age of twenty-one years, he has the management of their property, except such property as has been left to them by others and placed under a different administration.”

Spiro indicates that, in addition to being a crisp summary of the South African law of parent and child, “[t]his summary does not in any material respect differ from the Roman-Dutch law ...”.<sup>236</sup> Although it is certainly true that the Roman-Dutch and South African law of parent and child is similar in material respects,<sup>237</sup> there has been a lot of development and refinement of the concept “parental authority” in modern South African law (both in case law and statute law).

One of the main trends has been the gradual relaxation of the father’s rights, and the gradual recognition of the mother’s rights in respect of the child. In modern South African law, both parents normally have equal custody rights and obligations in respect of their legitimate children.<sup>238</sup>

In Roman-Dutch law, guardianship of the child vested in the father solely.<sup>239</sup> In modern South African law the principle of equal guardianship was established by the Guardianship

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<sup>236</sup> Spiro *Parent and child* 5.

<sup>237</sup> See, in general, ch 3 below in this regard.

<sup>238</sup> See ch 3 par 4.3 below.

<sup>239</sup> See ch 2 par 4.4.2.2. above.



Act 192 of 1993.<sup>240</sup> This Act provides that a woman is the guardian of her minor children born from a valid marriage, and that such guardianship is equal to that which a father has under the common law.<sup>241</sup>

Furthermore, some development took place in case law regarding the proprietary capacity of the minor. Spiro<sup>242</sup> indicates that the distinction between *peculium profecticium* and *peculium adventicium* initially still featured in the reported cases.<sup>243</sup> As mentioned earlier, *peculium profecticium* was property derived from the father or given to the son with the intention of conferring a benefit on the father (excluding property donated by a father to his child). Every other property would fall in the category of *peculium adventicium*. Spiro says the following:

“Since [*peculium adventicium*] belongs clearly to the child, it is only necessary to ascertain whether the present law still knows of property of children other than [*peculium adventicium*], in other words, whether there are still different classes of property of children.”

Although the courts on occasion (when asked to authorise the alienation or mortgaging of immovable property belonging to the minor)<sup>244</sup> took into account the origin of the property (ie whether the minor had acquired it from the parents or from persons other than the parents), this was merely one of the factors considered in the exercise of their judicial discretion. Moreover, according to Spiro it really constituted a recognition of the legal ownership vesting in the minor concerned. It is thus clear that this aspect of Roman-Dutch law (ie the minor’s capacity to own assets) has undergone further development in South African case law, which development took the form of equating the different classes of

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<sup>240</sup> See ch 3 par 4.2.1 below.

<sup>241</sup> S 1(1).

<sup>242</sup> Spiro *Parent and child* 94. Also see ch 3 par 4.2.2 below.

<sup>243</sup> See eg *Ex parte Estate Gates* 1919 CPD 162; *Ex parte Brink* 1948 4 SA 273 (O) at 274; *Ex parte Joubert* 1949 2 SA 109 (O).

<sup>244</sup> See the cases quoted in ch 2 fn 243 above.

property for children.

Lastly, statutory development took place in modern South African law regarding the age of majority. In Roman-Dutch law (specifically the 16th century) men reached majority at the age of 25, and women at the age of 20,<sup>245</sup> while minority comes to an end at the age of 21 in South African law.<sup>246</sup> The South African Law Commission<sup>247</sup> has recommended lowering the age of majority to 18 years and has included a clause to this effect in the Children's Bill.<sup>248</sup>

In summary: modern South African law in general follows the Roman-Dutch concept of "parental authority". This principle is, however, subject to certain development and refinement of the concept "parental authority" in both case law and statute law.

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<sup>245</sup> See ch 2 par 4.3 above.

<sup>246</sup> Age of Majority Act 57 of 1972 s 1.

<sup>247</sup> See ch 1 par 1 above.

<sup>248</sup> Draft Children's Bill clause 29; Social Development's draft Children's Bill clause 17.