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Remarks on two aspects of patria potestas in Roman law

Summary
A Roman *pater familias* was entitled to the following positive rights: *ius vitae ac necis*, *ius exponendi*, *ius vendendi* and *ius noxae dedendi.* What follows is an in-depth analysis of the changes in *ius vitae ac necis* and *ius exponendi*. *Ius vitae ac necis* denotes right of disposal over the life and death of a *filius/filia familias*, while *ius exponendi* the right to expose newborn infants. Exposing a child often contained its death or wilful murder; e.g., in case of a deformed child when the aim was to get the family or the community rid of *prodigium* representing ill luck. Therefore, it seems to be more proper to discuss the rights a father had against newborn infants—no matter if they applied to killing or only exposing the child—as part of *ius exponendi* since killing or exposing children was several times limited and sanctioned in a single imperial decree. Originally, *ius vitae ac necis* was sacral and punitive law power. Its sacral character came to the front when killing a deformed child since this right is the component of the father's power over his newborn infant, and this will be discussed under the heading *ius exponendi*; its punitive law aspect will become obvious when it is used against an adult child. This paper, first, intends to describe changes in *ius vitae ac necis*, and dwell on the restrictions and rules of procedure of exercising it (I.). After that, changes in *ius exponendi* will be followed up, with special regard to the regulation of the legal status of the exposed child (II.).

Keywords: patria potestas, ius vitae ac necis, ius exponendi

In Roman law *potestas* always denotes some power; *plena in re potestas* is full power of the owner of the thing over the thing, by which "*in his own property everybody can do everything that does not disturb others*".[1] *Pater familias* was entitled to *patria potestas* over his children and *dominica potestas* over his slaves.[2] *Patria potestas*, just as power over one's wife, *manus*, comes from the same full-scope power of the head of the family. This power is total: on the one hand, because free family members, slaves and lifeless things are all subjected to it; on the other hand, because it contains the right to destroy things and kill the above mentioned persons.[3] Consequently, the power over persons and things the head of the family was entitled to (*potestas, manus, mancipium, dominium*) developed from the same ancient power, none of the formations of power served as an example for the other[4], which clearly refutes Mommsen's view that the father had ownership over his children.[5] According to Ulpian, *pater*

[1] Ulp. D. 8, 5, 8, 5.
[2] Paul. D. 50, 16, 215. *'Potestatis' verbo plura significantur*: *In persona magistratuum imperium: in persona liberorum patria potestas: in persona servi dominium.*
[3] Kaser, Max: *Der Inhalt der patria potestas*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 83. 1971. pp. 62–87., 62.
[4] Kaser 1971. p. 63. *In Warheit beruht die Gleichartigkeit* der *Gewalten über die Personen und über die Sachen nur darauf, daß sie beide, auch noch lange Zeit nach ihrer Ablösung aus der einheitlichen Urgewalt, gleich total geblieben sind. Keine hat der anderen zum Vorbild gedient, sondern beide sind ebenso ursprünglich, wie die Teilung einer Sache in einheitliche Teile den Teilstücken im gleichen Augenblick ein selbstandiges Dasein verleiht.*
[5] Mommsen, Theodor: *Römisches Strafrecht*. Leipzig 1899. p. 17., 20.

familias is the one who is entitled to dominion in his house.[6] (*Domus* is also a sacral concept, which had its own household gods (*dii penates*).[7]
It is well known that according to Roman law certain persons have rights of their own, such as the *pater familias*, others are under power, such as the wife (*uxor in manu*), the person in *mancipium* and the family child under *patria potestas*.[8] Several descriptions of *patria potestas* can be found in the sources of Roman law, e.g. in *Institutiones* of Gaius[9] and Iustian.[10] Almost surprised, Gaius notes that such an extended father's power does not exist anywhere else, perhaps only among the Galatas. (He is presumably wrong on this point since we have information on similar extensive *potestas* in the Antiquity among the Celts in Gaul[11], as it is described by Caesar.[12]) Although several presentations of *patria potestas* can be found in the sources, it was not defined uniformly. Presumably, they considered it unnecessary to determine it exhaustively since *patria potestas* was clearly the product of the Roman spirit, and it owed its existence not to the State's lawmaking as it went back to times long before the State.[13] Only *sui iuris* citizens with full right could be *patres familias*[14], all the persons were under *patria potestas* over whom the *pater familias* exercised his rights not due to *dominica potestas* or *manus*: children begotten in lawful marriage[15], adopted children[16], legitimated children, wives of blood children and adopted children (in case of *manus* marriage), if their father was under *patria potestas*, grandchildren, great-grandchildren etc. and their wives (in case of *manus* marriage).[17] In Watson's definition, *patria potestas* meant the power that in Roman society the male head of the family was entitled to over the free family members subordinated to him (apart from the wife, who was under *manus*).[18]
Pater familias was entitled to the following rights: *ius vitae ac necis*, *ius exponendi*, *ius vendendi* and *ius noxae dedendi.*[19] What follows is an in-depth analysis of the changes in *ius vitae ac necis* and *ius exponendi*.

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[6] Ulp. D. 50, 16, 195, 2. *Paterfamilias est, qui in domo dominium habet.*
[7] Cic. *dom.* 41. *Quid est sanctius, quid omni religione munitius quam Domus unus cuiusque civium. Hic arae sunt, hic foci, hic dii penates, hic sacra religiones ceremoniae continentur. Hoc profugium est ita sanctum, ut inde abripi neminem fas sit.*
[8] *Inst.* 1, 8.
[9] Gai. *inst.* 1, 55. *Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus. Quod ius proprium civium Romanorum est; fere enim nulli alii sunt homines qui talem in filios suos habent potestatem, qualem nos habemus. Idque divus Hadrianus edicto, quod proposuit de his qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. Nec me praeterit Galatarum gentem credere in potestate parentum liberos esse.*
[10] *Inst.* 1, 9. *In potestate nostra sunt liberi nostri, quos ex iustis nuptiis procreaverimus. Nuptiae autem sive matrimonium est viri et mulieris coniunctio individuam consuetudinem vitae continens. Ius autem potestatis, quod in liberos habemus, proprium est civium Romanorum: nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus. Qui igitur ex te et uxore tua nascitur, in tua potestate est: item qui ex filio tuo et uxore eius nascitur, id est nepos tuus et neptis, aeque in tua potestate, et pronepos et proneptis et deinceps ceteri, qui tamen ex filis tua nascitur, in tua potestate non est, sed in patris eius.*
[11] Mitteis, Ludwig: *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*. Leipzig 1891. p. 24.
[12] Caes. *Gall.* 4, 19, 3–4. *Viri in uxores sicuti in liberos vitae necisque habent potestatem, et cum pater familiae inlustiore loco natus decessit, eius propinqui conveniunt et de morte, si res in suspicionem venit, de uxoribus in servilem modum quaestionem habent, et si conpertum est, igni atque omnibus tormentis excruciatas interficiunt. … omnia quaeque vivis cordi fuisse arbitrantur in ignem inferunt, etiam animalia ac paulo supra hanc memoriam servi et clientes, quos ab iis dilectos esse constabat, iustis funeribus confectis una cremabantur.*
[13] Pólay, Elemér: *Az atyai hatalom intézményének alapvonalai a római jogban*. (Principles of patria potestas in Roman Law) Miskolc 1940. p. 7.
[14] *Inst.* 1, 9, 1–2.
[15] Gai. *inst.* 1, 55.
[16] Gai. *inst.* 1, 97.
[17] Pólay 1940. 14.
[18] Watson, Alan: *The Law of Persons in the Late Roman Republic*. Oxford 1967. p. 77.
[19] Nótári, Tamás: *Római köz- és magánjog*. (Roman Public and Private Law) Szeged 2011. p. 176.

I. In Antique sources several references can be found to *ius vitae ac necis* that constituted an essential element of the *potestas* of the *pater familias*.[20] One of the royal laws left to us by Dionysius of Halicarnass under the name of Romulus regulates the father's punitive power over his adult child. According to it, the father was entitled to full-scope power over his son during the son's whole lifetime, he was allowed to restrict his personal freedom, beat him, exile him in handcuffs to do rural work, and kill him; thus, the source, listing the canon of punishments that could be imposed, refers to the possibility of exercising *ius vitae ac necis* almost as *ultima ratio*.[21] Although the law does not say anything on either the scope of application of these punishments or the procedure necessary for imposing them, it can be made probable that the family child was not at the mercy of the father, if we consider the strict control that the *gens* exercised initially over the internal life of the family and which was later assumed by the *censor*.[22] We know from Dionysius that *censores* controlled how the *pater familias* brought up their children and if they deemed upbringing too strict or too mild, they took firm measures; they acted similarly with regard to disciplining slaves.[23] Presumably, *censores* also took care to ensure that the religious cult of the house community was properly fulfilled.[24] By clear irony, Plutarch notes that *censores* did not leave either marriage or upbringing of children or feasts without control, instead they exercised supervision over everybody's conduct of life and political thinking.[25]

The first proof of the restrictions of exercising *ius vitae ac necis*, which constituted the *content* of *patria potestas,* is provided by the stipulation of the Twelve Table Law that can be more or less safely reconstructed from the Gaius text of *Codex Veronensis* and from *Fragmentum Augustoduniense*: *"Ergo tum praetor corpus te dedere dom ……. parentem putes …… iure uti t……<do> mino vel parenti etiam occidere eum et mortuum dedere in no<xam> ……. ……. patria potestas potest. n ……. cum patris potestas talis est ut habeat vitae et necis po<testatem>. De filio hoc tractari crudele est, sed… non est. … n post r…. <occi>dere sine iusta causa, ut constituit lex XII tabularum, sed deferre iu<dici> debet propter calumniam.*[26] *Fragmentum Augustoduniense* discusses the power of *pater familias* that gives him the right to kill the slave or family child who has caused damage to a third party delictually, and to fulfil the obligation of *noxae deditio* by handing over the corpse or a part thereof. Directly after that, it clearly states that *patria potestas* contains *ius vitae ac necis*, and that in accordance with the provisions of the Twelve Table Law the *pater familias* was not allowed to kill his son *sine iusta causa*. Krüger's reading of the text is not completely certain, however, in spite of these changes it is possible to read the phrase without any doubt *<occi>dere sine iusta causa, ut constituit lex XII tabularum*, i.e., that in accordance with the provisions of the Twelve Table Law the *pater familias* was not allowed to kill his son without *iusta causa*. The authenticity of the quotation would be doubtful if it should or could be presumed that this is only an independent insertion of the jurist who compiled *Fragmentum Augustoduniense* from Gaius's texts. However, in the present case rather fragmentary text of *Codex Veronensis* contains the *"…tabul…"*

[20] Cic. *dom*. 29. 77; *Pis* 40. 97; *fin* 1, 8; *rep* 2, 35; Val. Max. 5, 8, 2-5, 9, 1; 5, 10, 1; 6, 1, 6; Suet. *Tib*. 35; Liv. 1, 26; 2, 41; 8, 7; *epit*. 54; Plin. *nat*. 34, 4, 16; Auct. ad Her. 4, 16, 23; Sall. *Cat*. 39, 5; 52, 30; Sen. *clem*. 1, 11. 50; Quint. *decl*. 317; Dio Cass. 37, 36; Gell. 5, 19, 9.

[21] Dion. Hal. 2, 26, 4.

[22] Liv. 6, 20; Gell. 9, 2.

[23] Dion. Hal. 20, 13, 3.

[24] Pólay, Elemér: *A censori regimen morum és az ún. házibíráskodás.* (Regimen morum of the censors and the so called iudicium domesticum) Acta Universitatis Szegediensis XII. 1965. p. 5.

[25] Plut. *Cato mai*. 16.

[26] *Fragmentum Augustoduniense* 85–86. In: Collectio librorum iuris anteiustiniani. Edd. P. Krüger–Th. Mommsen–G. Studemund. Berolini 1923. p. 160.

fragment[27], which can mean nothing else than *leges XII tabularum*, which makes it highly probable that this provision from the Twelve Table Law was contained in the original Gaius text too.[28] Kunkel claims that originally *iusta causa* meant that it was mandatory to prove that the son had committed a crime which made it lawful to apply death penalty.[29] Presumably, demonstration had a determined order where, after the case had been accurately described and investigated, the family child charged with committing the crime was given the opportunity to defend himself. This is also implied by the phrases found in the cases to be discussed later *cognita domi causa*[30], *inspecta diligentissime causa*[31], *audita causa* and *quae adulescens pro se dixerat*[32].

The fragment *deferre iu<……> debet propter calumniam* was read by its first publisher, Chatelain as *hoc*, which was borrowed from him by Krüger too. First, Ferrini and Scialoja read and supplemented it to *iu<dici>*, which version was soon shared by Krüger too. However, as it has been proved by Kunkel[33], the *iu<dici>* reading is not acceptable either in terms of content or textual criticism. Namely, if the translation of *deferre iudici* is "*beim Richter Anklage erheben*" or "*dem Richter anzeigen*", then, by interpreting *iudex* as a body of administration of justice (*öffentliche Justiz*), two opportunities are offered. Either the *pater familias* shall bring a charge against his son before the law to avoid *calumnia*; but this interpretation would fundamentally question the existence or exercisability of *ius vitae ac necis*, which constitutes a cardinal point of *patria potestas*. Or the *pater familias* had to report to the *iudex* the killing carried out by him owing to the *ius vitae ac necis* he was entitled to, and in this case it is difficult to harmonise a mere obligation to report with the prohibition of killing of the *filius familias sine iusta causa*. If we accept the reading *iu<……>* as proper, the addition *iu<dici>* cannot satisfy us because it does not fill up the *lacuna* present in the text. Namely, the edge of the page was cut off in equal width in order to use it again, so, at least seven-eight—and not four—letters are missing from each line; consequently, the addition *iu<dicibus>* instead of *iu<dici>* seems to be more acceptable. This reading will give sense if we interpret *iudices* not as judges of administration of justice but members of the *consilium*, the relatives and friends. At the same time, it is also possible that the reading *iu<……>* not having been confirmed can be replaced by *nec<essariis>* or *pro<pinquis>*. As the reading of the text raises serious problems, it should not be considered a proof beyond any doubt of the absolute necessity of *consilium necessariorum*, yet, from the above it is absolutely clear that in order to exercise *ius vitae ac necis* the crime of the *filius* had to be proved (*iusta causa*), if the father wanted to avoid the charge of murder. At the same time, other sources provide convincing proofs that to exercise *ius vitae ac necis* it was necessary to hold *iudicium domesticum* and to convene the *consilium necessariorum*: *"Maiores nostri dominum patrem familias appellaverunt, honores in domo gerere, ius dicere, permiserunt et domum pusillam rem publicam esse iudicaverunt.*"[34] Seneca, in his letter to Lucilius, mentions that the ancestors made it possible for the *dominus*, i.e., the *pater familias* to fulfil offices in the house community and exercise *iurisdictio*, thus, they considered the home or house community a reduced-sized copy of the State. The *dominus*, exercising punitive power, acted in compliance

[27] Gai. *inst*. 4, 80.
[28] Rabello, Alfredo Mordechai: *Effetti personali della „patria potestas"*. Milano 1979. p. 90; Visscher, Ferdinand de: *Le régime romain de la noxalité*. Bruxelles 1947. p. 175; Kunkel, Wolfgang: *Das Konsilium im Hausgericht*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 83. 1966. pp. 219–251., 243.
[29] Kunkel 1966. p. 243.
[30] Liv. 2, 41, 10.
[31] Val. Max. 9, 5, 1.
[32] Sen. *clem*. 1, 15, 3.
[33] Kunkel 1966. p. 244.
[34] Sen. *epist.* 47, 14.

with *exemplum maiorum*[35] and *priscum institutum* according to Tacitus;[36] in compliance with *mos maiorum* according to Sueton;[37] and in compliance with *consuetudo* according to Cicero[38]. The *iudicium* took place, within certain formalities, usually in the *atrium* of the home of the *pater familias*.[39]

With regard to the question whether *iudicium domesticum* was real jurisdiction, the literature is rather divided. The view that does not acknowledge *iudicium domesticum* as real jurisdiction can be traced back to Mommsen.[40] He refuses the concept of *iudicium domesticum* for being an *oxymoron*, and speaks about *Hauszucht* only, which can be called *coercitio* or *disciplina* too; so, *iudicium domesticum*, that is, according to him *Hauszucht* is nothing else than a sort of a *Gewissensgericht*.[41] Following Mommsen, Volterra claims that the judgment of the *iudicium domesticum* did not exempt the person under power from the State's court proceedings and the punishment imposed by it[42], and that the existence of State's court set up for judging the crime excludes the existence of *iudicium domesticum* as a legal institution.[43] Guided by a similar thought, Mommsen also misses the accurate description of the scope of crimes to be judged by *iudicium domesticum*.[44] According to Kunkel's opinion, this way of thinking was not typical of the Romans as scopes of authority overlapped in the order of the state administration of justice too, which also proves that the competence of the courts of justices ordered to judge determined crimes had never become exclusive, between domestic jurisdiction and the State's administration of justice, and while they existed side by side a mutual competition of competencies prevailed between them.[45] (A similar situation evolved between the *tresviri capitales* and the *quaestiones perpetuae*[46], and due to certain crimes it was possible to bring a charge before the *quaestio repetundarum*, the *quaestio maiestatis* or the *quaestio de vi* too.[47]) Kaser—although he does not resolutely refuse to give any significance to *iudicium domesticum* as Mommsen and Volterra—emphasises that it did not belong to the scope of *ius*.[48] *Iudicium domesticum* is considered real jurisdiction by those who more or less share Geib's opinion, as Geib claims that the *pater familias* was entitled to the right of punitive jurisdiction over the members of his family.[49] Romans considered the family a reduced-sized copy of the State, in which *pater familias* can be made equal to *magistratus* having *imperium*, and similarly their *iudisdicto* can be made parallel too[50], as

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[35] Tac. *ann.* 2, 50. *Adulterii graviorem poenam deprecatus, ut exemplo maiorum propinquis suis ultra ducentesimum lapidem removeretur suasit.*

[36] Tac. *ann*. 13, 32. *Isque prisco instituto propinquis coram de capite famaque coniugis cognovit et insontem nuntiavit.*

[37] Sue. *Tib*. 35. *ut propinqui more maiorum de communi sententia coercerent*

[38] Cic. *Rosc. Am.* 15, 44. *Quod consuetudine patres faciunt, id quasi novum reprehendis…*

[39] Val. Max 5, 8, 3. *Succurrebant effigies maiorum cum titulis suis ut eorum virtutes posteri non solum legerent, sed etiam immittarentur.*

[40] Mommsen 1899. pp. 16-26.

[41] Mommsen 1899. p. 17.

[42] Volterra, Edoardo: *Il preteso tribunale domestico in diritto romano*. RISG 85. 1948. pp. 103–153., 117.

[43] Volterra 1948. pp. 135. ff.

[44] Mommsen 1899. p. 20.

[45] Kunkel 1966. p. 222.

[46] Kunkel, Wolfgang: *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit.* München 1962. p. 76.

[47] Kunkel 1966. p. 223.

[48] Kaser 1971. p. 69. *Die Eindordnung der hauslichen Gerichtsbarkeit in den Bezirk der mores läßt vielmehr deutlich erkennen, daß sie bei der Scheidung von Recht und Sitte aus der Rechtsordnung ausschlossen worden ist.*

[49] Geib, Gustav: *Die Geschichte des römsichen Criminalprozesses*. Leipzig 1842. p. 82.

[50] Sen. *contr*. 10, 2, 8. *cetera iura puto, paterno imperio subiecta esse*; Gell 10, 23, 4. *Vir… mulieri iudex pro censore est, imperium quod videtur habet*. Sen. *epist*. 47, 14. *Maiores nostri dominum patrem familias*

Bonfante has already called the attention resolutely to this point.[51] This opinion was shared by Düll, although in his view in *iudicium domesticum* the *pater familias* was not necessarily bound by the opinion of the *consilium*.[52] Kunkel ties the wife's and children's capital culpability by all means to *consilium*, and believes that the *pater familias* could not make himself independent of the majority judgement of the *consilium* with regard to guilt or innocence of the accused.[53] Below we provide a few examples which reveal that if the father wanted to exercise the *ius vitae ac necis* he was entitled to and wanted to be exempted from the charge of murder, he had to deal with the case in *consilium necessariorum*.

Livy discloses two traditions on the conviction and death of Cassius.[54] According to one of them, his father executed the death sentence on him; after he had held the necessary trial at his home, he had his son whipped and executed. He offered the son's property to Ceres, he had a statue made of that and had it written on it that it had been made by Cassius's family. According to the other tradition, *quaestores* Caeso Fabius and L. Valerius brought a charge against Cassisus due to *perduellio* and convicted him in the proceedings conducted before the *comitium* in 486/5 B.C. Livius tends to give credit to the second tradition, however, the impossibility of this version has already been demonstrated by Mommsen too.[55] Therefore, in the tradition that can be considered authentic, an example of *iudicium domesticum* is presented to us. Killing on the father's order is not arbitrary because the cases have been investigated and negotiated. Livy does not expressly refer to *consilium necessariorum*, however, as the other cases published by him reveal this was natural to the writer of the age of Augustus, his intention by giving this account was primarily to highlight the *severitas* and *gravitas* of heads of family of ancient times.[56] According to Voci, the fact that it is the word *familia* and not the word *pater* that can be read on the statue erected for Ceres refers to a *giudizio commune*.[57] In the present case it seems to be proper to translate the word *familia* as *family* and not as *property* because also Livius mentions the *consecratio* of the son's *peculium* only, and *familia (pecuniaque)*[58] was not used as a synonym of *peculium*. The phrase *damnatus*, for that matter, does not prove that the father had adopted the judgment independently, *sine consilio* because the words *condemnare* and *damnare* in classical *quaestio* lawsuits denote the activity of the accuser too.[59]

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appellaverunt, honores illis in domo gerere, ius dicere permiserunt et domum pusillam rem publicam esse iudicaverunt.

[51] Bonfante, Pietro: *Corso di diritto romano*. Roma 1925. I. p. 98. *Tutto quanto il diritto punitivo del paterfamilias non e poi altrimenti spiegabile che come l'esercizio di un impero giurisdizionale. Le forme sono quelle di un giudizio publico; come il magistrato ha un consilium di sua libera scelta, cosi il paterfamilias convoca all'uopo un consilium necessariorum o propinquorum o anche di amici e di persone autorevoli—in un caso, si narra, un paterfamilias chiamo a consiglio quasi tutto il senato—ed ha luogo un vero giudizio, iudicium domesticum.*

[52] Düll, Rudolf: *Iudicium domesticum, abdicatio und apoceryxis.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 63. 1946. pp. 54–116., 60.

[53] Kunkel 1966. p. 249.

[54] Liv. 2, 41, 10-12. *Quem ubi primum magistratu abiit damnatum necatumque contstat. Sunt qui patrem auctorem eius supplicii ferant: eum cognita domi causa verberasse ac necasse peculiumque filii Cereri consecravisse; signum inde factum esse et inscriptum: 'Ex Cassia familia datum.' Invenio apud quosdam, idque propius fidem est, a quaestoribus Caesone Fabio et L. Valerio diem dictam perduellionis, damnatumque populi iudicio, dirutas publice aedes. Ea est area ante Telluris aedem. Ceterum sive illud domesticum sive publicum fuit iudicium, damnatur Servio Cornelio Q. Fabio consulibus.*

[55] Mommsen, Theodor: *Römisches Staatrecht I–III*. Berlin 1887–1888. II. p. 541.

[56] Kunkel 1966. p. 225.

[57] Voci, Pasquale: *Storia della patria potestas da Augusto a Diocleziano*. IURA 31. 1980. pp. 37–100., 53.

[58] See also Zlinszky, János: *Familia pecuniaque*. Jogtörténeti Tanulmányok VI. Budapest 1986. pp. 395-406.

[59] ThLL IV. 125 *condemno* B *de accusatore*: *efficere ut is quocum agitur condemnetur*; V. 17 *damno* B *de accusatore, efficere ut is quocum agitur damnetur.*

According to Valerius Maximus L. Gellius (*cos.* 72 B.C.; *censor* 70 B.C.), who charged his son with the intention to kill him and having committed adultery with his stepmother, invited almost the entire *senatus* to the trial to judge his son's crime.[60] He disclosed his suspicion to the accused and allowed him to defend himself; then, after very careful deliberation of the case he acquitted him on the grounds of the judgement of the *consilium* and of his own. The judgment was adopted *de consilii sententia*, so it was based on the votes of the *consilium*; *sua sententia* refers merely to the fact that the father found his son innocent too.[61] Volterra asserts that the father, being convinced of his son's innocence from the outset, convened the *consilium* to clarify his own honesty and to save his son from the popular action proceedings of *parricidium*.[62] Kunkel, however, calls the attention to the point that the source does not contain any reference to that, what is more, it speaks about a highly careful investigation of the charge, and that the state of facts of *parricidium* had never been extended to merely attempted or planned crime and that the assassination attempt was to be punished in certain cases only, even after *lex Cornelia de sicariis*.[63]

According to Seneca L. Tarius Rufus (*cos. suff.* 16 B.C.) punished his son, who tried to kill him, by exile only, and continued to pay him the previously set annuity.[64] If Seneca praised the *bonus pater familias* only, then the description of the case would serve as a proof of the unlimited punitive power of *pater familias*. The philosopher, however, commemorates Augustus too as *bonus princeps*. The praise of the emperor and description of his behaviour clearly reveals that the *filius*'s crime was judged by a *consilium*, and Augustus was its most respected member, however, a member only, because, taking care that the father should conduct the *cognitio*, he did not ask the *consilium* and its members to appear before him, instead, he went to see them at the home of the head of the family. After the *cognitio* had been conducted, in which his son was allowed to defend himself, in accordance with usual order of procedure the persons present cast their vote orally on the issue of the son's guilt, however, Augustus, preventing his own vote cast first as the ballot of the most highly ranked person from influencing the others, proposed voting in writing. After the boards, on which the *sententia*s were written, had been collected but had not been opened yet, he made an oath that he would not accept Tarius's inheritance. So, in this case the issue of guilt was decided in writing, and he did not want to influence them. In imposing the punishment, however, he wanted to urge the *consilium* to adopt a lenient judgment, which was carried out orally. Tarius had to decide on the basis of the majority of the votes cast, because if he had considered the *sententia*s advice only, then Augustus's efforts not to influence anybody by his vote and to count his ballot as equal to the other votes would have been unnecessary.

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[60] Val. Max. 5, 9, 1. *L. Gellius onmibus honoribus ad censuram defunctus, cum gravissima crimina de filio, in novercam conmissum stuprum et parricidium cogitatum, propemodum explorata haberet, non tamen ad vindictam continuo procucurrit, sed paene universo senatu adhibito in consilium expositis suspicionibus defendendi se adulescenti potestatem fecit inspectaque diligentissime causa absolvit eum cum sonsilii tum etiam sua sententia. Quod si impetu irae abstractus saevire festinasset, admisisset magis scelus quam vindicassset.*

[61] Kunkel 1966. p. 224.

[62] Volterra 1948. p. 133.

[63] Kunkel 1966. p. 224.

[64] Sen. *clem*. 1, 15, 2–6. *Cogniturus de filio Tarius advocavit in consilium Carsarem Augustum; venit in privatos penates, adsedit pars alieni consilii fuit, non dixit: 'Immo in domum meam veniat', quod si factum esset, Caesaris futura erat cognitio, non patris. Audita causa excussisque omnibus ex his quae adulescens pro se dixerat, et his, quibus arguebatur, petit, ut sententiam suam auisque scriberet, ne ea omium fieret, quae Caesaris fuisset. Deinde priusquam aperientur codicilli, iuravit se Tarii, hominis locupletis, hereditatem non aditurum. Tarius quidem eodem die et alterum heredem perdidit, sed Caesar libertatem sententiae suae redemit; et postquam adprobavit gratuitam esse severitatem suam, quod principi semper curandum est, dixit relegandum, quo patri videretur.*

In the case referred by Marcian, emperor Hadrian sent a father to exile who killed his son while they were hunting because he had an adulterous affair with his stepmother.[65] According to the emperor, the act of assassination is a deed worthy of a rogue and not a father, as the essence of *patria potestas* is *pietas* and not cruelty. The father should not have killed his son even if he had caught him in the act of adultery with his stepmother as he was not entitled to do that by *lex Iulia de adulteriis coercendis*.[66] Whereas, if the above mentioned law would have entitled the *pater familias* to kill his son or wife caught in the act of adultery, here he should not have exercised his such right because this was not a case of being caught in the act but a permanent adulterous affair (the phrase *adulterabat* is used here as *durativum*). In this case in *iudicium domesticum* a *consilium* should have been convened to judge over the offenders. The father did not do that, instead, he assassinated his son. It is more probable that here Hadrian punishes the father due to lack of proper punitive proceedings, *iudicium domesticum* and not just *schimpliche Gesinnung*, as Kaser presumes.[67]

Special attention should be paid to the fragment of Ulpian that states that the father shall not kill his son without hearing him; instead, he shall bring a charge against him before the principals of the province.[68] The first part of the text (*indauditum filium pater occidere non potest*) is perhaps the only trace of the existence of *iudicium domesticum* in Iustinian's *Digest*. The originality of the second part of the text (*sed accusare eum apud praefectum praesidemve provinciae debet*) has been questioned by Mommsen already[69], and Bonfante clearly considered it interpolated.[70] Perozzi believed that the description was possibly original because in his view in the times of Severus the rights the father was entitled to had not lost their effect yet, they were subordinated to the obligation to report to the *magistratus* only.[71] Kunkel adds the following explanation to this locus: The first part forbids the father to kill his son without hearing him; the second part, however, clearly refuses to give him the right of killing and thereby entirely and generally orders him to bring a charge before the State's court of justice. Therefore, it is probable that the original text applied to the case of holding the *iudicium domesticum*, and if under it the *filius* was allowed to defend himself, it permitted the killing of the son. Furthermore, in his opinion, the part on *praeses* and *praefectus* is not necessarily interpolated because the father could also waive exercising his punitive power and bring the son's crime before public court of justice, and so, perhaps, the compilers deleted the reference to *iudicium domesticum* only, which might have run as follows: "*sed cognoscere de eo cum amicis vel accusare eum apud praefectum praesidemve provinciae debet*."[72]

In the *Digest*, apart from the above-mentioned case, all traces of *iudicium domesticum* and *consilium necessariorum* had been carefully deleted by the compilers as *patria potestas* had been reduced to a merely instructive, disciplinary power already before Iustinianus, and so the *ius vitae ac necis* exercised in *iudicium domesticum* had completely lost its significance. Consequently, the lack of *iudicium domesticum* and *consilium* cannot be proved by the *argumentum e silentio* that we cannot find any reference to them in Iustinian's codification.[73]

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[65] Marc. D. 48, 9, 5. *Divus Hadrianus fertur, cum in venatione filium suum quidam necaverat, qui novercam adulterabat, in insulam eum deportasse, quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere.*

[66] D. 48, 5.

[67] Kaser 1971. p. 69.

[68] Ulp. D. 48, 8, 2. *Indauditum filium pater occidere non potest sed accusare eum apud praefectum praesidemve provinciae debet.*

[69] Mommsen 1899. p. 618.

[70] Bonfante 1925. p. 111.

[71] Perozzi, Silvio: *Instituzioni di diritto romano*. Roma 1928. I. p. 424. On the contrary see Kunkel 1966. p. 248.

[72] Kunkel 1966. p. 249.

[73] Kunkel 1966. p. 247.

The fact that *iudicium domesticum* was required in order to exercise *ius vitae ac necis* is apparent from the above. In certain exceptional cases the law allowed killing *sine iudicio* too. Among these cases the regulations of *lex Iulia de adulteriis coercendis* had highly great significance. This law provides the father with the right to kill both his daughter caught in the act of adultery and the man committing adultery, with impunity; however, it confines this right to certain terms and limits.[74] The daughter had to be under the father's[75] *potestas*[76], the *adulterium* had to be committed at his own or his son-in-law's house[77], the father had to kill his daughter too, along with the man. If he killed the *correus* only, it was considered *homicida*, and his deed was to be judged in accordance with *lex Cornelia de sicariis*.[78] The father who killed the *correus* only was not punishable in the event that his daughter stayed alive because she fled and not because the father saved her life.[79] The *rescripta* of emperors Marcus Aurelius and Commodus provided the father with acquittal from the charge of *homicidium* in the case where the father had killed the *correus* but his daughter stayed alive, if the father had seriously wounded the daughter—which reveals that he wanted to kill her—but his daughter recovered owing to pure luck.[80] The father had to catch the offenders *in ipsis rebus Veneris*.[81] He had to kill both offenders at the same time, without any delay (*uno ictu et uno impetu et aequali ira*).[82] If the father killed his daughter only after a certain amount of time has elapsed, it was deemed *homicida*, if, however, the daughter escaped, and the father reached and killed her—as he acted *continuatione animi*—he was acquitted from the charge of *homicidium*.[83] What is the connection between *ius vitae ac necis* arising from *patria potestas* and *ius occidendi* provided by *lex Iulia de adulteriis coercendis*?[84] Papinian[85], to the question

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[74] Cantarella, Eva: *Adulterio, omicidio legittimo e causa d'onore in diritto romano*. Studi in onore di G. Scherillo I. Milano 1972. pp. 243–274.

[75] Pap. D. 48, 5, 23. (22) *Nec in ea lege naturalis ab adoptivo pater separatur.*

[76] Pap. D. 48, 5, 21. (20) *Patri datur ius occidendi adulterum cum filia quam in potestate habet: itaque nemo alius ex patribus idem iure faciet: sed nec filius familias pater*. Ulp. D. 48, 5, 24 (23), 2. *Quare non, ubicumque deprehenderit pater, permittitur ei occidere, sed domi suae generive sui tantum, illa ratio redditur, quod maiorem iniuriam putavit legislator, quod in domum patris aut mariti ausa fuerit filia adulterum inducere.*

[77] Paul. Coll. 4, 12, 1. *Permittitur patri tam adoptivo quam naturali, adulterum cum filia cuiusque dignitatis domi suae vel generi sui deprehensum sua namu occidere*.

[78] Paul. Coll. 4, 2, 6. *Sed si filiam non interfecerit sed solum adulterum, homicidii reus est.* Pap. Coll. 4, 9, 1. *Si pater quis adulterum occidit et filiae suae pepercit, quaero quid adversus eum sit statuendum? Respondit: sine dubio iste pater homicida est: igitur tenebitur lege Cornelia se sicariis.*

[79] Pap. Coll. 4, 9, 2. *Plane si filia non voluntate patris, sed casu servata est, non minimam habebit defensionem pater, quod forte fugit filia. Nam lex ita punit homicidam, si dolo malo homicidium factum fuerit, hic autem pater non ideo servavit filiam, quia voluit, sed quia occidere eam non potuit.*

[80] Mac. D. 48, 5, 33. (32) *Nihil interest, adulteram filiam prius pater occiderit an non, dum utrumque occidat: nam si alterum occidit, lege Cornelia reus erit. Quod si altero occiso alter vulreatus fuerit, verbis quidem legis non liberatur: sed divus Marcus it Commodus rescripserunt impunitatem ei concedi, quia licet interempto adultero mulier supervixerit post tam gravia vulnera, quae ei pater infixerat, magis fato quam voluntate eius servata est.*

[81] Ulp. D. 48, 5, 24 (23) *Quod ait lex 'in filia adulterum deprehenderit', non otiosum videtur: voluit enim ita demum hanc potestatem patri competere, si in ipsa turpitudine filiam de adulterio deprehendat. Labeo quoque ita probat, et Pomponius scripsit in ipsis rebus Veneris deprehensum occidi: et hoc est quod Solo it Draco dicunt en erga.*

[82] Ulp. D. 48, 5, 24 (23), 4. *Quod ait lex 'in continenti filiam occidat', sic erit accipiendum, ne occiso hodie adultero reservet et post dies filiam occidat, vel contra: debet enim prope uno ictu et uno impetu utrumque occidere, aequali ira adversus utrumque sumpta. Quod si non affectavit, sed, dum adulterum occidit, profugit fulia et interpositis horis adprehensa est a patre qui persequebatur, in continenti, videbutur occidisse.*

[83] Paul. Coll. 4, 2, 6–7. *Sed si filiam non interfecerit, sed solum adulterum, homicidii reus est. Et si intervallo filiam interfecerit, tandundem est, nisi persecutus illam interfecerit: continuatione enim animi videtur legis autorictate fecisse.*

[84] Pap. Coll. 4, 8, 1. *Cum patri lex regia dederit in filium vitae necisque potestatem, quod bonum fuit lege conprehendi, ut potestas fieret etiam filiam occidendi, velis mihi rescribere; nam scire cupio. Respondit numquid*

why it was necessary to set forth in law that the father had the power to kill his daughter too although the relevant *lex regia* granted him *vitae necisque potestas* over his children, responds that the law does not vest the father with new power, instead, it obliges him to kill his daughter too together with the man committing adultery because thereby—i.e., if he does not pardon his daughter either—he acts with greater equity. The question might arise why it is necessary to discuss this legal institution in details in the *Digest* and the *Collatio*. As it has become apparent from the above, the father's *ius vitae ac necis* terminated in the 4th c. already and careful compilers deleted almost all references to *iudicium domesticum* necessarily related to it. Thus, it became indispensable to maintain *lex Iulia de adulteriis coercendis*, which continued to operate now without *ius vitae ac necis* arising from *patria potestas*.

Ius occidendi that may be exercised over the daughter caught in the act of adultery is an organic part of *patria potestas*. Probably, here they applied the criminal law principle that punishment—in the present case: killing—of offenders caught in the act (*manifesti*) was permitted without proceedings too.[86] This right would continue to hold against a married daughter too, even if his father had given her *in mariti manum*, which is probably connected with the provisions of *lex Iulia de adulteriis coercendis* that restricted *manus*. Namely, according to *leges regiae*, the husband judged, in the *consilium domesticum* together with relatives, over his wife's acts to be punished by death such as adultery and drinking wine.[87] If, however, he had caught her wife in the act of adultery (*in adulterio uxorem tuam si prehendisses*), according to Cato, he could kill her with impunity (*impune*) and without any special proceedings (*sine iudicio*).[88] The *lex Iulia de adulteriis coercendis*, however, deprived the husband from this right, even in the case where his wife was under *manus*; thereby Augustus weakened *manus* and adjusted it to the current conditions of the age.[89] He argued that whereas father's love encouraged him to give pardon, a husband's rage urged him to take hasty revenge.[90] If the husband nevertheless killed his wife caught in the act of adultery, he had to account for his act under *lex Cornelia de sicariis*.[91]

The father's *ius vitae ac necis* remained untouched until the 4th c. A.D. in spite of minor or greater legal or out-of-law restrictions. Constantine speaks about *ius vitae ac necis* still as a living legal institution.[92] In 365, this right of the *pater familias* weakened to pure punitive power; the emperor's decree determined the father's duty that he should reprimand young people for their blunders, and should prevent them from committing further faults.[93] With a

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ex contrario praestat nobis argumentum haec adiectio, ut non videatur lex non habenti dedisse, sed occidi eam adultero iussisse, ut videatur maiore aequitate ductus adulterum occidisse, cum nec filiae pepercerit?

[85] A szöveg eredetiségét illetően lásd Rabello 216.

[86] Kunkel 1966. p. 240.

[87] Dion. Hal. 2, 25.

[88] Gell. 10, 23, 4. *Verba Marci Catonis adscripsi ex oratione quae inscribitur De dote, in qua id quoque scriptum est, in adulterio uxores deprehensas ius fuisse maritis necare: 'Vir' inquit 'cum divotium fecit, mulieri iudex pro censore est, imperium quod videtur habet, si quid perverse taetreque factum est a muliere; multiatur si vinum bibit; si cum alieno viro probri quid fecit, condemnatur.' De iure autem occidenti ita scriptum est: 'In adulterio uxorem tuam si prehendisses, sine iudicio impune necares; illa re, si adulterares sive tu adulterare, digito non audetur contingere, neque ius est.'*

[89] Kunkel 1966. p. 237.

[90] Pap. D. 48, 5, 23 (22), 4. *Ideo autem patri, non marito mulierem et omnem adulterum remissum est occidere, quod plerumque pietas paterni nominis consilium pro liberis capit: ceterum mariti calor et impetus facile decernentis fuit refrenandus.*

[91] Pap. Coll. 4, 10, 1. *Si maritus uxorem suam in adulterio deprehensam occidit, an in legem de sicariis incidat, quaero. Respondit: nulla parte legis marito uxorem occidere conceditur: quare aperte contra legem fecisse eum non ambigitur.*

[92] CTh. 4, 8, 6. *Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas permissa est, eripere libertatem non liceret.*

[93] C. 9, 15, 1. *In corrigendis minoribus pro qualitate dilicti senioribus propinquis tribuimus potestatem, ut quos ad vitae decora domesticae laudis exempla non provocant, saltem correctionis medicina compellat. Neque nos in*

few changes, Iustinianus borrowed Constantine's text from *Codex Theodosianus*. However, he made such changes specifically with regard to *ius vitae ac necis* as he mentioned it merely as the power that the *pater familias* used to be entitled to.[94] This clearly reveals that by the age of Iustinianus *ius vitae ac necis* as a legal institution had long become extinct, and application of the provisions set forth therein was subject to criminal law regulation.

II. *Ius exponendi* and *ius vitae ac necis* exercised over newborn infants had been contained from the outset by *patria potestas*. A *lex regia* left to later ages under the name Romulus obliged the *pater familias* to bring up every male child and firstborn female child, and forbade him to kill children younger than three years, except for deformed children immediately after their birth. It did not forbid exposition of the latter either, however, it set the condition that they had to be shown to five neighbours. On those who might not comply with this law, it imposed the punishment of confiscating half of their property.[95] This norm, which belonged to the system of sacral law, had at one time actually restricted *patria potestas*, yet, later on we can find no reference to its application—especially with regard to applying forfeiture of property as sanction in such cases.
After that, we learn from Cicero of a provision of the Twelve Table Law, which probably not only allowed but ordered the *expositio* of deformed children: *"Cito necatus tamquam ex XII tabulis insignis ad deformitatem puer*."[96] Just as Romulus's *lex regia* did not forbid exposition of deformed children, the norm from the Twelve Table Law left to us from Cicero's *De legibus* also permits, what is more, perhaps orders their destruction. *Leges regiae* provides for exposition of children, the Twelve Table Law for killing children, however, presumably these phrases in these sources—even if they are not used as synonyms—denote acts with identical outcome in terms of the child's fate. For, in the case of deformed children nobody thought of adopting and bringing them up, which can be attributed to practical and religious causes. In Roman thinking, a deformed child was considered *prodigium*, which the community had to be get rid of during *procuratio prodigii*. Romans called the usual order, repose of the world *pax deum*, which meant gods' peaceful relation to men, and if this order was upset, it could be always attributed to gods stepping out of this repose.[97] Breaking down of the cosmic order, so every extraordinary, new event was considered *prodigium*.[98] The etymology of the word is dubious; in Walde–Hofmann's interpretation *prodigium* comes from *prod-aio*,[99] accordingly *prodigium* means *foretelling* or *forecastring*. This approach does not seem to be acceptable because "*prodigium itself does not declare anything*"[100], actually, needs to be interpreted, that is why they used the assistance of *pontifex*es, the *Sibylla books* or *haruspex*es.[101] There is a more proper interpretation claiming that the word comes from the compound *prod-agere*, so *prodigium* is nothing else than *"breaking through this shell, supernatural forces hiding behind the surface come forth, become manifest*".[102] Whenever *prodigium* appeared, be it of a private or state kind, after its meaning had been found out, that is, interpreted, *procuratio* had

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puniendis morum vitiis potestatem in immensum extendi volumus, sed iure patrio auctoritas corrigat propinqui iuvenis erratum et privata animadversione compescat.

[94] C. 8, 46, 10. *Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas olimerat permissa, eripere libertatem non liceret.*

[95] Dion. Hal. 2, 15.

[96] XII tab. 4, 1. (Cic. *leg*. 3, 8, 19)

[97] Köves-Zulauf, Thomas: *Bevezetés a római vallás és monda történetébe*. (Introduction into the History of Roman Religion and saga) Budapest 1995. p. 61.

[98] Zintzen, Clemens: *Prodigium*. Der Kleine Pauly. München 1979. IV. pp. 1151–1153.

[99] Walde, Alois–Hofmann, Johann Baptist: *Lateinisches etymologisches Wörterbuch I–II*. Heidelberg 1954. II. p. 368.

[100] Köves-Zulauf 1995. p. 62.

[101] Zintzen 1979. 1153.

[102] Köves-Zulauf 1995. 62.

to be carried out, upon the proposal made again by the interpreters; if the same *prodigium* recurred more frequently, the *pontifices* always ordered the same conciliation.[103] (For example, if stone rain was falling, *novemdiale sacrum* had to be held.[104]) Deformed children had to be destroyed[105], and children born on an ominous day were considered *prodigium* too.[106] Sueton describes that on the day of Britannicus's death stones were thrown at the temples, altars were turned over, the Lares were driven to the street, and children were exposed. The *procuratio* of deformed children considered *prodigium* was usually carried out by killing or exposition; however, it should be added that in these cases exposition always meant that the child was destined to die, the outcome of the two acts was eventually identical. The *procuratio* had to be always bloodless, therefore they performed it by drowning.[107]
Data on newer regulation of *ius exponendi* are available from a much later period, the 4th c. A.D. only, so it is possible that this element of *patria potestas* had not been considerably limited until then. Exposition of children could be attributed, as a matter of fact, not only to religious causes, in this period either. Likewise, the father could expose the child that it was not willing to acknowledge as his own due to the mother's alleged or real infidelity or that he did not want to bring up because of his poverty or other economic reasons. In these cases the child was not meant to perish; they exposed it at a place where others could easily find it.[108] As a matter of fact, we know of cases where a child, having been admitted, was meant and instructed to be a prostitute or gladiator (*ad servitutem aut ad lupanar).*[109] It occurred that the father met and got familiar with his formerly exposed daughter now as a prostitute.[110] Several of them were afflicted and forced to beg.[111]
Sources from the age before Constantinus do not provide a uniform picture on the legal status of exposed children. In Plautus's and Terence's plays exposed and then admitted children keep their free *status*.[112] In Plautus's comedy *Casina*, the exposed female child was admitted by the *libertina* Cleostrata, who gave her the name Casina. Casina, having grown up, became the wife of Eutyrichus also having free *status.* In *Cistellaria* by Plautus, the procuress Melaenis admitted and brought up the exposed Selenium born as a free person, who later married the free Alcesimarchus. In Terence's *Heautontimorumenos*, Antiphila, who was exposed by his mother, Sostrata, kept his free *status*, and married the also free Clinia. At the same time it is beyond doubt that several exposed children were forced to live as a slave.[113]

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[103] Latte, Kurt: *Römische Religionsgeschichte*. München 1967. p. 204.
[104] Liv. 1, 33, 4; 30, 38, 9. *In Palatio lapidibus pluit, id prodigium more novemdialisacro, cetera hostiis maioribus expiata.*
[105] Liv. 27, 37, 6; 31, 12, 7; 39, 22, 5.
[106] Suet. *Cal*. 5. *Quo defunctus est die, lapidata sunt templa, subversae deum areae, Lares quibusdam familiares in publicum abiecti, partus expositi.*
[107] Sen. *ira* 1, 15. *Portentosos fetus extinguimus, liberos quoque, si debiles monstrosique editi sunt, mergimus.* Tib. 2, 5, 79. *Prodigia indomitis merge sub aequoribus.*
[108] Cf. Fest. *s. v. Lactaria columna in foro olitorio dicta, quod ibi infantes lacte alendos deferebant.*
[109] Lact. *inst*. 6, 20, 18; Memmer, Michael: *Ad servitutem aut ad lupanar ...* . Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 108. 1991. pp. 21–93.
[110] Min. Fel. 31, 4; Iust. *apol*. 1, 27; Boswell, John Eastburn: *Expositio and Oblatio. The Abandonment of Children in the Ancient and Medieval Family.* American Historical Review 89. 1984. pp. 10–33. *Incest comprised the single most common objection of Christian moralists to expositio, and no solution to this problem presented itself. Few, if any fathers of the church objected to abandonment as a dereliction of parental duty. In the relatively few places where early Christian literature touched on the practice, which it describes as common, authors complained of the possibility that parents might unknowingly use as prostitutes children they once abandoned.*
[111] Sen. *contr*. 10, 4. *Quidam expositos debilitabat et debilitatos mendicare cogebat ac mercedem exigebat ab eis.*
[112] Memmer 1991. p. 26.
[113] Sen. *contr*. 10, 4, 13. *Deinde, an hoc non licuerit illi facere. Licuit, inquit, expositi in nullo numero sunt, servi sunt.*

Sueton provides information first on M. Antonius Gnipho, who was born free in Gaul (*ingenuus*), however, was exposed as a child, and was then liberated and educated by the person who brought him up. After that he mentions that Gnipho was a highly talented man with outstanding power of memory, who acquired erudition in both Latin and Greek.[114] The second source is about C. Melissus born also free (*ingenuus*) in Spoletium, who was exposed in his childhood due to conflicts between the parents.[115] Thanks to the person who brought him up and admitted him, he was given training in higher sciences, and was recommended to Maecenas as a grammarian. Maecenas made friends with him, and although his mother supported his son's freedom too—using the claim called *adsertio libertatis*—Melissus nevertheless remained *in statu servitutis* because he deemed it more than his original descent. Weiss interpreted the phrases *ingenuus natus* and *manumissus* as opposites, and derived Gnipho's slave status therefrom.[116] According to Coril, in this text *in servitute* denotes merely a *de facto* status and not that the child had been made *servus* also *de iure*.[117] Watson believes that Suetonius does not use the phrases *status servitutis* or *manumissus* as *terminus technicus*, so it would have been unnecessary to pay special attention to them.[118] *Manumissus* not necessarily refers to *status servitutis* since they used *remancipatio* or *manumissio* also in the case of *filius* in *mancipium*.[119] The father could reclaim his exposed child from the *nutritor* after having reimbursed the costs of *alimentatio*.[120]

On the legal status of children born free and then exposed, Pliny the Younger, *propraetor* of Bithynia and emperor Traianus exchanged letters. The letters were presumably dated in Plinius's second year in office, in 111.[121] In his letter, Plinius presents the issue of the *status* and *alimentatio* of children born free and then exposed, called *threptos*, as a problem affecting the entire province to emperor Traianus, as he has not found a rule that applies either expressly to Bithynia or the whole empire and believes that he could not be satisfied with other examples in a matter that can be decided solely by the emperor's authority. Although he knows about certain *epistulae* and *edicta*, such as for example those issued by emperors Augustus, Vespasianus and Titus for Andania, Sparta and Achaia, they all contain particular rules only, and therefore cannot be applied to Pliny's province. Otherwise, he does not send Traianus the copies of the documents referred to because they are probably available in the emperor's archives, which much better text.[122] In his response letter, Traianus precisely

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[114] Suet. *gramm*. 7. *M. Antonius Gnipho, ingenuus in Gallia natus sed expositus, a nutritore suo manumissus institutusque fuisse dicitur ingenii magni, memoriae singularis, nec minus Graece quam Latine doctus.*

[115] Suet. *gramm*. 21. *C. Melissus, Spoleti natus ingenuus, sed ob discordium parentum expositus, cura et industria educatoris sui altiora studia percepit, ac Maecenati pro grammatico muneri datus est. Cui cum se gratum et acceptum in modum amici videret, quamquam asserente matre, permansit tamen is statu servitutis praesentemque condicionem verae origini anteposuit.*

[116] Weiss, Egon: *Peregrinische Manzipationsakte*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 37. 1917. pp. 136–176.

[117] Cornil, Georges: *Contribution à l'étude de la patria potestas*. Paris 1897. p. 428.

[118] Watson 1967. p. 171.

[119] Kaser, Max: *Das römische Privatrecht I–II*. München 1971–1975. I. p. 65.

[120] Sen. *contr*. 9, 3. *Expositum qui agnoverit, solutis alimentis recipiat.*

[121] Plin. *epist*. 10, 65. *C. Plinius Traiano Imperatori. Magna, domine, et ad totam provinciam pertinens quaestio est de condicione et alimentis eorum, quos vocant threptus in qua ego auditis constitutionibus principum quia nihil inveniebam aut proprium, aut universale, quod ad Bithynos ferretur, consulendum te existimavi, quid observari velles; neque enim putavi posse me in eo, quod auctoritatem tuam posceret, exemplis esse contentum. Recitabatur autem apud me edictum, quod dicebatur divi Augusti, ad Andaniam pertinens; recitatae epistulae et divi Vespasiani ad Lacedaemonios et divi Titi ad eosdem et Achaeos, et Domitiani ad Avidium Nigrinum et Armenium Brocchum proconsules, idem ad Lacedaemonios, quae ideo tibi non misi, quia et parum emendata et quaedam non certae fidei videbantur, et quia vera et emendata in scriniis tuis esse credebam.*

[122] Plin. *epist*. 10, 66. *Traianus Plinio. Quaestio ista, quae pertinet ad eos, qui liberi nati expositi, deinde sublati a quibusdam et in sevitute educati sunt, saepe tractata est, nec quicquam invenitur in commentariis eorum, qui ante me fuerunt, quod ad omnes provincis sit constitutum. Epistulae sane sunt Domitiani ad Avidium Negrinum*

formulates the question raised by Pliny: so, the issue addressed concerns children born free who have been exposed by their parents and then have been admitted and brought up as slaves by others. Traianus mentions that his predecessors have indeed settled this issue with general effect extending to each province, and refers to Domitianus's two *epistulae* written to *proconsules* Avidius Negrinus and Armenius Brocchus, which are perhaps not to be fully ignored, however, as they do not have a general scope, cannot be applied to Bithynia. Traianus grants the opportunity of *adsertio in libertatem*, and refuses to give the *nutritor* the right to claim reimbursement of the costs of *alimentatio* and *ius retentionis* that serves to ensure that. The question arises who may enforce plea for freedom. As it was *vindicatio in libertatem* and not *vindicatio in patriam potestatem* that Traianus permitted, according to Cornil, it was not the parents but the child itself that was entitled to the right of *vindicatio.*[123] Yet, because a child living as a slave was not allowed to initiate a lawsuit, action taken by the *adsertor* was needed to represent the child in the lawsuit.[124] Consequently, Traianus sets out from the child's *status libertatis* that, accordingly, cannot be lost.[125] The costs of *alimentatio* are not be reimbursed because in the present case regaining freedom is not ransoming from *status sevitutis* but liberation from slavery.[126]

According to Scaevola's fragment, which also bears decisive significance in determining the legal status of exposed children, a Roman citizen divorced his wife and married again.[127] The cast off wife exposed the child, who was brought up by a third party. In his last will and testament the father, as he did not know if his son was alive or not, did not name him as his inheritor and did not disinherit him either. Following his father's death, the son, once he had been recognised by his mother and father's mother, took possession of the estate as *legitimus heres*. In Scaevola's view, the last will was invalid because the son was under *patria potestas*, even if his father did not know about it.[128] According to Paulus, the exposed child will retain its *status libertatis*, even if it might not be aware of it and might consider itself a slave.[129]

In the *rescriptum* of emperors Diocletianus and Maximianus, dated 295, addressed to Rhodonus, the following can be read:[130] Rhodonus admitted and brought up a girl born free and exposed, and after she had grown up, he meant her to marry his son. Before entering into the marriage, the natural father took action and claimed to release his daughter. The father

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et Armenium Brocchum, quae fortasse debeant observari: sed inter eas provincias, de quibus rescripsit, non est Binthya. Et ideo nec adsertationem denegandam iis, qui ex eius modi causa in libertatem vindicabuntur, puto, neque ipsam libertatem redimendam pretio alimentorum.

[123] Cornil 1897. p. 430.

[124] Memmer 1991. p. 33.

[125] See also Bang, Martin: *Die Herkunft der römisches Sklaven II. Die Rechtsgründe der Unfreiheit*. Mitteilungen des kaiserlich deutschen archäologischen Instituts. Röm. Abt. 27. 1912.

[126] Memmer 1991. p. 34.

[127] Scaev. D. 40, 4, 29. *Uxorem praegnantem repudiaverat et aliam duxerat: prior enixa filium exposuit. Hic sublatus ab alio educatus est nomine patris vocitatus usque ad vitae tempus patris tam ab eo quam a matre, an vivorum numero esset, ignorabatur; mortuo patre testamentoque eius, quo filius neque exheredatus neque heres institutus sit, recitato filius et a matre et ab avia paterna adgnitus hereditatem patris ab intestato quasi legitimus possidet. Quaesitum est hi qui testamento libertatem acceperunt utrum liberi an servi sint. Respondit filium quidem nihil praeiudicii passum fuisse, si pater eum ignoravit, et ideo, cum in potestate et ignorantis patris esset, testamentum non valere. Servi autem manumissi si per quinquennium in libertate morati sunt, semel datam libertatem infirmari contrarium studium favore libertatis est.*

[128] Gai. *inst*. 2, 123.

[129] Paul. D. 22, 6, 1, 2. *Si quis nesciat se cognatum esse, interdum in iure, interdum in facto errat.nam si liberum se esse et ex quibus natus sit sciat, iura autem cognationes habere se nesciat, in iure errat: at si quis (forte expositus) quorum parentium esset ignoret, fortasse et serviat alicui putans se servum esse, in facto magis, quam in iure errat.*

[130] C. 5, 4, 16. *Patrem, qui filiam exposuit, at nunc adultam sumptibus et labore tuo factam matrimonio coniungi filio desiderantis favere voto convenit. Qui si renitatur, alimentorum solutioni in hoc solummodo casu parere debet.*

retained his *potestas* over the child, and he could have enforced it through *praeiudicium de patria potestate*.[131] The question, however, concerned only the issue whether the father should reimburse the costs of *alimentatio*. In the *rescriptum*, the rulers decided that if the natural father should be against conclusion of marriage between his daughter and the foster father's son, then he should reimburse the costs of *alimentatio*, if, however, he agreed to it, then he would be exempted from reimbursing the costs.

An exposed slave child also retains its innate *status servitutis*. The issue of ownership over the child was regulated by emperor Alexander Serverus in his *rescriptum* written to A. Claudius in 224:[132] if the child was exposed without the *dominus* being aware of it or against his will, he was entitled to the right of *vindicatio*, however, he had to reimburse the *nutritor* for his costs. On the other hand, if the *dominus* himself had the slave woman's child exposed, then he would not be granted the right of *repetitio*. In accordance with the principle of *derelictio*, the slave child so exposed will retain its *status*, yet, will become a child having no *dominus*, and the *collector* will obtain ownership over him through *occupatio*.[133]

Reference to the exposed child's slave *status* can be found also among the contracts of the waxed boards of Dacia:[134] on 17 March 139, in Kartum, purchase of a slave was entered into between Maximus Batonis and Dasius Versonis, its subject was an approximately six-year-old slave girl called Passia. The seller was obliged to name the origin of the slave in negotiating the purchase and sale[135] as it highly influenced what occupation she was suitable for; for this reason, the *aedilisi edictum* also obliged those who sold slaves on the market to name their *natio*.[136] Mommsen claims that the phrase *empta sportellaria* implies that the owner had purchased the girl's mother, and was given the slave girl, Passia as a present since *sportella* means present.[137] Weiss's interpretation seems to be more probable, he asserts that the seller himself had purchased the girl as an exposed child, and he proves it by the following:[138] the papyruses reveal that the phrase *sportellarius* is identical with *koptriaireios*[139], which always denotes the exposed child. Undoubtedly, *sportella* means a small basket, as in Hieronymus's *Vulgata* regarding the exposition of Moses can be read.[140] *Fiscella*, which is the *deminutivum* of *fiscus* that originally meant basket, is the synonym of *sportella*, and refers to the custom that a basket was often used when exposing a child. Therefore, *sportellaria* means a female child exposed in a basket; it is possible to get closer to this interpretation by certain Greek sources, which assert that a child was exposed also in some kind of vessel (*ostrakon*, *enkhystria*).

Constantine's law dated 17 April 331 brought significant change in the legal status of exposed children, for it extended the regulation pertaining to the fate of slave women's children, adopted by Alexandrus Severus, to free children.[141] Thus, the father who has exposed his

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[131] Memmer 1991. p. 38.

[132] C. 8, 51 (52), 1. *Si invito vel ignorante te partus ancillae vel adscripciae axpositus est, repetere eum non prohiberis. Sed restitutio eius, non a fure vindicaveris, ita fiet, ut, si qua in alindo vel forte ad discendum artificium iuste consumpta fuerint, restitueris.*

[133] Memmer 1991. p. 40.

[134] FIRA III. 284.=CIL III. 937. *Maximus Batonis puellam nomine Passiam, sive ea quo alio nomine est, annorum circiter sex plus minus, empta sprotellaria emit mancipioque accepit de Dasio Verzonis Pirusta ex Kavieretio v/v ducentis quinque…*

[135] Lenel, Otto: *Das „Edictum Perpetuum"*. Leipzig 1927. p. 554. *Clausula de natione pronuntianda.*

[136] Pólay, Elemér: *A dáciai viaszostáblák szerződései*. (Contracts of the tabulae ceratae from Dacia) Budapest 1972. p. 146; Ulp. D. 21, 1, 31, 21. *Nationem cuiusque in venditione pronuntiare debent.*

[137] Pólay 1972. 146.

[138] Weiss 1917. p. 160.

[139] Aristoph. *ran*. 1190.

[140] Exod. 2, 3. *Sumpsit fiscellam scripeam … posuitque intus infantulum et exposuit eum.*

[141] CTh. 5, 9, 1. *Quicumque puerum vel puellam, proiectam de domo patris vel domini voluntate scientiaque, collegerit ac suis alimentis ad robur provexerit, eundem retineat sub eodem statu, quem apud se collectum*

child, will lose his *potestas* over the child, and thereby the right to reclaim the child. The *nutritor* freely decides the *status* of the admitted child, irrespective if the child was born as a free person or a slave. The phrase *retineat sub eodem statu, quem apud se collectum voluerit agitare* shows that the father was not given the opportunity of *vindicatio in libertatem* or *adsertio libertatis*.[142] It is quite clear that this law provided highly effective protection for the person who brought up the exposed child.

Restriction or prohibition of *ius exponendi* was implemented on the level of law rather late. In February 374, emperors Valentinianus, Valens and Gratianus ordered to impose death penalty for killing children.[143] A month later Valentinianus declared that exposition of children was to be punished.[144] As Valentinianus referred to an earlier punishment, it cannot be ruled out that he renewed a prohibition of exposition that had existed for a long time. On the contrary, it is also possible—if we interpret *expositio* as a form of *necatio*, which was not alien from post-classical thinking at all—that Valentinianus referred to the prohibition of killing children dated February of the same year and the item of penalty imposed thereon.[145] The latter standpoint can be supported by the argument that the addressee of both *constitutiones* was the same Probus *praefectus praetorio*. The item of punishment cannot be known from the latter *contitutio*. According to Memmer, the fact that in 442 a person who exposed his child was certainly not sentenced to death yet is confirmed by the proof that the tenth canon of the *Concilium Vasense* held in the same year dealt with ecclesiastical punishment of those who exposed their children.[146] Namely, if a regulation imposing death penalty on exposition had existed, then the discussion of ecclesiastical punishment would have become completely unnecessary.[147] The prohibition of exposition of children of 374 presumably applied to the *pater familias*'s own children only because this law also regulated the *dominus*'s rights over the exposed *colonus* and slave child.[148] Based thereon the *dominus* or the *patronus* who meant the child to die and for this reason exposed it was not entitled to the right of reclaiming it. In 412, emperors Honorius and Theodosius entered a similar regulation into force.[149] Compared to the previous regulation, it appears as a new element that the regulation makes admitting the child subject to meeting two conditions: it had to take place before the bishop and a document had to be made thereon. According to Memmer, this makes it probable that the *collector* had the right in accordance with the norm of 331 to decide the *status* of the child.[150]

In accordance with Iustinianus's regulation of 529 covering the entire empire, it was prohibited to sink the exposed child to the fate of *colonus* or slave, no matter what *status* he

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voluerit agitare, hoc est sive filium sive servum eum esse maluerit: omni repetitonis inquietudine penitus submovenda eorum qui servos aut liberos scientes propria voluntate domo recens natos abiecerint.

[142] Memmer 1991. p. 65.

[143] CTh. 9, 14, 1; C. 9, 16, 8. *Si quis necandi infantis piaculum adgressus adgressave sit, sciat se capitali supplicio esse puniendum.*

[144] C. 8, 51 (52), 2. pr. *Unusque subolem suam nutriat. Quid si exponendam putaveri, animadversioni quae costituta est subiacebit.*

[145] Bonfante 1925. p. 112; Kaser 1971. p. 79.

[146] *Sacrorum conciliorum nova et amplissima collectio*. Ed. Mansi. Graz 1960. VI. 455. *Sane si quies post hac diligentissimam sanctionem expositorum hoc ordine collectorum repetitor vel calumniator extiterit, ut homicida ecclesiastica distinctione feiatur.*

[147] Memmer 1991. p. 70.

[148] C. 8, 51 (52), 2, 1. *Sed nec dominis vel patronis repetendi aditum relinqiumus, si ab ipsis expositos quodammodo ad mortem voluntas misericordiae amica collegerit: nec enim dicere suum poterit, quem pereuntem contempsit.*

[149] CTh. 5, 9, 2. *Nullum dominis vel patronis repetendi aditum relinqiumus, si expositos quodammodo ad mortem voluntas misericordiae amica collegerit: nec enim dicere suum poterit, quem pereuntem contempsit; si modo testis episcopalis subscriptio fuerit subsecuta, de qua nulla penitus ad securitatem possit esse cunctatio.*

[150] Memmer 1991. p. 70.

was from.[151] So, it ensured freedom to all exposed children, even to slave children who were caused to be exposed by the *dominus*. It forbids the *collector* to gain advantage from bringing up the child; his act is deemed *officium pietatis*.[152] He confirmed the provisions set forth in this regulation in the same year.[153] In 541, he *expressis verbis* guaranteed the freedom of exposed children too[154], and he allowed the *dominus* to prove his ownership over the child only in the event that the child had been exposed without him being aware of it or in spite of his will.

Coming to the end of this analysis, it is necessary to add a few remarks in summary on the two legal institutions of *patria potestas*, discussed in this paper. *Ius vitae ac necis*, that is, the punitive power of *pater familias* against an adult child meant a right that actually existed until the 4th c. A.D., based on which the father himself could kill his children. The exercise of this right, however, was confined to meeting certain rules of procedure and limits. Consequently, he had to conduct the proceedings within the frameworks of *iudicium domesticum*, in which the *consilium necessariorum* investigated the charge and heard the defence of the accused, and, then, in the event that the offence seemed to be a crime that deserved death penalty indeed, it decided guilt by majority of the votes cast, which decision had absolutely binding force upon the *pater familias*. By *lex Iulia de adulteriis coercendis*, Augustus further narrowed the scope of application of *ius vitae ac necis*. *Ius exponendi*, that is, the right of the *pater familias* over the newborn infant was a living legal institution also in practice until 374 A.D. Two sides of its exercise are distinguished. One of them is basically ecclesiastical, in this case the exposition of the child as *procuratio prodigii* was aimed at the child's death and was not separated from killing the newborn infant. In the other case the reason was merely that the family or the *pater familias* did not want to bring up the child; yet, they could reckon that somebody would find and bring up the child. If the latter opportunity occurred, then the issue of the *status* of the brought up child arose as a question. During the centuries this showed rather variable picture until the law of the age of Iustinian reached the stage where it ensured free *status* to almost all exposed and brought up children.

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[151] C. 8, 51 (52), 3. pr. 1. *Sancimus nemini licere, sive ab ingenuis genitoribus puer parvulus procreatus sive a libertina progenie sive servlili condicione maculatus expositus sit, eum puerum in suum dominium vindicare sive nomine dominii sive adscripticiae cive colonariae condicionis: sed neque his, qui eos nutriendos sustulerunt, licentiam concedi penitus (cum quadam distintione) eos tollere et educationem eorum procurare, sive masculi sint sive feminae, ut eos vel loco servorum aut colonorum aut adcsripticiorum habeant. Sed nullo discrimine habito hi, qui ab huiusmodi hominibus educati sunt, liberi et ingernui appareant et sibi adquirant et in posteritatem suam vel extranenos heredes omnia quae habierint, quomodo voluerint, transmittant, nulla macula vel servitutis vel adscripticiae aut colonariae condicionis imbuti: nec quasi patronatus iura in rebus eorum concedi, sed in omnen terram, quae Romanae dicioni supposita est, haec obtinere.*

[152] C. 8, 51 (52), 3, 2. *Neque enim oportet eos, qui ab initio infantes abegerunt et mortis forte spem circa eos habuerunt, incertos constitutos, si qui eos susceperunt, hos iterum ad se revocare conari et servlili necessitati subiugare: neque hi, qui eos pietatis ratione suadente sustulerunt, ferendi sunt snuo suam mutatnes sententiam et in servitutem eos retrahentes, licet ab inito huiumodi cogitationem habentes ad hoc prosiluerint, ne videantur quasi mercimonio contracto ita pietatis officium gerere.*

[153] C. 1, 4, 24.

[154] N. 153, 1. *Quicunque igitur in ecclesiis, vel vicis, vel aliis locis expositi probantur, eos omnibus modis liberos esse iubemus, licet actori manifesta probatio suppetat, qua personam illam ad suum dominium pertinere ostendat. Se enim legibus nostris praeceptum est, ut servi aegrotantes, qui a dominis neglecti, quum de valetudine eorum desperarent, tamquam cura a dominis digni non habiti omnino in libertatem rapiantur, quanto magis eos, qui in ipso vitae initio aliorum hominum pietati relicti, et ab ipsis enutriti sunt, in iniustam servitutem trahi non patiemur? His igitur et sanctissimum Thessalonicensium archiepiscopum et sanctam dei ecclesiam, quae sub illo constituta est, et gloriam tuam opem ferre, libertatemque illis adiudicare sancimus. Neque illi, qui haec faciunt, legum nostrarum poenas effugient, ut qui omni inhumanitate et crudelitate repleti sunt, domnique homicido tanto deteriore, quanto miserioribus id afferunt.*