PATERNAL POWER IN LATE ANTIQUITY*

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I. INTRODUCTION

One of the most peculiar features of Roman law was the father's dominant position. In theory, he exercised an almost absolute authority, *patria potestas*, over his descendants until his own death. The uniqueness of their family system did not escape the Romans themselves. In his mid-second-century legal textbook Gaius explained:

> 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. (*Inst.* 1.55)
>
> Again, we have in our power our children, the offspring of a Roman law marriage. This right is one which only Roman citizens have; there are virtually no other peoples who have such power over their sons as we have over ours. This was made known by the emperor Hadrian in an edict which he issued concerning those who applied to him for Roman citizenship for themselves and their children. I have not forgotten that the Galatians believe that children are in the power of their parents. (Translated by W. M. Gordon and O. F. Robinson, *The Institutes of Gaius* (1988))

This account immediately raises at least one fundamental question: If *patria potestas* was a distinctive feature of Roman society, how did the other peoples of the Empire react to it after the universal grant of the Roman citizenship in A.D. 212? Did it endure the influx of so many peregrines, the turmoils of the third century, and the 'vulgarization' of Roman law? Was it a living institution in Late Antiquity? Surprisingly, these questions have never been accorded a general survey. Although ancient historians have paid considerable attention to paternal power, and especially its social relevance, they have hardly extended their interest beyond the early third century.[1] Legal historians, on the other hand, have tended to disregard the problem. For example, the most recent exhaustive treatment of *patria potestas* in late Roman law does not contain a single reference to any source outside the legal codes.[2] It is mainly in the field of papyrology that the impact of imperial law on local traditions has been at issue. Over eighty years ago Taubenschlag argued that paternal power was adopted in Roman Egypt only in a very distorted legal form.[3] Although the demonstration was far from unambiguous, his views have not been generally challenged, nor has the accumulated papyrological evidence been thoroughly scrutinized since then.

* This paper grew out of material outlined in my *Women and Law in Late Antiquity* (1996)—hereafter *WLL*. Some new ideas derive from a discussion at the conference 'Shifting Frontiers in Late Antiquity II' (Columbia, S.C.) in March 1997. I have also received very helpful criticism at various stages from Roger Bagnall, Judith Evans Grubbs, Jane Gardner, Jane Rowlandson, Richard Saller, the readers of the *Journal*, and especially from Gillian Clark. None of them bears any responsibility for remaining errors or ungrounded conclusions.

[1] See recently e.g. J. F. Gardner, *Being a Roman Citizen* (1993), 32–84; R. P. Saller, '*Patria potestas* and the stereotype of the Roman family', *Continuity and Change* 1 (1986), 7–22; idem, *Patriarchy, Property and Death in the Roman Family* (1994), 71–153.

[2] P. Voci, 'Storia della patria potestas da Costantino a Giustiniano', *SDHI* 51 (1985), 1–72; cf. also idem, 'Storia della patria potestas da Augusto a Diocleziano', *Iura* 31 (1980), 37–100; E. Sachers, 'Potestas patria', *RE* XXII (1953), 1046–175; D. Dalla, 'Aspetti della patria potestà e dei rapporti tra genitori e figli nell'epoca postclassica', *Atti dell'Accademia Romanistica Costantiniana: VII Convegno internazionale* (1988), 89–109. Relatively vague on paternal power is L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (1891, repr. 1935, 1963), 209–12.

[3] R. Taubenschlag, 'Die Patria potestas im Recht der Papyri', *ZRG* 37 (1916), 177–230, esp. 207–30; and idem, *The Law of Greco-Roman Egypt in the Light of the Papyri* (2nd edn, 1955), 130–49; followed e.g. by Sachers, op. cit. (n. 2), 1067–8, 1136–7, and by many others.

The aim of this paper is to trace the history of *patria potestas* in the Later Empire and at least partly explain how it persisted to the end of Antiquity and even beyond. If we can attain this task, important in itself, it will also help us to evaluate the arguments that *patria potestas* in the Principate was a purely legal construct, surviving through inertia and/or because it had only marginal social consequences.[4] More generally it may throw valuable light on the interplay of law and social practice in Late Antiquity and on the whole process of acculturation in the Roman Empire.

II. *PATRIA POTESTAS, PECULIUM* AND ROMAN PROPERTY

In theory, what made *patria potestas* unique was its duration: the *pater* did not lose his prerogatives when his descendants matured and established independent households. Even a grandfather and a senior magistrate of the Roman state could be in his own father's power. In practice, however, this was not often the case. As Roman men married relatively late and died early, most adult citizens had already lost their father: less than half of them had a surviving *pater* when they reached their full majority at twenty-five, and only a small fraction at the age of forty.[5] Moreover, Roman law had always contained a method by which the father could release his descendants from *potestas*. This procedure, called *emancipatio*, severed most legal ties between children and their paternal relatives, making them immediately independent (*sui iuris*) just as if their father had died (see further below Section v).

Despite the combined effect of demographic factors and emancipation, there was always quite a number of adult Romans who really did live under *potestas*. For them the system had far-reaching consequences. Children who were *in potestate* had no independent ownership rights: everything they acquired belonged to their *paterfamilias* just as if they had been his slaves. The father could support them by more or less regular allowances. Alternatively, he could separate for them a *peculium*, a sum of money or other property which they could control independently, especially if they had been granted free administration over it (*libera administratio peculii*).[6] In theory, the father could take the *peculium* back at will. That may have been very rare in practice, though. Perhaps social pressure delimited his freedom of action. Evidence on this is almost entirely lacking.[7]

It is easier to understand the economic aspect of *patria potestas* if we recall the nature of property movements in Roman society. Wage work being relatively rare in the upper and middle classes, these sections of the society lived, directly or indirectly, on income from inherited property. They might be involved in various economic enterprises, but only if they had the initial capital at their disposal. A young adult male

[4] A status symbol of the upper classes: D. Daube, *Roman Law: Linguistic, Social and Philosophical Aspects* (1969), 75–91. An utterly inconvenient relic: A. Watson, *Society and Legal Change* (1977), 23–30. A legal abstraction for the purpose of inheritance: Y. Thomas, 'The division of the sexes in Roman law', in P. S. Pantel (ed.), *A History of Women in the West, I. From Ancient Goddesses to Christian Saints* (1992), 83–137, at 90–111.

[5] See above all Saller, op. cit. (n. 1, 1986), → idem, 'Men's age at marriage and its consequences in the Roman family', *CPh* 82 (1987), 21–34. John Chrysostom quite rightly remarked that sons grew annoyed if their fathers lived too long, *In Coloss.* 1.3, *PG* 62.303. On the problems of ancient demographic evidence and on the use of model life-tables, see T. G. Parkin, *Demography and Roman Society* (1992), esp. 70–85; Saller, op. cit. (n. 1, 1994), 9–69; R. S. Bagnall and B. W. Frier, *The Demography of Roman Egypt* (1994), esp. 75–110.

[6] The exact legal content of the *libera administratio* is not clear. It did not normally enable the child to give away the property unless he was a senator: in that case Ulpian thought it natural to assume that the *administratio* included the ability to make donations as well, *Dig.* 39.5.7; see also 2.14.28.2; 34.4.31.3; 41.2.14.pr; 42.8.12; 46.2.34.pr; Seneca, *Cons. Helv.* 14.3 etc. More generally on the *peculium* and property relations between fathers and sons, see Y. Thomas, 'Droit domestique et droit politique à Rome: Remarques sur le pécule et les honores des fils de famille', *MEFRA* 94 (1982), 527–80; A. Kirschenbaum, *Sons, Slaves and Freedmen in Roman Commerce* (1987); Gardner, op. cit. (n. 1), 55–62.

[7] *Dig.* 4.4.3.4; 34.4.31.3; *CJ* 5.18.7 (294); Geront., *Vita Melaniae* 12, SC 90.150, with Arjava, *WLL* 43. M. Kaser, *Das römische Privatrecht, I: Das altrömische, das vorklassische und klassische Recht* (2nd edn, 1971), 344; R. P. Saller, '*Pietas*, obligation and authority in the Roman family', in P. Kneissel and V. Losemann (eds), *Alte Geschichte und Wissenschaftsgeschichte: Festschrift für K. Christ* (1988), 393–410, at 396–7, 407–8; idem, op. cit. (n. 1, 1994), 123–7.

could not acquire the necessary wealth and hardly even support himself if he had not inherited his parents' estate. Apart from occasional smaller donations and bequests from more distant relatives and friends, he would have been totally dependent on his father, whether *in potestate* or not.[8] The only major alternative source of wealth was his mother. In fact, this last possibility created serious problems within the legal framework of *patria potestas*. They will be discussed below.

Outside the uppermost classes, free farmers also relied on inherited capital, the ancestral land, to earn their living. In the cities, every major enterprise above subsistence level required some capital to begin with, say a ship, an education, or at least a few slaves. Again, it did not make much difference whether one was *in potestate* or not. If the son had not inherited his father's property he could not raise the capital, unless the *pater* was willing to give him an advance. And it was precisely this inheritance advance which was called *peculium*. On intestacy, it was reckoned in the final estate account, but often it was expressly bequeathed to the child.[9]

Of course, not all people could rely on an inheritance. There were undoubtedly many quite profitable salaried occupations, both in imperial and private service, but they were in large part manned by freedmen, who had no legal father at all, so they were not in anyone's *potestas*. The manual labour was partly performed by slaves. Humbler freeborn people could also support themselves by their own work, e.g. as craftsmen, doctors, or seasonal labourers in agriculture, and their economic role may have been important in those provinces where the number of slaves was smaller. Still, in terms of property, they counted for little: such activities did not enable them to accumulate many possessions during their lifetime.[10] Among them, property rights played little role, and the concept of *patria potestas* was certainly much more vague than among the nobility or the moderately well-off.[11]

In the Principate, there was only one important and respectable employment which offered earned income for freeborn people: the army. As it happened, any property acquired in military service (*peculium castrense*) was excluded from *patria potestas*. At first, from the reign of Augustus, this meant only that a soldier *filiusfamilias* could leave his acquisitions by will, but later this freedom was applied to transactions *inter vivos* as well.[12] Consequently, as Justinian admitted, in the eyes of law sons in military service appeared not unlike people who were *sui iuris* (*CJ* 4.28.7.1).

For a long time, imperial civil servants did not constitute a similar exception: they were mostly slaves and freedmen and thus, as already noted, not under the system of *patria potestas*. The administrative staffs of the praetorian prefects and provincial governors on the other hand were drawn from the ranks of military units. Already in the third century there existed a clear practical division between this civilian section of the imperial *militia* and the real armed forces. However, even as the civil service was vastly expanded after the early Empire, the clerks continued to be classed technically as soldiers.[13] This meant that their earnings were still counted as *peculium castrense*. Indirectly it is proven by a fifth-century eastern law: obviously aiming to dispel some doubt which had later arisen, it confirmed that all the junior clerks who served in the

[8] cf. Watson, op. cit. (n. 4), 27–8; P. Garnsey and R. P. Saller, *The Roman Empire: Economy, Society and Culture* (1987), 47–8.

[9] *Dig.* 6.1.65.1; 31.88.pr/89.pr; 33.8.6.4/10/19.2/26; 34.4.31.3; 40.1.7; *CJ* 3.29.2; 3.36.13/18.pr.

[10] On freeborn and freedmen in the Roman economy, see e.g. P. Garnsey (ed.), *Non-Slave Labour in the Greco-Roman World* (1980), with sources and further literature.

[11] cf. *CJ* 8.46.5; *Dig.* 25.3.5.7; Aug., *Serm.* 45.2, CCL 41.517; Saller, op. cit. (n. 7, 1988), 406; idem, op. cit. (n. 1, 1994), 126–7; Daube, op. cit. (n. 4), 81–2.

[12] *Tit. Ulp.* 20.10; Just., *Inst.* 2.12.pr; *CJ* 4.28.7.1; 12.36; *Dig.* 14.6.2; 24.1.32.8; 38.2.22; 39.5.7.6; 49.17. H. Fitting, *Das castrense peculium in seiner geschichtlichen Entwickelung und heutigen gemeinrechtlichen Geltung* (1871); F. La Rosa, *I peculii speciali in diritto romano* (1953); Kaser, op. cit. (n. 7), 344; B. Lehmann, 'Das Eigenvermögen der römischen Soldaten unter väterlicher Gewalt', *ANRW* II.14 (1982), 183–284.

[13] See e.g. E. Stein, *Untersuchungen über das Officium der Prätorianerpräfektur seit Diokletian* (1922), 14–16; A. Boak, 'Officium', *RE* XVII (1936), 2045–56; A. H. M. Jones, 'The Roman civil service (clerical and subclerical grades)', in idem, *Studies in Roman Government and Law* (1960), 153–75; idem, *The Later Roman Empire 284–602* (1964), 563–6; cf. also K. L. Noetlichs, *Beamtentum und Dienstvergehen: Zur Staatsverwaltung in der Spätantike* (1981), 20–34.

office of the pretorian prefect 'should have the right of the military *peculium* inviolate just as if they served in our Legion I Adiutrix'.[14]

The staff of the central imperial offices (*palatini*), which had a more 'civilian' origin, expressly received the benefits of the *peculium castrense* from Constantine.[15] In the fifth century, the same privilege was further applied to the earnings of public lawyers and even clergy.[16] It is not possible to trace the development more accurately or detect any changes of policy, since a number of relevant constitutions have no doubt been omitted as outdated or superfluous in the *Justinianic Code*. It is, however, quite clear that by Justinian's time the rights of the *peculium castrense* covered most or all Eastern state employees ('omnibus omnino, qui salaria vel stipendia percipiunt publica') and all donations from the emperor: he called this civilian income *peculium quasi castrense*.[17] From the crumbling Western Empire there is no cogent evidence after the mid-fifth century; up till then the development had been roughly similar to that in the East. The inclusion of some of these laws (*CTh* 1.34.2; 2.10.6; *Nov.Val.* 2.2.4) and their late-fifth-century *interpretationes* in the *Lex Romana Visigothorum* in 506 suggests that the question still had some relevance.[18]

The passages relating to *peculium (quasi) castrense* also shed some light on normal *peculium*. For example, an Eastern law of 422 stated:

> Filiifamilias [advocati], quidquid ex huiuscemodi professione vel ipsius occasione quaesierunt vel conquisierint, id post patris obitum praecipuum veluti peculium castrense proprio dominio valeant vindicare sub tali forma, quam militantibus ex iure procinctus cinguli praerogativa detulit. (*CTh* 2.10.6 = *CJ* 2.7.4)
>
> Whatever sons under paternal power [who are advocates] have acquired or should acquire from such a profession or in connection with it, they shall be able to vindicate specifically as their own property after their father's death, just like the *peculium castrense*, under a similar rule as that which has been bestowed as a privilege upon soldiers by right of active military service.[19]

At first sight this wording may sound strange. At least it perplexed the Byzantine commentators in the late sixth century.[20] Why does the law say that a son could assert his ownership rights (*dominium*) 'after his father's death'? According to the normal rules of the *peculium castrense*, he should have acquired both the *dominium* and the actual control (*possessio*) of his earnings already in his father's lifetime. There is no reason to doubt that it was presumed here, too.[21] Most likely the writer just wanted to make clear the practical difference between a *peculium castrense* and a normal *peculium*. There was little factual distinction before the father's death because in practice the son would have

[14] *CJ* 12.36.6 (444?); cf. Fitting, op. cit. (n. 12), 416–31; La Rosa, op. cit. (n. 12), 218–21 (mainly correct, but her treatment at 208–19 is confusing rather than helpful); Stein, op. cit. (n. 13), 9–10. *CJ* 6.21.16–17 evidently do not concern the *peculium castrense* but other privileges of a 'military will', cf. *Dig.* 29.1; *CJ* 6.21; Just., *Inst.* 2.11.

[15] *CTh* 6.36.1 (326); cf. 6.35, esp. 6.35.3 (352?); B. Lehmann, 'Das "peculium castrense" der "palatini"', *Labeo* 23 (1977), 49–54. The *silentiarii*, who served under the *praepositus sacri cubiculi* and were certainly members of the palatine staff, are separately mentioned in *CJ* 12.16.5 (497/9 East), probably because in later language *palatini* had come to mean only the financial departments and the Constantinian privileges had to be confirmed for the others so as to avoid ambiguity. Cf. W. Ensslin, 'Palatini', *RE* XVIII.1 (1942), 2529–60, esp. 2536–40.

[16] Lawyers: *CTh* 1.34.2 + 2.10.6 (422 East); *CJ* 2.7.7 (439 East), 8 (440 East); *Nov. Val.* 2.2.4 (442 West). Clergy: *CJ* 1.3.33 (472 East); *Nov.* 123.19 (546 East).

[17] *CJ* 3.28.37 (531); 6.61.7 (530). Cf. also M. Kaser, *Das römische Privatrecht, II: Die nachklassischen Entwicklungen* (2nd edn, 1975), 216; Voci, op. cit. (n. 2, 1985), 33–9.

[18] For a brief introduction to the late Roman provincial codes and the early Germanic laws, to be discussed below, see e.g. C. Schott, 'Der Stand der Leges-Forschung', *Frühmittelalterliche Studien* 13 (1979), 29–55; Arjava, *WLL* 18–23, with references to further literature.

[19] The word 'vindicare' is here problematic. In Classical law 'vindicatio' denoted a lawsuit to recover something which one already owned but did not possess at the moment. In post-Classical law the verb was used much more freely in the sense 'acquire or assert ownership rights', irrespective of whether one had already owned the property and whether one now actually possessed it or not; see E. Levy, *West Roman Vulgar Law: The Law of Property* (1951), 210–19, for examples.

[20] *Basilicorum scholia* 8.1.19, 8.1.23.3, Scheltema B I 72–4, 76; Voci, op. cit. (n. 2, 1985), 34.

[21] Otherwise the whole analogy which the law draws to the military would have been broken. That is why the arguments of La Rosa, op. cit. (n. 12), 208–16, do not seem convincing. However, it is true that the testamentary capacity of the various classes of functionaries is somewhat obscure; see *CJ* 1.3.49.pr; 3.28.37 (showing that the matter was under dispute in Justinian's time).

controlled his *peculium* anyway. In other words, despite legal theory his rights to the *peculium* were not threatened so much by his father as by eventual coheirs (or creditors): when the estate was divided the 'father's property' (*peculium*) had to be brought in while the 'son's property' (*peculium castrense*) remained outside the account. Such considerations are often found in the legal sources.[22]

It remains to consider the most important additional source of wealth for most Romans: their maternal inheritance. Roman women were strongly expected to bequeath the bulk of their property to their descendants. After the Senatusconsultum Orphitianum in A.D. 178 children succeeded to their mother's estate even on intestacy. However, if they were still *in potestate* all they inherited actually accrued to their father. We know little about practical arrangements in such situations because they were no longer relevant in the time of Justinian. The most natural assumption is that although the father was the legal owner there was strong social pressure on him to safeguard the children's interests. *Bona materna* seem to have been regarded as a special item within the paternal property, being often assigned to the child as *praelegatum* in the father's last will. Some mothers tried to assure by *fideicommissa* that the children really received the property after the father's death; or the mother might include in her will a condition that the children had to be emancipated before they could receive the inheritance.[23]

Early in his reign, Constantine established more definite rules for the fate of maternal inheritance. Thenceforth the widowed father was forbidden to alienate anything from his wife's goods but had to preserve them for the children. He retained what was called both 'dominium' and 'ius fruendi' of the estate. Constantine's chancellery seems to have meant that the father was still a kind of owner, though only with limited rights. In terms of classical law, this was awkward language. The arrangement was essentially a lifelong usufruct, and was so called in later constitutions.[24] It shows how much force *patria potestas* still retained. Although Constantine and his successors clearly wanted to protect the children's long-term interests, they could not restrict the father's power during his lifetime. It was simply considered too unjust to take the enjoyment of his children's goods away from him.

Two centuries later, the laws of Justinian shed some light on contemporary practices. For example, a man wanted to legitimize his natural children. Their mother happened to possess some property, and the children tried to stop the process because they knew that after her death the father would have the use and enjoyment of their maternal inheritance (*Nov.* 74.praef.2). In this and many other cases the usufruct appears as a privilege which the father was entitled to. On the other hand, he may sometimes have permitted the children to keep their *bona materna* as a *peculium*.[25] Finally, it could be claimed that the whole system was to the children's own benefit. It enabled the father to restrict their youthful fire and prevent them from dissipating their fortunes. Since he was compelled to maintain them why should they wish to sell anything? The general impression deriving from these texts is that circumstances varied. The age of the orphans, for example, must have had an effect on the arrangements chosen. A good father looked after his children's interests, a bad father might not, but the decision remained his.[26]

[22] e.g. *Dig.* 6.1.65.1; 37.7.8; *Fragm. Vat.* 294; *CJ* 3.36.4 (Alex. Sev.); 6.20.12–13 (294); 1.3.33 (472 East); 12.16.5 (497/9 East); 6.20.21 (532 East). True, there are also passages where it appears possible to lose the acquired property to the father if it was not safe-guarded by the right of the *peculium castrense*, *Nov. Val.* 2.2.4 (442 West); *CJ* 12.16.5.pr (497/9 East); Just., *Inst.* 2.12.pr.

[23] See e.g. M. Humbert, *Le Remariage à Rome* (1972), 207–63; J. F. Gardner, 'Another family and an inheritance: Claudius Brasidas and his ex-wife's will', *LCM* 12 (1987), 52–4; E. Champlin, *Final Judgments: Duty and Emotion in Roman Wills 200 B.C.–A.D. 250* (1991), 125–6; Arjava, *WLL*, 98–100; and below, n. 58.

[24] *CTh* 8.18; Arjava, *WLL*, 100–5, with further references. On the problems of the legal terminology (including the act of *cretio*, through which the child and the father together demanded the inheritance), see e.g. P. Voci, 'Il diritto ereditario Romano nell'età di tardo impero: il IV secolo (prima parte)', *Iura* 29 (1978), 17–113, at 56–79; and P. Fuenteseca, 'Maternum patrimonium (Revisión de CTh. 8,18,1 y 8,18,2)', *Atti dell'Accademia Romanistica Costantiniana: IX Convegno internazionale* (1993), 331–47.

[25] cf. '*ius peculii*', *Nov. Theod.* 14.8 (439 East); see also Humbert, op. cit. (n. 23), 246–52, although he slightly stretches the evidence.

[26] *CJ* 6.61.6 (529); 6.61.8.5a (531); *CTh* 8.18.9 (426 West).

A curious law from the last years of Constantine's reign was directed against fathers who lived in a second marriage. It was claimed that not even the system of usufruct prevented them from causing permanent damage to their children's maternal inheritance. As we now have it, the text implies that the maternal estate was isolated from the remarried father's property. His children from the first marriage were otherwise still *in patria potestate* but their *bona materna* remained outside it. This sounds very much like a kind of *peculium (quasi) castrense* (although Constantine certainly did not want to use that term). Unfortunately, it is unclear how far the new rule was respected after Constantine. It seems to have been forgotten in the West; in the East it was claimed to be 'confusingly ambiguous' and was repealed in 468.[27] However, in 542 Justinian again introduced a major innovation into the regime of the *bona materna* (*Nov.* 117.1). Now the mother, or in fact anyone else who made a bequest or donation to children *in potestate*, could prescribe that the father have no right to it, not even the normal usufruct. If the children were of legal age they were free to control and alienate the property. In other respects the father continued to have the children in his power. Again, this ruling essentially established a *peculium quasi castrense*, even if Justinian did not use the word.

From all this legislation it emerges that the conflict of interests between a father and his children was most usual in the case of maternal inheritance. After Constantine had partly solved this dilemma with his law on the paternal usufruct, the Romans gradually grew prepared to apply the same solution to a number of other situations where the same problem existed: in 379 to any property inherited from the maternal grandparents;[28] in 426 to property received from the spouse;[29] and finally, from the reign of Justinian, to any funds acquired from other sources than the father himself. The last step cannot be attested in the West.[30]

To sum up the result of these developments: *patria potestas* in its original form now applied only to property which stemmed from the father's family. Funds earned in the army or in the civil service remained outside *potestas*. Other property, from the maternal or conjugal families or from external sources, belonged ultimately to the child but could be enjoyed by the father as long as he lived, unless the donor had prescribed otherwise. As most children did not acquire much property from outside their own family, *patria potestas* did not conflict too harshly with economic realities. While the *peculium (quasi) castrense* was something which the son had earned with his own labour, the normal *peculium* was capital which he had received in advance of his inheritance plus everything which could be considered its fruits. As the importance of paid labour of freeborn people was growing in Late Antiquity there was also a growing number of people whose earnings were not subject to the rules of *patria potestas*. This was hardly the result of any conscious legislative policy. Without doubt the emperors' primary target since Augustus was to create privileges for the groups they depended on: the soldiers and the civil servants. However, the course of the development cannot have been a pure coincidence either. It highlights the close connection between *patria potestas* and inherited wealth. On the other hand, the laws on *bona materna* were not a response to social or economic change: inheritance from mothers to children had hardly become any more common. Roman fathers were just legally enjoined to do what they had earlier been expected to do voluntarily or by force of *fideicommissa*, a symptom of changes in Roman legal thinking rather than in the Roman family.

Of course, to the great majority of people, who were engaged in subsistence farming, all this must have seemed irrelevant. If a family had only enough land to maintain one household it was impossible to grant a *peculium* for the children. Nor would it have helped much to emancipate them since they could not be given anything with which to support themselves. The two adult generations had to share the same household under the direction of the oldest male. Whether he retired in old age or not,

[27] *CTh* 8.18.3 (334); *CJ* 6.60.4 (468); Arjava, *WLL*, 101–3; and for the many problems of step-parenthood in late Roman law, 172–7.

[28] *CTh* 8.18.6 (379 West) and 7 (395 West); not yet in 8.18.5 (349 East).

[29] *CTh* 8.19.1 (426 West); *CJ* 6.61.2 (428 East); *Nov. Theod.* 14.8 (439 East); *CJ* 6.61.4–5 (472/3 East).

[30] *CJ* 6.61.6 (529); Just., *Inst.* 2.9.1. Cf. *Lex Rom. Vis.* 8.9–10 (= *CTh* 8.18–19); *Lex Rom. Burg.* 22.1–2.

all the members of the family were probably thought to have some rights in the property. Their co-operation was needed if anything was going to be alienated. Thus, in the deeds of sale written amidst the rugged mountains of North Africa in the very last years of the fifth century, fathers and widowed mothers appear selling land together with younger members of the family.[31]

III. AUTHORITY AND DISCIPLINE

In principle, the *paterfamilias* had power not only over the property of his children but over their person as well.[32] Exactly what means a father might use to govern his descendants is somewhat obscure. The extreme form of *patria potestas* was the father's right to kill his children (*ius vitae ac necis*). However, such power seems always to have been mainly symbolic, and in Late Antiquity it was clearly considered obsolete.[33] In normal circumstances, the Roman father was not a terrifying figure. Many fathers were actually accused of excessive indulgence towards their sons. Tertullian and Lactantius contrasted the tenderness of a father to the severity of a slave-owner. Most children conformed obediently to the father's authority, and in a clash he was advised first to give a verbal scolding.[34] On the other hand, it is clear that children could be beaten.[35] Augustine, too, suggested that the *paterfamilias* sometimes needed a whip to keep his sons under proper discipline.[36] However, corporal punishment was certainly used first and foremost against small children, or boys in their teens. It is much more difficult to believe that fathers used to beat their grown-up sons, especially when they had established an independent household.

If the father could not physically coerce his dependants, the next step was to invoke official help.[37] However, given the trouble and loss of time which he could expect in a Roman court, he can rarely have considered a lawsuit an attractive alternative to uphold his *patria potestas*. One would expect that fathers mostly relied on their economic powers. In a rare passage Augustine indeed asserts that property ownership gave fathers authority over financially dependent sons (*Serm.* 45.2, CCL 41.517). Otherwise there is surprisingly little evidence that fathers actually would have exercised their prerogatives (to reclaim the *peculium*, for example) against disobedient children.[38] Perhaps it was a

[31] *Tablettes Albertini* 11; 15; 18; 21; 29; 30.

[32] On marriage and divorce, see P. E. Corbett, *The Roman Law of Marriage* (1930), 53–67, 122–5; J. F. Gardner, *Women in Roman Law and Society* (1986), 10–11, 41–4; S. Treggiari, 'Consent to Roman marriage: some aspects of law and reality', *EMC/CV* 26 (1982), 34–44; eadem, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (1991), 459–61, 476–82; J. Beaucamp, *Le Statut de la femme à Byzance (4e-7e siècle), II, Les pratiques sociales* (1992), 145–6, 153–8, 297–300, 305–6; Arjava, *WLL*, 29–41, 44–6, with further references.

[33] *Dig.* 37.12.5; 48.8.2; 48.9.5; Gaius of Autun, 4.85–6 (*FIRA* II 224); *CTh* 9.15.1; 11.27.1; 4.8.6.pr, with *CJ* 8.46.10; *Lex Vis.* 6.5.18–19. On the whole topic, Kaser, op. cit. (n. 7), 341–2; idem, op. cit. (n. 17), 204; Voci, op. cit. (n. 2, 1980), 60–1, 66–74, 79; Y. Thomas, 'Vitae necisque potestas. Le père, la cité, la mort', in *Du châtiment dans la cité: Supplices corporels et peine de mort dans le monde antique* (Coll. EFR 79, 1984), 499–548; W. V. Harris, 'The Roman father's power of life and death', in R. S. Bagnall and W. V. Harris (eds), *Studies in Roman Law in Memory of A. A. Schiller* (1986), 81–95; Saller, op. cit. (n. 7, 1988), 395–6; idem, op. cit. (n. 1, 1994), 115–17; cf. also J. Goody, *The Oriental, the Ancient, and the Primitive: Systems of Marriage and the Family in the Pre-Industrial Societies of Eurasia* (1990), 405.

[34] Tert., *Adv. Marc.* 2.13.5, CCL 1.490; Lact., *Inst.* 4.3.14–17, CSEL 19.280; Lib., *Or.* 62.24–5; *Ep.* 1375; Jerome, *Ep.* 82.3; John Chrys., *Vidua elig.* 9–10, PG 51.329; *De inani gloria* 30, SC 188.120; Aug., *Serm.* 9.4; 13.9, CCL 41.114/182; see Saller, op. cit. (n. 7, 1988), 405; idem, 'Corporal punishment, authority, and obedience in the Roman household', in B. Rawson (ed.), *Marriage, Divorce, and Children in Ancient Rome* (1991), 144–65; E. Eyben, 'Fathers and sons', ibid. 114–43; Saller, op. cit. (n. 1, 1994), 142–53.

[35] See e.g. Dio Chrys., *Or.* 15.18; *Dig.* 48.19.16.2; *CJ* 8.46.3 (227); *CTh* 9.13.1 (365/73); and works in the preceding note.

[36] e.g. Aug., *In evang. Joh.* 7.7, CCL 36.70; *In psalm.* 32.2.1.3, CCL 38.249; → B. D. Shaw, 'The family in Late Antiquity: the experience of Augustine', *Past and Present* 115 (1987), 3–51, at 19–26, with ample documentation, and much (perhaps too much) stress on violence inside the family; see also S. Poque, *Le Langage symbolique dans la prédication d'Augustin d'Hippone: Images héroïques* (1984), 193–224; and cf. now P. Garnsey, 'Sons, slaves—and Christians', in B. Rawson and P. Weaver (eds), *The Roman Family in Italy: Status, Sentiment, Space* (1997).

[37] cf. *Dig.* 1.16.9.3; *CJ* 8.46.1/3/5; *CTh* 9.13.1; *BGU* VII.1578; cf. also Aug., *In Joh.* 30.8, CCL 36.293.

[38] cf. above, n. 7.

threat which was rarely uttered but silently understood by all parties. In poor families it must have been difficult to use anyway.

It may sometimes have been more effective to menace the children's prospects of inheritance—at least it is much more often mentioned in our sources. Disinheritance was a heavy weapon, but it had a weak point, too. Disinherited children could claim that the will was contrary to duty if their father had not left them at least a quarter of their intestate share (*querela inofficiosi testamenti*).[39] Then a court had to decide whether the child's repute had been bad enough to justify the disinheritance. If a daughter had only refused to divorce her husband, her father's reaction was considered too harsh (*CJ* 3.28.18–9). In Late Antiquity angry parents might try to disinherit their daughter because she wanted to remain a virgin against their wish. Paradoxically, she could sometimes face the same threat because she wanted to marry while they had decided to put her in a convent.[40] Justinian finally gave a long list of offences which justified disinheritance (*Nov.* 115.3). For example, a child who renounced the Catholic faith or practised a shameful profession gave just cause for disinheritance. These examples implicitly show that *patria potestas* alone did not suffice for the father to have his way. Although punitive disinheritance is sometimes mentioned by late ancient writers, it appears to have been after all a rare and dramatic occurrence. Sidonius Apollinaris in mid-fifth-century Gaul classed it with crucifixion and drowning, traditional punishments for parricide. And Libanius regrets that the fathers, who were otherwise powerless against their sons' unruly behaviour, did not even threaten to use it.[41]

Consequently, outright disinheritance was not a very convenient way to keep one's offspring disciplined. The father could enhance his authority most easily by reminding the children that he did not have to leave them more than their lawful portion, that is, one quarter of their share on intestacy. Unequal division of the estate was much more common in Roman society than it is today. It was also usual to distribute legacies to friends and more distant relatives, thus diminishing the share of the principal heirs. This certainly inspired children to keep on good terms with their parents.[42] For example, if the father had two children, he might bequeath seven-eighths of his estate to the favoured one and only one-eighth to the other. The children together did not need to receive more than one-quarter. Later in the East Justinian raised the legitimate share to one-third.[43]

In the West, Roman parents retained the right to discriminate among their heirs for as long as we can follow the legal sources, until the early sixth century.[44] The evidence for Germanic usage is sparse. The earliest Visigothic law imitated Roman legislation, giving parents wide liberty to dispose of their property. Later the freedom of testation was decisively limited for the benefit of children. Now parents could give only one-fifth of their estate outside the family. Inside it, they were able to use just one-tenth to reward a favourite child. That is why the parents were reminded that they could still maintain their authority at home by the whip or other physical correctives. Perhaps this was not enough: a little later the quota of one-tenth was again increased to one-third.[45] The Frankish codes did not discuss wills at all. Among the Langobards, every son was usually guaranteed over two-thirds of his intestate share, much more than in Roman

[39] See *CJ* 3.28; *Dig.* 5.2; Gardner, op. cit. (n. 32), 183–90. For later developments, Kaser, op. cit. (n. 17), 514–21.

[40] Ambr., *De Virginibus* 1.62–4; *Nov. Maj.* 6.3 (458 West); *CJ* 1.3.54.5 (533/4); *Nov.* 115.3.11; cf. also Lib., *Decl.* 46 (a similar threat against a son). And see Arjava, *WLL*, 157–67, for the diverse problems caused by Christian asceticism.

[41] Sidon., *Ep.* 4.23; Lib., *Or.* 62.24–5; cf. Theodoret., *Hist. eccl.* 3.17, repeated by Cass., *Hist.* 6.44; Ambr., *Hex.* 5.4.10; 5.18.58; 6.4.22, CSEL 32.1.147/184/218; Aug., *Serm.* 355.3–5, PL 39.1570; *In psalm.* 32.2.3, CCL 38.248; 93.17, CCL 39.1318; *In Galat.* 39, PL 35.2132. See also Champlin, op. cit. (n. 23), 14–15, 107–11.

[42] cf. Aug., *Serm.* 21.8; 45.2, CCL 41.283/517; *In psalm.* 17.32, CCL 38.99; 102.20, CCL 40.1469; Ambr. ,*Hex.* 5.18.58, CSEL 32.1.184f. Shaw, op. cit. (n. 36), 20–5; Saller, op. cit. (n. 1, 1994), 122–3.

[43] Nov. 18.1 (536); the new quota is attested in *P.Masp.* III.67353 (569). See also *P.Masp.* I.67097 = *FIRA* III.15, with Beaucamp, op. cit. (n. 32), 79–81; and the *Syro-Roman Law Book* L 9; cf. W. Selb, *Zur Bedeutung des syrisch-römischen Rechtsbuchs* (1964), 72–86.

[44] *Lex Rom. Burg.* 45.4–5; *Sent. Pauli* 4.5 + int, and *CTh* 2.19.2/4 + int, in the *Lex Romana Visigothorum* (and its *Epitomes*).

[45] *Lex Vis.* 4.5.1/3; cf. K. Zeumer, 'Geschichte der westgotischen Gesetzgebung IV', *Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde* 26 (1901), 91–149, at 138–46; P. D. King, *Law and Society in the Visigothic Kingdom* (1972), 246–7.

law.[46] We cannot tell how strictly the rules were observed nor how quickly the customs of Roman and Germanic populations were fused. In general, however, the Germans appear to have been much more reluctant to let a man distribute his property away from his legitimate (male) descendants. Thus, in the early Middle Ages people's ability to use their last will to bring financial pressure on their adult children may have diminished.

IV. THE SURVIVAL OF *PATRIA POTESTAS*: THE MIDDLE EMPIRE

We shall next tackle the crucial question: how *patria potestas* was received outside Italy in the third century. The remark of Gaius cited at the beginning is the clearest statement we have about the father's role in peregrine communities before A.D. 212. To repeat it: *patria potestas* was peculiar to Roman citizens and unknown to almost all other people (*Inst.* 1.55). Gaius hardly had knowledge of all the local legal systems inside the Empire, but he was probably able to make comparisons with most of those which were important and especially those which sprung from Greek traditions.[47] However, although his basic information has to be accepted with some confidence, the situation was not quite so simple. The Lex Irnitana, a municipal law from the late first century, shows that inhabitants of a Spanish town who were not yet Roman citizens could recognize legal relationships which were modelled after Roman law, among them *patria potestas*. This may have applied first and foremost to those people who had the so-called Latin rights. The whole issue of municipal status is still very obscure, and it does not follow that a Roman-style legal system covered everyone living within the Empire's borders. It does, however, suggest that Roman institutions were being spread in the Western provinces already in the early Empire.[48]

In the East the situation was probably different. It is at any rate better documented, although even in Egypt the sources rarely characterize paternal power on a general level. Only a few papyri before 212 contain any explicit statement about legal relations between fathers and their adult children. Among them the famous petition of Dionysia is the most important.[49] These documents show that fathers in Egypt could assert an extensive authority (*exousia*) over both the person and the property of their married daughters.[50] The exact nature of this authority is far from clear. But the sheer number of obligations, contracts, claims, and counter-claims between Dionysia and her father is enough to show that these people would not have recognized *patria potestas* in the absolute form described by Roman jurists.[51] Moreover, there are numerous documents which implicitly show that sons were thought to own personal property and were able to conclude contracts, both with their father and with third parties.[52]

When we move to the third century and to the time following the *Constitutio Antoniniana* we can avail ourselves of two rather disparate groups of evidence: firstly again the papyri from Egypt and secondly the imperial rescripts. Both can be employed for determining the impact of law on the populace. Although the rescripts were normative juridical statements they were addressed to private people and closely reflected their personal problems. Of course, the original petition would often be more interesting than the emperor's blunt answer, but even in their extant form the texts delineate fairly well the real-life situation which had prompted the rescript. It is

[46] *Ed. Roth.* 168–71; *Leg. Liutpr.* 113; cf. *Ed. Roth.* 158–60; *Leg. Liutpr.* 5; 65; 102. See also *Lex Burg.* 1; 24.5; 51; 75. On Merovingian wills, cf. Arjava, *WLL*, 72, 97–8.

[47] cf. *Dig.* 1.6.3; Just., *Inst.* 1.9; Dion. Hal. 2.26. Enfranchized peregrines, like the family of Herodes Atticus, naturally had to adopt the idea of *potestas*, Philostr., *Soph.* 1.21.7 (= 521).

[48] *L.Irnit.* 21–2; 86; cf. Gaius, *Inst.* 1.93–[illegible] J. González, 'The Lex Irnitana: a new copy of the Flavian municipal law', *JRS* 76 (1986), 147–243, at 148–9, 154, 176–7, 203–4, 231; Gardner, op. cit. (n. 1), 188–90.

[49] *P.Oxy.* II.237; *P.Mil.Vogl.* IV.229; cf. N. Lewis, 'On paternal authority in Roman Egypt', *RIDA* 17 (1970), 251–8.

[50] See esp. *P.Oxy.* II.237, VI.14 and VII.41–2; in *BGU* VII.1578 the veteran father probably refers to Roman law.

[51] cf. *Dig.* 5.1.4: 'Lis nulla nobis esse potest cum eo quem in potestate habemus, nisi ex castrensi peculio'.

[52] See Taubenschlag, op. cit. (n. 3, 1916), 177–207; idem, op. cit. (n. 3, 1955), esp. 130–1, 148.

conceivable that people who owned at least some property formed the majority of the addressees, yet the emperors wrote to humble people as well, even slaves. The geographic distribution of the petitioners is equally difficult to demonstrate but it seems to have been wide. The Tetrarchic material (over one thousand rescripts) overwhelmingly derives from the eastern half of the Empire.[53]

It seems unlikely that anyone presented a petition to the emperor unless he or she presupposed that the conflict would be decided according to Roman law. None the less it often emerges that people had not been aware of the finer points of law, a finding which should not surprise anyone. Occasionally even the main principles had been obscure, leading the imperial lawyers to such remarks as: 'You should have known that. . .' Despite the wishful thinking that there may have been in many cases, the texts also supply abundant evidence of people who had been able to absorb the rules of law and had handled their legal affairs correctly. All this being said, it must be emphasized that the rescripts consistently regard *patria potestas* as a self-evident and commonplace institution. Not only were the addressees always expected to understand such key concepts as 'potestas' and 'emancipatio' without any difficulty (although they may not initially have appreciated all the implications). What is more important, they had clearly themselves often anticipated such considerations in their petition, informing the emperor of the legal status of various family members, such as emancipated and unemancipated brothers.[54] It is hard to avoid the conclusion that throughout the third century a great (though unquantifiable) part of Roman citizens around the Empire was conscious of *patria potestas*, not as an empty phrase but as a concrete factor which determined their financial position.

The papyri from Egypt present a much more complicated picture. In principle, the documents should in the third century refer to official Roman institutions, but in practice they may preserve traces of local tradition. Moreover, a particular expression may often have gone back to the scribe rather than to the individuals concerned: apart from the problem of illiteracy, most people were likely to consult someone experienced in legal matters if they had to draw up a contract. Further, as we are concerned with children whose fathers are known to be alive, we can normally use only papyri where both the father and the child are mentioned. This may give undue weight to situations where they cooperate in one way or another. Thus, the interpretation of this abundant but inconsistent array of material is anything but easy.

Patria potestas as a concept was certainly not unknown in third-century Egypt. There are numerous cases where the child is explicitly called subject (*hypokheirios/a*) to his/her father.[55] Alternatively the father is said to have his children 'in his power according to Roman law' (*hypo te kheiri kata tous Romaion nomous*).[56] There can be no doubt that these expressions were meant as translations of the Roman *potestas*.[57] Their first emergence is around A.D. 200, when a Roman veteran complains of his daughter's behaviour (*BGU* VII.1578). The father obviously had given some property to the daughter when she married. Now he claimed that what she had since acquired belonged to him. No wonder that she was dissatisfied to be *in potestate* (*[akh]thomene to hypokheirian moi einai*). Here Roman family law appears in a perfectly correct form. Similarly, in the 260s a mother was very much aware that an inheritance left to her child would end up as the father's property. Consequently, she had instituted her children

[53] See e.g. T. Honoré, *Emperors and Lawyers* (2nd edn, 1994); L. Huchthausen, 'Herkunft und ökonomische Stellung weiblicher Adressaten von Reskripten des Codex Iustinianus (2. und 3. Jh. u.Z.)', *Klio* 56 (1974), 199–228; eadem, 'Zu kaiserlichen Reskripten an weibliche Adressaten aus der Zeit Diocletians (284–305 u.Z.)', *Klio* 58 (1976), 55–85.

[54] As a random sample, see e.g. *CJ* 2.2.3; 3.31.6; 4.19.16; 4.29.8; 5.16.16; 5.71.7; 6.9.4; 6.14.1; 6.20.6/9/11/15; 6.30.1; 6.46.5; 6.57.2; 6.59.1; 8.46.1–8; 8.48.1–4; 8.53.2/17; 8.54.5; 10.50.2; etc. A simple search for strings 'potesta*' or 'emancipat*' in the *Justinianic Code* would produce dozens of further examples.

[55] *BGU* VII.1578 (*c.* 200); *P.Diog.* 18 = *P.Harr.* I.68 = *FIRA* III.28 (225); *P.Gen.* I.44 (260); *P.Oxy.* XIV.1642 (289); LIV.3758.156–80 (325); *P.Panop.* 28 = *SB* XII.11221 (329); possibly to be restored in *SB* I.5692 (3rd century) and *P.Oxy.* XIV.1703 (*c.* 260). See also *P.Lond.* III.977.14 (330), where the daughter is said to be *ep' exousias moi*.

[56] *P.Oxy.* X.1268 (3rd century); XLI.2951 (267); IX.1208 (291); *SB* X.10728 (318).

[57] They denoted a state of subjection (without technical import) already in classical Greek, see Liddell and Scott, *A Greek-English Lexicon*, s.v., but were not used in papyri before the Roman period.

heirs on the condition of emancipation—a practice which we often encounter in contemporary legal sources.[58] Furthermore, a fragmentary document preserves the formal procedure of emancipation, a fictitious sale in the presence of seven witnesses (*mancipatio*),[59] while emancipated sons (*apoluthentes tes patrikes exousias*) appear in one dossier.[60]

The above evidence would suggest that Roman family law was adopted in Egypt reasonably well. Yet, some other papyri are less plain: they indicate in one way or another that children owned separate property, albeit they are not totally free of ambiguity, and the father always plays some role in the affair.[61] Quite frequently a man or a woman is said to operate 'through the father' (*dia tou patros*). Often this does not tell anything about property relations but can be understood as a simple representation. However, not a few documents convey the idea that while the children acted through the father they were themselves selling, renting, or buying something, that is, they were the owners of the property.[62] Still the same papyri may explicitly state that the child is in his/her father's power.[63]

Sometimes the father is said to be the guardian for a minor child or an adult daughter.[64] As children *in potestate* did not need a guardian, in Roman juridical terms this could only mean that they had been emancipated. Particularly puzzling is a bilingual document where the formula appears in Latin as well ('praef(ecto) Aegypti [a M.] Aurelio Chaeremone q(ui) e(t) Didymo impub(ere) t(utore) a(uctore) patre [suo] M. Aurelio Chaeremone q(ui) e(t) Zoilo hieronica [An]tinoense').[65] As the request was addressed to the highest juridical authority of the province, deviations from the official phraseology might seem less likely, and we cannot exclude the possibility that emancipation was here tacitly assumed.[66] However, the Greek version of the text presents an additional difficulty: the father is called *kyrios*. This word meant normally only the guardian of an adult woman while minors were supervised by an *epitropos* (and later by a *kourator*). A simple lapse of translation is, of course, possible. An alternative is suggested by a few other documents, where the father of a male child is also termed *kyrios*: possibly the word was sometimes usurped to describe the Roman *paterfamilias*.[67] Neither explanation is capable of proof, but clearly there was aberrant phraseology either in the Latin or the Greek, or both.

The peaceful coexistence of Roman law and popular patterns of thought is perhaps best exemplified by a contract from A.D. 291. A certain Aurelius Thonios was selling land which he had inherited from his mother. In the document he (or rather the scribe) stated that he was acting with the approval of his father (*meta symbebaiotou tou patros*), who had him 'in his power according to Roman law', but later on the son presented himself as the owner by right of inheritance. Such a wording would hardly have been

[58] *CPR* VI.78 (the document is fragmentary and might be reconstructed somewhat differently from the present edition). Cf. e.g. *CJ* 3.28.25 (301); 6.25.3 (216); 6.42.15 (256); 8.54.5 (294); Arjava, *WLL*, 99 nn. 72–3; and above n. 23.

[59] *CPL* 206 = *FIRA* III.14 (3rd century); cf. Gaius, *Inst.* 1.132–4. In the second century *mancipatio* took place before the praetor or provincial governor, but later the act was possible before local magistrates as well. That must have considerably eased the governors' work after 212 while it also helped those people who lived far from the provincial capital. A written document was favoured but not compulsory. *CJ* 4.21.11; 8.48; *Sent. Pauli* 2.25.2–4; Gaius, *Epit.* 1.6.3–5; *Syro-Roman Law Book* L 3. In so far as the empty formality of *mancipatio* was observed in Late Antiquity it was hardly a real obstacle for anyone; it was officially abolished only by Justinian, *CJ* 8.48.6; Just., *Inst.* 1.12.6; Selb, op. cit. (n. 43), 169; Kaser, op. cit. (n. 17), 212.

[60] CPR VI.12–30 (300/1); cf. *CPR* VI p. 60.

[61] *P.Grenf.* I.49 (220/1); *P.Oxy.* VII.1040 (225); *P.Gen.* I.9 (251); *PSI* VIII.873 (299).

[62] *P.Oxy.* LI.3638 (220); XIV.1697 (242); IX.1208 (291); *P.Bub.* I.4 (221); *P.Lond.* III.954 = *MChr* 351 (260); *P.Giss.* 34 (265/6, paternal grandfather); *P.Coll.Youtie* II.71–2 (281); see also *P.Oxy.* XXXIV.2723 (3rd century).

[63] *P.Oxy.* IX.1208 (291); X.1268 (3rd century); XLI.2951 (267); possibly also in XIV.1703 (*c.* 260); *SB* I.5692 (3rd century).

[64] *BGU* II.667 (221/2); *PSI* XV.1546 (222); X.1126 (3rd century); *SB* VI.9069 (3rd century); probably also *CPR* I.218. For the guardianship of adult women, see Arjava, *WLL*, 112–23.

[65] *SB* I.1010 = *FIRA* III.61 (249). The Greek text has been preserved also in a more complete copy, *SB* VI.9298. Another bilingual document with related contents is *P.Oxy.* VIII.1114 = *FIRA* III.63 (237).

[66] Most other papyri here discussed are either private contracts or communications to lower officials.

[67] *PSI* X.1126 (3rd century); *CPR* I.218 (probably to be so restored); *SB* V.7996 = *PSI* XII.1239 (430), discussed below. After 212 only one father appears as an *epitropos* of his child, *BGU* II.667 (221/2). The 'irregular' use of *kyrios* for *epitropos* is otherwise attested just once in the whole Roman period, *P.Lond.* III.903 (103/17).

recommended by an imperial jurist. However, the disagreement with Roman law does not appear too serious since the father was present and sanctioned the sale. This fact may have been sufficient to satisfy an official who was more familiar with imperial law. Besides, the question did not arise at all unless there were someone who wanted to contest the sale's validity.[68]

The orderly functioning of the Roman legal system did not require that every transaction had been recorded in faultless phraseology. It was enough that eventual disputes could be solved by giving afterwards a 'correct' interpretation to the facts. For example, if a father had allowed his children to administer separate property, a jurist might simply call it a *peculium*, whether the people themselves knew the word or not. Unfortunately, there is to my knowledge no extant Western document which would show how a *filiusfamilias* and his *peculium* were 'normally' termed (assuming that Latin practice on average would observe more closely the legal requirements). The only exception is the inscriptionally preserved codicil of a man who asks his father to manumit 'my slave Aprilis' ('Aprilem servum meum'). He was clearly *in potestate*, otherwise he would have freed the slave himself.[69] The nomenclature of imperial slaves and freedmen also reflects the idea that *filiifamilias* princes of the ruling house had a separate servile staff.[70] That in popular consciousness the father and child could be thought to have separate possessions is further demonstrated by numerous third-century imperial rescripts which discuss gifts from fathers to children. Thus, it was quite normal for the jurists to say that a father had 'donated' something to a child *in potestate*, although they were careful to stress that this did not transfer the real ownership away from him.[71] The practice of buying or registering certain property in the name of one's children (*ep' onomatos tou hypokheiriou hyiou*), which sometimes appears in the papyri, is echoed in a rescript from the year A.D. 260 ('Si domum. . . pater tuus, cum in potestate eius ageres, nomine tuo donandi animo comparavit. . .').[72]

Thus, the papyri of Roman Egypt do not depict *patria potestas* in the same rigorous way as the legal textbooks, but such a picture might not emerge from the documents of the Romanized West either, if we had any. Legal accuracy is not to be expected in private deeds anyway. Even if people knew family law, points of doctrine were mentioned chiefly if they served the purpose of the document, thus the scribes may not have bothered to record details which they felt superfluous.

There are three main possibilities to interpret the evidence of the papyri:

1. The scribes knew some formulas of Roman law but had not really understood them. They used *hypokheirios* essentially as a synonym for 'underage', thus identifying paternal power with the guardianship for minor children. Children became automatically independent at their majority without further ado.
2. *Patria potestas* was understood as a kind of lifelong guardianship, i.e. children were thought to own separate property but under the father's supervision.
3. Fathers usually but not always emancipated their children when these became adult, using some more or less formal method which satisfied the authorities.

[68] *P.Oxy.* IX.1208; see E. Volterra, 'Il senatoconsulto Orfiziano e la sua applicazione in documenti egiziani del III secolo d.C.', in *Atti dell'XI congresso intern. di papirologia* (1966), 551–85, at 576–85.

[69] *CIL* X.7457 = *ILS* 8377 = *FIRA* III.56 (175). Cf. the registration of his own and his sons' slaves by a citizen father, *PSI* V.447 (167).

[70] See a list of cases in H. Chantraine, *Freigelassene und Sklaven im Dienst der römischen Kaiser, Studien zu ihrer Nomenklatur* (1967), 35–41; e.g. *CIL* VI pp. 899–906. Expressions like 'Onesimus Germanici Caesaris libertus' or 'Marci Aurelii Caesaris libertus' do not conform with *Dig.* 37.14.13: 'Filius familias servum peculiarem manumittere non potest. Iussu tamen patris manumittere potest: qui manumissus libertus fit patris.'

[71] *CJ* 3.36.4; 6.20.13; *Fragm. Vat.* 274; 277; 281; 294–6; etc.

[72] *Epit. Cod. Greg. Vis.* 3.8.2 (*FIRA* II.661); cf. *P.Gen.* I.44 (260); *SB* X.10728 (318); *P.Oxy.* XII.1470 (336). Many other sales mentioned in previous notes could be interpreted in the same sense, e.g. *P.Oxy.* IX.1208; XXXIV.2723; LI.3638; *P.Lond.* III.977. J. Rowlandson, *Landowners and Tenants in Roman Egypt: The Social Relations of Agriculture in the Oxyrhynchite Nome* (1996), 194, remarks that in the Roman period parents sometimes bought land for their unmarried daughters, perhaps in order to provide them with capital at their marriage.

In his much-cited article Taubenschlag regarded the first alternative as the most important one. There is to my knowledge no evidence to confirm it.[73] True, many of the cases discussed above show underage children. This may just reflect the simple demographic fact that the younger the children were the more likely they were to have a living father to appear in the same document, and minors may also have been more likely to mention the father's assistance. Of those thirteen children who are described as *hypokheirioi* only three are also said to be minors (*P.Diog.* 18; *P.Gen.* 44; *SB* I.5692). Admittedly none of the others can be proved to be of age (over twenty-five), although one is a mother (*P.Panop.* 28 = *SB* XII.11221) and another a cavalryman (*P.Oxy.* XLI.2951).[74]

Both the first and the second hypothesis would conveniently explain the phrases found in papyri. It goes without saying that local practices were slow to change: no one would seriously believe that millions of provincials suddenly absorbed Roman law in 212. The first model is the most difficult to reconcile with the evidence of the rescripts: the petitioners are never blamed for having mistaken emancipation for an automatic corollary of majority, and minors had been emancipated, too.[75] Although the second alternative differed theoretically from the Roman concept of *potestas*, in everyday life the result was very much the same, and this may have formed a bridge between legal theory and popular practice. Formal emancipation is also documented in Egypt, though not amply. It is conceivable that there were always some people who had managed to absorb legal rules better than others. Thus, all the three paradigms perhaps coexisted in the Nile valley, but I would be inclined to believe that with time the first was the least important while the tendency was towards a combination of the second and the third. That is at least suggested by later evidence from elsewhere in the Empire (below Section v).

Finally, it is worth mentioning the area in which the Roman state certainly had the keenest interest: taxation and other public duties. Here *patria potestas* made less difference than we might imagine. Taxes were paid on property or *per capita*, regardless of *potestas*. The father was responsible for the compulsory public services of his dependants, but this was no financial load since members of the same *familia* could not be called to duty more often than a single person. Thus, emancipation did not ease the family's total burden and might even increase it (depending, of course, on how much property was ceded to the children).[76] The evidence from Egypt is in harmony with this: in a couple of papyri the father and his children appear mutually responsible for each other's liturgies.[77]

V. THE SURVIVAL OF *PATRIA POTESTAS*: THE LATER EMPIRE

Whatever confusion it may have caused among the new citizens, *patria potestas* by no means disappeared from Roman society after 212. After figuring regularly in the rescripts of the Tetrarchic period, it thereafter continued to be treated in both Eastern and Western laws (see e.g. above Section II, on *bona materna* and the *peculium castrense*).

[73] The only proof adduced, *P.Mon.* I.1.11–13 (574), is too obscure to be useful. *P.Lips.* I.28 (381), discussed below Section v, is perhaps more relevant but still ambiguous. See Taubenschlag, op. cit. (n. 3, 1916), 207–14, 223–30; his later work, op. cit. (n. 3, 1955), 130–49, avoids any clear conclusions.

[74] In classical Roman law, *tutela impuberis* ended at the age of twelve (for girls) or fourteen (for boys). In the third century the tendency was to stress twenty-five years as the real threshold of adulthood ('aetas legitima'). Now children under twenty-five regularly had a *curator minoris*, who by and by assumed the same powers as a *tutor*. See e.g. Kaser, op. cit. (n. 7), 352–72; idem, op. cit. (n. 17), 222–37. In third-century papyri the age of majority is not explicitly defined, cf. D. Hagedorn, 'Noch einmal zum Volljährigkeitsalter in Ägypten nach der *Constitutio Antoniniana*', *ZPE* 113 (1996), 224–6; however, the frequent appearance of *kouratores* indicates that the Roman concept had been adopted.

[75] *CJ* 2.20.5 (293); 5.62.19 (294); 5.71.7 (283); 10.50.2 (Diocl.); *CTh* 8.12.2 (316).

[76] *Dig.* 50.1.2; 50.2.6.4; 50.2.7.3; 50.4.3.16–17; *CJ* 4.13.2–3; 7.71.3; 10.32.1/5; 10.41.1/3; 10.50.2; 10.52.4; 10.62.1–4.

[77] *CPR* I.20 (250); *P.Oxy.* XIV.1642 (289); see also *P.Oxy.* XII.1418 (247).

Patria potestas is also discussed as an existing institution in the *Syro-Roman Law Book*.[78] There is no doubt that Justinian considered it an important and living part of the legal system which he tried to maintain in his Empire, and it is impossible to believe that this recurrent topic was wholly fictional.[79] The laws themselves sometimes reveal that people felt the impact of the paternal power on their everyday life, like those illegitimate children who did not want to be legitimized because their father would then have controlled their maternal inheritance (*Nov.* 74.praef.2). Some non-legal authors allude to paternal power in more or less precise terms through the fourth and fifth centuries.[80] That the number of explicit statements remains relatively low is not surprising: the writers of the late Republic and early Empire did not mention *patria potestas* any more often. Reading Cicero's Verrine speeches it is difficult to notice that Verres was actually *in potestate* and thus did not even own the riches which he had extorted from his province.

It is perhaps somewhat disappointing that the papyri of the Byzantine period are even less precise about *patria potestas* than those of the third century. The expressions *hypokheirios* and *hypo te kheiri* do not occur after 329, but they are later replaced by *hypexousios* (see below). From the fourth century we have two deeds of adoption. They both omit any mention of *patria potestas* or anything which could be linked with it. For example, the adoptive father promises to maintain the adoptee and make him his heir, and to transfer to the boy his paternal and maternal inheritance after he has become of age. Besides, the person who gave the boy in adoption was his grandmother although in Roman law this act (technically *arrogatio*) could not be so performed. It seems that whoever drafted these documents had little respect for Roman legal concepts.[81] Of course, the terms of the contract did not as such conflict with Roman law: the adoptive father could fulfill his promise by emancipation or a *peculium*.

On the other hand, in 430 a monk and his dead sister's three children were selling property which they had inherited from his mother, their maternal grandmother (*SB* V.7996 = *PSI* XII.1239). The children, whose age was not specified, were acting through their father. He had them in his power (*hypexousioi*) and declared to sanction and guarantee their decision, being also their guardian (*kyrios*). Although the scribe here deviated from the phraseology of imperial law he followed its substance tolerably well. The text met at least the minimum legal demand: the participants were acting jointly to transfer an estate to which both the father (as usufructuary) and the children (as 'real' proprietors) had certain rights. Possibly a similar situation lies behind a remark in a mid-sixth-century papyrus (*P.Michael.* 40.61–3).

Thus, while the two fourth-century deeds of adoption display indifference towards imperial law this fifth-century sale seems to be evidence of some respect for it. As far as I know, none of the other late Roman documents is more conclusive.[82] In the sixth century the word *hypexousios* sometimes appears, twice in Egypt and once in Nessana (Palestine). The context in all these is the same: a father marries off (or takes back) a son or a daughter who is said to be *hypexousios*, and the nature of this relationship is not specified. However, in one of them the groom's father gave to the couple as a bridegift (*pro gamou dorea*) 'everything that had been left by his deceased wife, the groom's mother'. Now it is quite improbable that he had himself been the direct beneficiary: much more likely the mother had left her property to her son and the father had governed it as a usufructuary according to imperial law.[83] In sum, although the papyri

[78] In chapters L 2–3, 18, 40, 42, 44. The Greek original of this somewhat mysterious work probably dates back to the late fifth century; the standardized Latin rendering in *FIRA* II.751–98 is handy but not always accurate. See Selb, op. cit. (n. 43); R. Yaron, 'Syro-Romana', *Iura* 17 (1966), 114–64; Kaser, op. cit. (n. 17), 49–50.

[79] The idea of *patria potestas* has permeated all of the *Corpus Iuris Civilis*: for a short statement, see *Inst.* 1.9 and 1.12.

[80] Lact., *Inst.* 4.3.15, CSEL 19.280; Greg. Naz., *Or.* 37.6; Basil., *Ep.* 276; Symm., *Ep.* 9.150; John Chrys., *Qual. duc. ux.* 2, PG 51.226; *Conc. Hipp.* (393) 1, CCL 149.20; Eunap., *Soph.* 495 (*heautou kyrios* = *sui iuris*); Aug., *Ep.* 262.11, CSEL 57.631; *Serm.* 45.2, CCL 41.517; Sidon., *Ep.* 7.2.7.

[81] P.Oxy. IX.1206 (335); *P.Lips.* I.28 = *MChr* 363 (381). Cf. Kaser, op. cit. (n. 17), 208–9.

[82] cf. e.g. *P.Oxy.* XII.1470.13 (336); L.3581 (4/5th century); XVI.1890 (508); *SB* XII.11075 (early 5th century); *PSI* IX.1075 (458); *P.Michael.* 43 (526); *P.Hamb.* I.23 (569); *SP* XX.145 (6th century); *P.Grenf.* II.87 (602); *P.Monac.* I.1.11–13 (574).

[83] *P.Ness.* III.18 (537); *P.Masp.* I.67006v.14–21 (6th century); *P.Oxy.* I.129 = *MChr* 296 = *FIRA* III.21 (6th century).

cannot be used to prove the existence of *patria potestas* in late Roman Egypt, they are not in conflict with it either. We are left with the legal and literary sources, which warrant our believing that in Late Antiquity paternal power was recognized as a fact of life throughout the Empire.

On the other hand, as a matter of practice *patria potestas* was typically connected with minor children. The father was responsible for them and for their property and needed some authority to prevent them doing anything foolish. As Lactantius put it: who could bring up his children unless he had power over them?[84] Such a connection was natural since most children *in potestate* really were minors. For this there were the two reasons which have already been mentioned. First, a great number of fathers were dead before the adulthood of their children. And second, many children were emancipated. We shall next review this important phenomenon more carefully.

The frequency of emancipation in the earlier phases of Roman history remains a matter of speculation. Like *patria potestas* in general, it is rarely recorded in literary sources. There emancipation is almost always connected with some specified reason, either political or familial.[85] This would imply that it remained an exceptional measure, but the evidence may mislead us. In any case, the decision always depended on the father.[86] Sometimes all the children of a family were emancipated, sometimes only some of them, sometimes only the son but not the grandchildren.[87] In the third century emancipation is frequently mentioned in imperial rescripts; although this does not render any statistical estimate possible, the least we can say is that it was a widespread phenomenon among those people who wrote petitions.[88]

In no source of the early Empire, legal or literary, is there any hint that the growing-up of children as such would have been a reason to release them from paternal power: the motives, when given, are always individual. In this respect the evidence clearly changes in Late Antiquity. Henceforth it is quite often suggested that people might like to emancipate their children when they reach adulthood. This is first explicitly attested in a law of Constantine:

> Cum aetates legitimae liberorum ad emancipationem parentes invitaverint et patresfamilias videre liberos suos voluerint. . . (*CTh* 8.18.2)
>
> When his children's legal age induces a father to emancipate them and he wishes to see his children as independent heads of households. . .

In 393 a council of African bishops advised that it was easier to maintain domestic discipline if the children were *in potestate*. Thus, one should not emancipate them before their majority, unless their decent behaviour was assured. The implication is that maturing sons were likely to be emancipated.[89] However, this was certainly not a rule, or even a routine practice. Western laws in the early fifth century imply that a man could have adult children and successive generations *in potestate*.[90] According to Augustine, in contemporary Roman Africa it was sometimes ('aliquando') expedient for the children to be emancipated and receive property from their parents: a son's marriage or holding of an office might be such a moment. Yet, many fathers refused because they did not want to lose the authority deriving from their control over family property. On the other hand, Augustine also suggested that fathers might want to get rid of hopelessly

[84] Lact., *Inst.* 4.3.15, CSEL 19.280; see also *Conc. Hipp.* (393) 1; *Brev. Hipp.* 13, CCL 149.20/37; *CTh* 9.43.1 (321); 9.13.1 (365/73); *CJ* 5.70.7.1 (530); 6.61.8.5a (531); 5.17.12 (534); *Nov.* 22.19 (535).

[85] e.g. it empowered children to administer properties devolving from the mother or more distant sources, Suet., *Vitell.* 6; Plin., *Ep.* 4.2.2; 8.18.4; see also Cic., *Dom.* 37; Liv. 7.16.9; SHA, *Pert.* 11.12; *Did. Jul.* 8.9.

[86] Gaius, *Inst.* 1.137a; *Dig.* 1.7.31; 30.114.8; 36.1.23.pr; 37.12.5 (an exceptional case); *CJ* 8.48.3 (293); 8.48.4 (Diocl.).

[87] e.g. *CJ* 3.31.6 (224); 4.19.16 (294); 6.14.1 (286); 6.20.6 (244); 6.57.2 (293); 6.59.1 (294); *Consult.* 6.10 (293). On the emancipation of women, which appears perfectly normal in Roman legal sources, see Arjava, *WLL*, 42.

[88] See above n. 54; A. Watson, 'Private law in the rescripts of Carus, Carinus and Numerianus', *TRG* 41 (1973), 19–34, at 23, and idem, op. cit. (n. 4), 24–5. Gardner, op. cit. (n. 1), 71–2, is certainly right in stressing the economic motives.

[89] *Conc. Hipp.* 1, CCL 149.20. See also Jerome, *Ep.* 107.6 ('perfecta aetas et sui iuris'); Symm., *Ep.* 1.6; 9.150 (Symmachus probably and his wife certainly emancipated).

[90] *CTh* 8.13.6 + 8.18.9 + 8.19.1 (426 West).

disobedient children. Although his language was in this passage more ambiguous, he probably referred to emancipation.[91]

We encounter equally vague expressions in a Western law in 452. It prescribed that the father could govern his children's maternal inheritance until they reached the age of twenty. At that moment he was advised to deliver them one half of the estate and to keep the other half until his own death. Constantine had earlier stated that when the children were emancipated the *paterfamilias* could keep one third of the *bona materna*. The problem is that although the two laws clearly discuss the same topic the later one does not use the word *emancipatio* but replaces it with a given age. However, the wording of the text (e.g. 'in familia constitutus') suggests that emancipation was actually meant: although it was not compulsory it was expected to happen around the age of twenty.[92]

Taken together, these pieces of information indicate that in the mid-fifth-century West the adulthood of children made a difference. A father was likely to consider the possibility of emancipating them, and many obviously chose to do so. Similar evidence seems to be lacking from the East. Justinian specifically ordered that an imperial codicil which conferred the rank of *patricius* on someone at the same time freed him from *patria potestas*. The emperor admitted that it was rare for a patrician to be *filiusfamilias* while it was quite normal for a consul ('quemadmodum in consulibus haec res usitata est').[93] On the other hand, the juridical difference between emancipated and unemancipated children was gradually fading, especially in the law of succession. This development was nearly completed in the East by the time of Justinian. In other words, emancipation was losing its legal side effects, a quite natural outcome if it was no longer an exceptional measure but a rather common phenomenon.[94] Emancipation may have remained less popular in the East, but that is impossible to verify.

Whatever the real frequency of emancipation, the essential characteristic of *patria potestas* survived both in the East and in the West: the father himself could decide whether or not to release his descendants. In this form *patria potestas* was still known to Roman jurisprudents working in the Visigothic territories in the late fifth and early sixth centuries. It was clearly not excluded from the *Lex Romana Visigothorum*.[95] On the other hand, the contemporary *Lex Romana Burgundionum* hardly mentions *patria potestas* and never *emancipatio*, although *filiusfamilias* appears three times. These isolated passages were a rather inadequate description of the old *patria potestas* and certainly difficult to understand without prior knowledge of Roman law. Nevertheless they give the impression that the paternal power had not been forgotten.[96]

In the early sixth century, the bishop Caesarius of Arles seemed to reckon with *patria potestas* when he ordered consecrated virgins to give away all their property:

> Illae vero qui adhuc vivis parentibus substantiam suam in potestate habere non possunt, aut adhuc minoris aetatis sunt, chartas tunc facere compellantur quando res parentum in potestate habere potuerint, aut ad legitimum aetatem pervenerint. (*Reg. virg.* 6, SC 345.184)

[91] Aug., *Serm.* 45.2, CCL 41.517; *In psalm.* 93.17, CCL 39.1318 ('dimittunt ut faciant quod volunt'); cf. *In Galat.* 39, PL 35.2132; Shaw, op. cit. (n. 36), 20–4. Cf. also the text of the African council mentioned above.

[92] *Nov. Val.* 35.10 (452) + int; cf. *Lex Rom. Burg.* 26; *Cod. Eur.* 321; Kaser, op. cit. (n. 17), 203 n. 10. For the earlier law, see *CTh* 8.18.1.2; 8.18.2; 8.18.9.pr. Cf. also *CJ* 6.61.6.3, where Justinian discusses a roughly similar solution in the case of emancipation.

[93] *CJ* 12.3.5; cf. *Nov.* 81; Just., *Inst.* 1.12.4. In Lib., *Ep.* 731, emancipation is probably meant, and portrayed as a generous act which is earned by the son's good behaviour; in a similar vein *CTh* 9.43.1.3 (321 West) and the *Syro-Roman Law Book* L 3.

[94] Kaser, op. cit. (n. 17), 203, 213, 497–511; e.g. *CJ* 6.58.11, 6.58.15.1b; *Nov.* 118; *CTh* 3.7.1 (on paternal consent to marriage); *Nov.* 22.19 (on divorce).

[95] See e.g. Gaius, *Epit.* 1.5–6; *CTh* 8.13.2.int; 8.14.1; 8.19.1; 9.43.1; *Epit. Cod. Greg. Vis.* 3.10.1 (*FIRA* II.662); all with their *interpretationes*. Cf. also *filiusfamilias* in Sidon., *Ep.* 7.2.7; 7.9.21.

[96] *Lex Rom. Burg.* 38.1; 14.4–5 (note the inclusion of the mother); 22.1–2 (formally consonant with Roman law, now somewhat ambiguous, when taken from the original context and omitting any mention of paternal usufruct, cf. *CTh* 8.18–19, and above Section II); 9.4; 26.1.

> But those who cannot have their property in their legal power because their fathers[97] are still living, or because they are still minors, should be compelled to dispose of it at the moment when they are able to have their fathers' [or: parents'?] property in their power or when they have come of age.

The words are ambiguous and might be interpreted in a universal sense. A girl rarely had any property before she had inherited it from her parents ('resparentum'). This was certainly true in any society. However, it appears more likely that the bishop thought in traditional Roman legal terms. He envisaged two reasons why a woman could not dispose of her assets ('substantiam suam'), from whatever sources: legal minority and paternal power.

Little is known about relations between parents and children among the Germanic peoples. Only the Burgundian and Visigothic codes discuss them to any extent. Predictably, in the *Lex Burgundionum* nothing resembling *patria potestas* can be found. This probably reflects the situation in most other immigrant societies. On the other hand, it seems that the Visigoths were somewhat more apt to utilize Roman models. Thus, they gave fathers the usufruct of the maternal inheritance. What the children received from external sources, such as the king, they could keep as their own. Late Roman law had already come very near this solution with the institution of the *peculium quasi castrense*. Children became automatically independent at marriage or at the age of twenty. Again, many Romans, though not all, had anticipated this habit by early emancipation. But the inevitable fact was that for the bulk of their property most children depended on the paternal estate. Without it, living was as difficult for the Germans as it had been for the Romans. In Burgundy, sons often received half of their inheritance in advance, perhaps when they married. Both the *Lex Burgundionum* and the *Lex Visigothorum* envisaged the possibility that adult sons lived in a common household with their parents. In all, although the Visigoths imitated some Roman solutions, the idea of a lifelong paternal power as such seems to have been strange to all Germanic nations.[98]

When did the former Roman provincials abandon the ancient institution of *patria potestas*? There are too few pieces of evidence to indicate the pace of the development or to disclose variations in different regions. A letter of Gregory the Great in 594 (*Ep.* 4.36) presents a Sicilian man whose *res maternae* had remained with his father until the latter's death. It is quite likely that Roman law in this Byzantine territory continued to be observed. On the other hand, Isidore of Seville, writing in Visigothic Spain in the early seventh century, explained in his etymological compendium the word *peculium* in the following way:

> Peculium proprie minorum est personarum sive servorum. Nam peculium est quod pater vel dominus filium suum vel servum pro suo tractare patitur. (*Orig.* 5.25.5)
>
> *Peculium* is in the proper sense something which belongs to minors or slaves. For *peculium* is what a father or a master allows his child or slave to manage as his own.

This is a very traditional Roman definition of the *peculium*, except that it is confined to children who are underage. It suggests that adult people were no longer *in potestate* in Isidore's time. There is an even more interesting document from the Visigothic dominions, a *formula* of a deed of emancipation. It begins:

> Prisca consuetudo et legum decreta sanxerunt, ut patres filios in potestate habentes tempore, quo perfectos in eos praespexerint annos, postulata a patribus absolutione, percipiant, quod tamen patres ipsi, si voluerint, concedant. . . (*Form. Vis.* 34)

[97] 'Parentes' could mean either 'parents' or 'fathers'. The sense 'fathers' is common in late Latin legal language, see e.g. 'in parentum potestate', *CTh* 8.18.1 (319); *CJ* 1.3.54.5 (533/4); 3.28.37.2 (531); 7.71.7 (531); 'his potestatis iure ad parentes reversis', *CJ* 6.61.2 (428); 'quod parentibus causa emancipationis obtulerint', *CTh* 8.18.2.*interpr.* (West, late 5th century); and numerous other cases where the sense is clear from the context. On the other hand, even the looser translation 'relatives' is possible, as e.g. in *CTh* 8.18.6.*interpr.*, and frequently in Germanic laws. See further *ThLL*, s.v.

[98] *Lex Burg.* 1; 24.5; 51.1–2; 75; 78; *Cod. Eur.* 305; 321; 336; *Lex Vis.* 4.2.2/13; 4.5.5; 5.2.2; cf. Zeumer, op. cit. (n. 45), 110–12, 146–8; King, op. cit. (n. 45), 243–4.

> Ancient custom and the rulings of law have laid down that when children who are in their father's power reach their majority they should ask the father to set them free. This the father should grant, if he wants.

The text, with its garbled syntax, cannot be dated with any accuracy. Possibly it reflects the wording of late Roman deeds of emancipation, otherwise vanished. In the early seventh century it was certainly used by people who tried to continue Roman traditions. It shows clearly how it had become customary to emancipate children after they had come of age, but it shows also that the act was still considered voluntary, at least in theory. No similar document survives in the Gallic Formularies, which are by far more numerous. One *formula* of adoption preserves traces of Roman phraseology ('potestas patris') but otherwise paternal power does not figure in them.[99] This indicates that *patria potestas* could not be a very central institution when the collections were put together in the seventh and eighth centuries. Still, the last vestiges of the Roman family system may have lingered on among the old populations of Western Europe long after the collapse of the Empire.[100]

VI. CONCLUSIONS

There can be no doubt that *patria potestas* continued to be the cornerstone of Roman family law, and also an essential element of the law of property and inheritance. Its practical importance emerges very clearly from the trouble which was taken to ensure that children *in potestate* were not deprived of their maternal inheritance. All this legislation would be inexplicable if paternal power had been a dead letter in Roman society. On the contrary, it shows that *patria potestas* was perceived to be a real means of economic control. Nor did the development of the *peculium (quasi) castrense* mean a radical encroachment upon the father's old powers. It simply reflected the growing importance of earned income in the upper and middle classes. Whether we want to say that *patria potestas* was 'eroded' in Late Antiquity remains a matter of taste. Although the Romans developed many ways to evade its individual consequences, they refused to consider it obsolete as such. The slow adjustment of written law to social and economic changes is a well-known phenomenon in many cultures. But the fact that paternal power survived the fourth century, when many outmoded legal concepts were simply ignored, indicates that inertia was not the prime reason. *Patria potestas* was not inconsistent with the normal patterns of property movement in Roman society. This probably explains why the Romans were able to look upon its many inconveniences as only small anomalies which could be avoided with a minimum of common sense. After all, it is not unnatural that the older generation of males were reluctant to forsake a system which gave them economic power over their descendants. Although the connection between *patria potestas* and family discipline is not often explicitly mentioned it must always have been tacitly perceived. Christian bishops, too, found it a useful prop of the natural hierarchy.

In our later sources the principal method for avoiding *patria potestas* is emancipation. This was now considered particularly appropriate when children became adult, something which is never attested in the Early Empire. It is tempting to assume that the habit spread in the third century as the new citizens were learning to cope with the Roman family system. Be that as it may, it appears that in most parts of the later Roman Empire, from Egypt and Syria to North Africa, Spain, and Gaul, the basic idea of paternal power had been adopted. This is not to claim, of course, that ordinary people were ever familiar with the technical details of law. Possibly many of them interpreted paternal power as a kind of surveillance (or 'guardianship') rather than as an absolute

[99] *Form. Tur.* 23; the phrase seems to have been modelled after Gaius, *Epit.* 1.5.1; cf. *Form. And.* 11a; 37; *Form. Tur.* 21; while these Formularies are generally considered sub-Roman in tone, others are more firmly rooted in Germanic tradition, e.g. *Form. Marc.* 2.9; 2.13. The authentic charters of the Frankish ruling élite of course display no hint of *patria potestas*.

[100] See E. Meyer-Marthaler, *Römisches Recht in Rätien im frühen und hohen Mittelalter*, Beihefte der Sweitzerischen Zs. für Geschichte 13 (1968), esp. 131–8.

domination. This was not a serious threat to the legal order, because the appropriate terminology could be restored afterwards, if ever necessary. True, as one descends the social pyramid both the appreciation and the meaningfulness of legal precepts must have declined. Villagers who did not even speak Latin or Greek may never have come into contact with the juridical system, apart from taxation. The family behaviour of this sizeable group of Roman citizens will always remain highly conjectural. But among those people who regarded themselves as heirs to the classical civilization *patria potestas* persisted, in the East beyond Justinian and in the West as long as such people can be discerned in our sources.

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