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PATRIA POTESTAS OR MURDER IN THE FAMILY

Patria potestas appears in the tradition in two aspects: as the father's right to put his son to death and as the right to dispose of the family property. All examples concerning the murder of the son (or daughters) known to the Roman authors are from the time of the Roman Republic. The father's right to dispose of the property even when the son is an adult lasted until the Later Empire. In a detailed study W. V. Harris limited his discussion to ten examples of the son's murder and three of the daughter. They are mostly not qualified as the *ius vitae ac necis* by the Roman authors. It is important to stress: a) That these examples mainly illustrate the father's right in charge as the high magistrate. In putting their sons to death the fathers-magistrates did not use the *vitae necisque potestas* of the father but the authority of supreme state officers. The crimes of which the sons were accused belonged not to family affairs but to offences against the military discipline and State interests. b) The only condition in applying the *vitae necisque potestas* was a moral one, the existence of the *iusta causa*. Even then it was not unpunished, and in many cases the father went into exile. c) The father's power existed only over legally born children within a legal marriage. Legal marriage was the privilege of patricians until 444 BC. That means that the *patria potestas* was originally limited only to patrician families. Biological kinship was not a decisive factor in the restitution of the father – children connection. d) The main right of the pater in the family was not to kill its members, but to preserve his position in economic control and to dispose of the property which was once common and eventually to control the moral behavior of the family members.

Key words: *Patria potestas*. – *Vitae necisque potestas*. – Pater. – Patricii. – Legal marriage.

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1. INTRODUCTION

The essence of the power of the *pater familias* is in the modern studies mostly reduced to his *vitae necisque potestas*. The father's power to put his own sons to death is defined as being its core (Kernstück)¹. Its substance was clearly described by Max Kaser, in his famous *Das römische Privatrecht*, 60–61: “als Kernstück der Familiengewalt wird das Recht über Leben und Tod (*vitae necisque potestas*) empfunden, das die äußerste Reichweite der Rechtsmacht des *paterfamilias* bezeichnet. Wie ihm Macht gegeben war, die freie Personen unter seiner Gewalt zu töten, so konnte er sie auch züchtigen, verkaufen, die Kinder verheiraten und ihre Ehen scheiden. Freilich waren ihm alle diese weitreichenden Eingriffe nur unter besonderen Umständen erlaubt. Die Ausübung des Tötungsrechts war an das Vorliegen gewichtiger Gründe und an die Durchführung eines hausgerichtlichen Verfahrens gebunden. Wurde diese Verfahren nicht beobachtet, galt der Hausvater vielleicht als Mörder”². In another text Kaser again discussed the *patria potestas* problem and defined further facts crucial for gaining a deeper understanding of many cases which have been qualified as the effects of *patria potestas*, when the home authority was equated with the primordial state power³. The norms prescribed by law, *Recht*, were separated from the rules of customs, *Sitte*⁴. His further conclusion about the family not only as a social but also a political community and the home government which was equal to the power of the state, means that it was unlimited in nature and thus excluded any restriction from the State. According to this definition the family was independent of any outside power making the head of the house all-powerful in it.

The right of the *pater familias* was limited in the first place by a series of threats of sacral penalties which were developed in the pontifical praxis and which are transferred to us as allegedly kings' laws. Above all the father was threatened by sacration. That meant that anyone who failed to respect the norms would lose the gods' protection as *sacer* and would remain restless. Originally, in the pre-urban phase in Rome the father could kill his new born children, probably those who could not be alimented. However, even according to the law which is prescribed to Romulus it was not allowed to kill the male descendant, the first born daughter and all children under five years of age⁵. Gaius, *Inst. Frag. Augustodun.*

¹ Max Kaser, *Das römische Privatrecht*, erster Abschnitt, München 1971, 60.

² M. Kaser, *Das römische Privatrecht*, 60–61.

³ Max Kaser, “Der Inhalt der *patria potestas*”, *ZSS* 58, 1938, 62–87.

⁴ M. Kaser, *ZSS* 58, 1938, 64.

⁵ Shaw, B. Shaw, “Raising and Killing Children, Two Roman Myths”, *Mnemosyne* 54, 1/2001, 57, distinguishes between infanticide or infant exposure common to

IV 86. seems to say that although the power existed, the Twelve Tables specified that the father must have a *iusta causa*⁶.

In a detailed article in the *Real Encyclopädie*, s.v. *Potestas patria*, Sachers cites cases when the father had a *iusta causa* to kill his son⁷. Under this he includes: α) high treason (Hochverrat), the reason why the sons of L.Brutus, A.Fulvius, and S. Cassius were killed by their fathers, β) bribery (Bestechlichkeit) which was the reason why Silanus was killed by his adoptive father T. Manlius Torquatus, and γ) military disobedience (militärische Ungehorsams), with the examples of A. Postumius and M. Scaurus who executed his son because he proved to be a coward in battle.

The participants in the Bacchanalien in spite of the prohibition from the State were punished, but only the wives. As censor, F. Censorinus killed his son because of theft.

Yaron asserts that there is no reason to doubt the extreme antiquity of *vitae necisque potestas* which he dates back to the very earliest days of Rome⁸. However, he suggests that the cases enumerated by Sachers in groups a,b and g, should be rejected as examples of the killing of a son by his father within the frame of *patria potestas*, because, as he rightly asserts, the father did not act within his *patria potestas*, but in his capacity as military commander. This means that T. Manlius Torquatus acted within his power as consul, and A. Postumius Tubertus as dictator. These fathers disregarded their natural inclination towards clemency, giving preference to their duty over their paternal feelings. The same applies to the case of L. Iunius Brutus, Rome's first consul. He acted in his public

many pre-modern societies and as he formulates it, “a firmly established legal right (*ius*) or formal power (*potestas*) possessed by adult male citizens over their offspring”. He sees in the Roman father's *vitae necisque potestas* “the firmly established legal right (*ius*) or a formal power (*potestas*) possessed by adult male citizens over their offspring”. The difference between infanticide or infant exposure common to many pre-modern societies and *patria potestas* is not clear. However, there are no decisive legal texts confirming this formulation. Even the instance he quoted of Gallic and German social relations mentioned in Caesar's BG (Shaw, p. 59) represents an argument against his assertion of the Roman *patria potestas* was unique in the ancient world.

⁶ FIRA pars altera, 223f.: *nam si servi filiive nomine condemnatus fuerit dominus vel pater, poterunt in noxam dare etiam mortuum: condemnatus dominus noxali actione potest serum etiam mortuum in noxam dare...etc.* 85. *Ergo cum praetor dedere dom... parentem putes...iure uti t.domino vel parenti et occidere eum et mortuum dedere in noxam...patria potestas potest... u... eum patris potestas talis est ut habeat vitae ac necis potestatem.* 86. *De filio hoc tractari crudele est, sed.....non est post ...r...occidere sine iusta causa, ut constituit lex xii tabularum. Sed deferre iudici debet propter calumniam.*

⁷ E. Sachers, “Potestas patria”, *Realencyclopädie der classischen Altertumswissenschaft*, XLIII (XXII), 1953, 1086 ff.

⁸ Reuven Yaron, “Vitae necisque potestas”, *Tijdschrift voor Rechtsgeschiedenis* 30, 1962, 243–251, especially p. 245 f.

capacity, and not as a father. The case of T. Manlius Torquatus cos. 165, who banished his son Silanus from his sight because of bribery, is also irrelevant here. This did not concern *patria potestas*, because he had given his son up for adoption. In Yaron's opinion, the case of the female participants in the Bacchanalian rites offers no example of the application of *patria potestas*. In all these cases the father did not act within the *patria potestas*, but as a military commander or censor. The cited instances do not concern family adheres, but state interests. However, even after excluding all these cases, Yaron asserts that sufficient examples remain to fully establish the father's *Tötungsrecht* (p.244), but he failed to enumerate them. Yaron focused his further interest on the examples of killing sons from the East, seeing in them an anthropological phenomenon common to many peoples.

In his article 'The Roman father's power of life and death' W. Harris adduced ten possible examples⁹ with reasonably clear texts showing that from an early date the *ius civile* had allowed fathers to put their sons to death: 1. L. Brutus put his sons to death for planning to bring back the Tarquins; 2. the case of Sp. Cassius who was put to death for attempting to seize royal power; 3. the dictator of 431. A. Postumius Tubertus had his son put to death for desertion, but not cowardice; 4. Manlius Torquatus, cos. 340 for the third time had his son put to death for a breach of military discipline in battle; 5. the son of M. Aemilius Scaurus the consul of 115 was banished from his father's presence following his desertion in the battle against the Cimbri, as supposed in BC 102. which resulted in the son committing suicide; 6. Q. Fabius Maximus, who is identified as Eburnius, consul BC 116 and censor, killed his son for a sexual offence which was not qualified; 7. the same happened to Iunius Silanus; in case 8, the praetor in 141 BC who was judged guilty of having committed peculation the following year. It was not a question of killing, but of provoking the son's death by punishing him privately – he banished him from his sight and he hanged himself the following night; 9. a senator named A Fulvius killed his son for setting out to fight on behalf of Catilina; 10. Seneca mentions the case of a knight named Tricho who killed his own son by flogging (Seneca, *De clem.* I 15, 1) for a reason not stated thus provoking the revolt of the people who attacked him in the forum.

⁹ William W. Harris, "The Roman father's power of life and death", *Studies in Roman Law in Memory of A. Arthur Schiller* (ed. R. S. Bagnal and W. V. Harris), Leiden 1986, 81–85.

2. FATHER'S RIGHT AS THE STATE MAGISTRATE AND *PATRIA POTESTAS*

However, Harris retained reasonable doubt in many of the quoted examples as to whether the death of the son was the consequence of the application of the *patria potestas*, as for instance case no. 2, regarding Sp. Cassius, who was put to death for attempting to seize royal power. The case is qualified by Harris as obscure, and it had plainly become the subject of notable controversy by the second century, and perhaps much earlier; some ancient authors assert that his father was responsible for his death, but no one refers to his *vitae necisque potestas*. The supposition of the father's role rests on the story told by Livy, II 41, 10 that the family put on Sp. Cassius's statue the inscription *Ex Cassia familia datum* which some people saw as evidence that the father had been responsible for the killing. The story as told by Val. Maximus V 8, 2 is deprived of any sense: Cassius emulated the example of L. Brutus in putting his son to death, *tribunes plebis*, who had been the first to propose an agrarian law and currying popular favor in many other ways held public sentiment attached to himself. When he laid down that office, his father summoned a council of relatives and friends and condemned him in his house on the charge of aiming to be king." In Livy II 41, 10 he was accused of treason and condemned by the people and his house was destroyed *populi iudicio*. Treason is again not an issue pertaining to the family, but the state.

Val. Maximus mentions the case of dictator of 431. A. Postumius Tubertus (no.3) under the title *De disciplina militari* and explains: *quia non tuo iussu, sed sua sponte e praesidio progressus hostis fuderat, victorem securi feriri iussisti*. Liv. IV 29, 6 refused to believe this because of the *saevitia* and *crudelitas* of the father: *nec libet credere, et licet in variis opinionibus...* etc. The father held the dictatorship which certainly entitled him to act in this fashion¹⁰. Manlius Torquatus, cos. 340 (no.4) is said to have acted not as a father but as a consul, as Val. Maximus explicitly points out, II 7, 6: *tu item, Postumii Torquati latino bello consul filium... abripi ab lictore et in modum hostiae mactari iussisti, satius esse iudicium patrem forti filio quam patriam militari disciplina carere*. Harris admits that no sources suggest that he relied on his legal rights as a father; the event did not end in capital punishment. Aemilius Scaurus, son of M. Aemilius Scaurus the consul of 115 in case 5, was banished from his father's presence after desertion in the battle against the Cimbri. It would be difficult to see the application of the father's *vitae necisque potestas* simply because the story ended with the son's death. Harris described this case as an unsuccessful attempt to present this as a deliberate attempt to avoid direct responsibility for death. Two more events, enu-

¹⁰ W. W. Harris, 83.

merated in Harris's list as cases nos. 5 and 6, should be added to those examples illustrating that service in State institutions excluded any emotional connections even between father and son. Both relate to punishment by the father not according to *patria potestas*, but his right as censor. Fabius Censorinus (M. Fabius Buteo) the censor of BC 241, supposedly had his son put to death because of theft at the time he was censor¹¹. This event is dated in the years BC 221/219. To Harris it seems likely that the son did indeed die. He may have committed suicide like the victims in cases 8 and 9. The story of Q. Fabius Maximus, who is identified as Eburnius, consul 116 and censor, presents no clear example illustrating the application of the *patria potestas*. In Val. Maximus this case is cited in the chapter under the title *De pudicitia*. He was punished because he was *dubia castitatis*. As a consequence the father went into exile. Harris, 85, presumed that the father had claimed to act in virtue *vitae necisque potestas* and that this claim was evidently rejected. Valerius Maximus, who identified him as Servianus, made him to held treated him as a censor, which Servianus never was in order to rectify his behaviour and says: *Q. Vero Fabius Maximus Servilianus honoribus, quos splendidissime gesserat, censurae gravitate consummatis exegit posesnas a filio dubiae castitatis et punito pependit, voluntareio secessu conspectum patriae vitando*. That means that he went into voluntary exile.

The same happened with Iunius Silanus, in Harris' case 8, who was praetor in 141 BC. This was not a question of directly having the son put to death. He caused his son's death by punishing him privately. He banished him from his sight and his son hanged himself the following night. It could be eliminated as an example illustrating the application of *vitae necisque potestas*, as Yaron suggests.

In the first century BC a deliberate attempt was made to present the killing of the son as the consequence of the application of the *vitae necisque potestas*¹². Killing the son for attempting to join Catilina's forces (7) represents a very particular case without any parallels in the past and could, as well as case 10, rather be qualified as a murder in the family than as punishment of the son by the father because of his political orientation. In the sources it is not explicitly qualified as the application of the *vitae necisque potestas*.¹³ Dio Cassius apparently held that Fulvius acted in *virtue of vitae necisque potestas* saying that it is not the only example of a private man killing his son. Val. Maximus compares this

¹¹ W. W. Harris, p. 84 suggests the years 221/219, when it is certain that the father held no office. The only source is Orosius, IV 13,18.

¹² As supposed by W.W. Harris, 85.

¹³ B. Shaw, 61 observes that the closer investigation of each of the cases reveals not the actual act of killing done by fathers who were exercising the specific powers they held as *patres*, but rather ideological interpretations of their actions.

with the case of Scaurus, *quam Scaurus ex praelio fugientem*. The father was a senator. In Harris's case no.10 a knight named Tricho killed his own son by flogging (Seneca *De clem.* I 15, 1) for a reason not stated, thus provoking the revolt of the people who attacked him in the forum. Augustus' auctoritas saved him. There is no reason to qualify his action as the application of the father's *vitae necisque potestas*. Examples 7 and 10 from the first century BC probably represent an attempt to keep the murder in the family hidden under the mask of the legendary *patria potestas*. In both cases the father had to expiate for the violation of moral norms like the censors in the cases quoted under no. 5 and 6.

3. FAMILY AFFAIRS, SUCH AS SEXUAL OFFENCE, STUPRUM, AND ADULTERY

Both the literary tradition and modern authors focus the application of the *patria potestas* on the cases of sons being killed by their fathers. It was not clear whether the father had the same right when daughters were concerned even in the Antiquity. They asked the jurists as illustrated in the text of Papinian, *Collatio* IV 7,1, who asserts under the title *De adulteria* that a *lex regia* gave the father this power.¹⁴ Harris quotes three examples of punished daughters. All three could be qualified as sexual offenses and are defined as *stuprum*. Val. Maximus mentions these under the title *De pudicitia*¹⁵: the case of Virginia from 450 BC, who was killed by her father in order not to be subjected to the decimvir Appius Claudius, the case of the Roman knight named Pontius Aufudianus who had his daughter put to death because her virginity had been violated by the slave paedagogus, and that of the freedman P. Atilius Philiscus who killed his daughter for *stuprum*.

A sexual offense or socially forbidden or politically illicit connection could have explained the daughter's murder in the earliest known example in which the *patria potestas* is mentioned, in the trial of Horatius (or Curiatius) in Livy I, 16. It does not illustrate the relations of the father to the son, but to the daughter. It is an instance which indicates competition between custom and law and indirectly the father's right to kill his daughter because she deplored the death of her fiancé, who was the enemy killed by her brother. Even in the case of a family matter the official

¹⁴ Papin. *Collatio* IV 8,1, FIRA pars II, p.552=5: *cum patri lex regia dederit in filium vitae necisque potestatem, quod bonum fuit lege comprehendi ut potestas fieret etiam filiam occidendi velis mihi rescribere: nam scire cupio. Respondit: numquam ex contrario praestat nobis argumentum haec adiectio ut non videatur lex non habenti dedisse sed occidi eam cum adultero iussisse ut videatur maiore aequitate ductus adulterum occidisse cum nec filiae pepercerit.*

¹⁵ VI 1,2, 5 and 6

court was competent as in this case. When one of his sons, the last surviving one, was condemned to death for killing his sister, even though he was a hero who had defeated his enemy, the father Horatius made an appeal to the people as an afflicted parent. In order to protect his son from being punished by the death penalty for killing his sister, the father pretended that his daughter had been justly slain; “otherwise he should have used a father’s authority and have punished his daughter himself using *vitam necisque potestas*.” – *ni ita esset, patrio iure in filiam*¹⁶ *animaver-surum fuisse*¹⁷. Horatia was *iure caesa* because she was guilty of *proditio* (treason). The story reflects the parallel existence of family judgment (the father) and the civil court (king and civil institution, *duoviri* including the *provocation ad populum*). The father did not represent the merciless authority, but one who tried to protect his son from the death penalty despite his having violated the law of the community. In this case the *pater* had to act in accordance with the law prescribed to Romulus which allows the killing of the daughter. As it was necessary to have a *iusta causa*, the daughter was accused by Livy of treason, because she lamented the death of her fiancé who was an enemy of the state.

4. SOME CONCLUSIVE NOTES

Roman legal texts never discuss in detail the content of the *patria potestas*. The misuse of the *patria potestas* was not the subject of criminal law. The sacral prohibition and the customs represented the only control. The only condition was the moral one, the existence of the *iusta causa*. However, in Gaius’ time the father’s powers over persons of *liberi*, originally unlimited, though tempered by the family council and the censor, had been brought under legal control¹⁸. The father’s power existed only over legally born children within a legal marriage¹⁹. Legal marriage was the privilege of patricians until 444 BC. That means that the *patria potestas* was originally limited only in patrician families. Biological kinship was not a decisive factor in the restitution of the father – children connection. A man became a father from the moment he recognized a son as his own child. The father as a central figure of great influence and unlimited power in the family appears from the moment it was possible to identify him as a *pater*. The unilateral descent, the father’s line and the patriarchy which prevailed in the newly organized society in Rome might be crucial in the division of the society into two socially, thereafter also

¹⁶ Filium j: filiam w.

¹⁷ Livy I 26, 9.

¹⁸ Francis de Zulueta, *The Institutes of Gaius* I, Oxford 1946, p.29.

¹⁹ M. Kaser, *Das römische Privatrech*, 65. Gai Inst. I 55: *Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus*. See Aul. Gell. V 19,9

politically differently defined orders: that of patricians and plebeians. The presence of these two opposed groups represents a peculiarity of the social life in Rome which colored the history of the Roman State in the first two centuries of the Republic. The institution of *pater* is essential in gaining a deeper understanding of the meaning of the *patricii*. They were those of certain origin, who could name their fathers²⁰. In his account of the struggle between the two classes in Rome, Roman author Livy defines the *patricians* as those who could name their fathers, *qui patrem ciere possent*²¹. That means that the *pater* at the head of the family was instituted only in part of Roman society. So the tradition of the strict and severe father appears to have been mainly senatorial and patrician²². In the early Roman state *patres* were organized as a body and included in the institutions which replaced the power of the *pater* in the individual kinship group, family or tribe. Livy X 8,4, always cites the fact that the auspices belonged only to the patricians, that only they had a certain gens, i.e. origin (*vos solos gentem habere*), that only they had the full *imperium* and right to divination, both at home and in the field²³.

If the *patria potestas* could have been realized only within patrician families, the murder of Virginia by her father could not be explained as a case of the application of the father's *vitae necisque potestas*. The daughter was innocent and the father's proceeding had no legal or human excuse. As a plebeian he could not have had *vitae necisque potestas*. She was not born in a legal marriage, because the father was of plebeian social status, i.e. belonged to the social group which had no *ius conubii* until 444 BC. That means that he could not have enjoyed *vitae necisque potestas*. The father's absence from the story until the end in Livy's account is not accidental. Livy adds him at the end in order to explain the girl's death. At first her plebeian fiancé Icilius and her mother's brother, *avunculus* Numitorius, tried to protect her²⁴. The latter is the vestige of the early social system in which the mother's brother was more important than the biological father. As the girl's father was not present at the beginning of the story, (Livy said that he was away at war) Appius could present her as his slave. Her connection with Appius, however forced, was qualified as incestum because marriage between plebeians and patricians was not legally possible.

²⁰ Theodor Mommsen, *Staatsrecht* III 13: Geschlechtgenossen, *gentiles*, *patres* die allein die einen Vater haben.

²¹ Miroslava Mirković, "Der Vater und die Patrizier: *qui patrem ciere possent*", *Klio* 86, 2004, 83–100.

²² W. W. Harris, 97

²³ The definition of patricians as those who were able to adduce their fathers was the reason for equalizing patricians and eupatrids in the Greek world by Dionysius of Halicarnasos.

²⁴ Livy III 54, 11, *avunculus*, mh/troj qei=oj in Dionys. Hal. XI 28,7.

Originally the *patria potestas* included the father's right to decide about the destiny of the newborn child. This exceptional right, contrary to all natural feelings, the father's *vitae necisque potestas* in killing the adult son, does not appear in the evidence before the first century BC. There is no doubt that in Cicero's time it was generally believed that the father had the right to put his son to death. It became a popular pattern of thought. The term *patria potestas* appears in Cicero's *De domo* 77 as a rhetorical question, and as the argument against Clodius Pulcher's adoption, asking whether P. Fonteius had *vitae necisque potestas* over Clodius Pulcher whom he had adopted in order to make it possible for him to apply for the position of *tribunus plebis*, which meant he had the right to put him to death as a real father could²⁵. In Ant. Rom. II 26, 4 Dionysius from Halicarnasus explains the father's right over his children as a peculiarity of the Romans. He states that the Romans gave virtually full power to the father over his son throughout his whole life in matters of whether he thought it proper to imprison him, to scourge him, to put him in chains and keep him at work in the fields, or to put him to death, and even when the son was already engaged in public affairs. He was the only author who explained the death of Manlius Torquatus and as he says, many others, as the application of the *patria potestas*²⁶. The *potestas* of the father over his descendants is defined by Gaius in Inst. I 55 as *ius proprium civium Romanorum*²⁷. Aulus Gellius, *Noctes Atticae* V 19, 9 cites the *rogatio* of the *pontifex maximus* Mucius as evidence that the father's right could be applied only to the legal son²⁸. Legal texts mention the *patria potestas*, but do not discuss it.

In the majority of the cases enumerated in Harris's study the central problem is the question of the relationship between the power of the

²⁵ Cicero, *De domo* 77: *sed cum hoc iuris a maioribus proditum sit, ut nemo civis Romanus aut libertatem aut civitatem posit amittere nisi ipse auctor factus sit quod tu ipse potuisti in tua causa discere credo enim, quamquam in illa adoption legitime factum est nihil, tamen te esse interrogatum, auctorne esses ut in te P. Fonteius vitae necisque potestatem haberet ut in filio.*

²⁶ II 26,6: "I forbear to mention how many brave men, urged by their valour and zeal to perform some noble deed that their fathers had not ordered, have been put to death by those very fathers, as is related by Manlius Torquatus and many others" (Engl. Transl. by E. Gary and E. Spelman, Loeb Class. Lib. 1961)

²⁷ Gai Inst. I 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. Ne me praeterit Galatarum gentem credere in potestate parentum liberos esse.*

²⁸ Aulus Gellius, *Noctes Atticae* V, 19, 9: *Eius (sc. Mucio pontifici maximo) rogationis verba haec sunt: Velitis, audeatis, uti L. Valerius L. Titio tam iure legeque filius siet quum si ex eo patre matreque familia eius natus esset utique ei vitae necisque in eum potestas siet, uti patri eido filio est. Haec ita dixi, ita vos Quirites rogo.*

pater familias and the State authority. The fathers who had their sons put to death as consuls or dictators in 1, 2, 3, 4, and 9 are mythical figures. None of the examples which are described in Valerius Maximus is qualified by him as the application of the father's *vitae necisque potestas*. In his book *Facta et dicta memorabilia*, they are cited under different headings: *De severitate patrum in liberos*, *De discupilina militari* and *De pudicitia* and are not qualified as examples illustrating the *patria potestas*. He notes the following cases of fathers killing their own sons: 1. L. Brutus, 2. Sp. Cassius, 3. T. Manlius Torquatus, 4. M. Scaurus, and 5. A. Fulvius; while cases 6 and 7 are listed under the headline *De Pudicitia*. *Patria potestasis* not mentioned in any of them. In the case of Brutus both Livy II 5, 5 and Valerius Maximus V 8,1 underline that “the office of the consul imposed upon the father the duty of exacting the penalty from his sons”²⁹ (Livy) and more explicitly by Valerius Maximus: he put off the father to play the consul³⁰. In the examples he quoted the problem arises in the conflict between the natural feelings of the father and the duty of the military commander and in this sense the ancient author speaks most explicitly in II 7, 6 *tu item, Postumii Torquati latino bello consul filium... abripi ab lictore et in modum hostiae mactari iussisti, satius esse iudicium patrem forti filio quam patriam militari disciplina carere*. It was not the intention of Valerius Maximus to illustrate the application of the *patria potestas*, but to underline the strict application of the law, even against one's own son. Between the father's feelings and duty, the latter prevailed.

There is good reason to doubt that the killing of the sons in the majority of the cases quoted by Sachers was the consequence of the strict application of the *patria potestas*. In putting their sons to death the fathers-magistrates did not use the *vitae necisque potestas* of the father, but the authority of supreme state officers. The crimes of which they were accused belonged not to family affairs, but to offences against the State interests. The fathers acted as supreme state magistrates, and not as fathers and the cases of the father killing the son are not preserved in the Roman literary tradition as examples of the *vitae necisque potestas* of the father. In order to preserve the authenticity of the tradition modern researchers propose different solutions. M. Kaser asserts that the home authority was made equal to the primordial state power. Harris suggests that any conflict between the authority of the magistrate and that of the *pater familias* to whom he was subject was resolved by giving the magistrate the status of the *pater familias* while he was engaged in public business. This explanation concerns a traditional form or behavior in a state which

²⁹ Livy II 5,5: *quod poenae capiendae ministerium patri de liberis consulatus imposuit*.

³⁰ Val. Max. V 8, 1: *exiit patrem ut consulem ageret, probusque vivere quam publicae vindictae deesse maluit*.

was still rudimentary and lacking the power to punish crime. But he supposes that it continued to be useful to the aristocracy as long as it represented the ruling class in Rome³¹. However, it must be kept in mind that the examples numbered 1 to 5 in Harris must have illustrated not the power of the father in the family, but the impartiality of the highest magistrate who was authorized to punish any act of treason or disobedience in war even if his own son were in question. In the time in which tradition puts examples 1, 2,3 and 4 the punishment of disobedience to the supreme magistrate and treason belonged to the competence of the State. Mommsen, *Staatsrecht* II–1, 51 explains the punishment for a public crime as the exclusive competence of the State³².

The application of the father's right to kill unpunished family members under his authority is not possible to prove in the historical period. The leadership of the pater was no longer in danger; he preserved his position in controlling everything concerning family property. None of the quoted examples could be taken as indisputable proof of it, except those concerning moral delict, such as adultery or *stuprum*. Even then the *patria potestas* was not unlimited, as shows case 6: after killing his son for being *impudicus* or *dubia castitatis* the father went into exile in consequence³³. Vestiges of this severity are preserved in the prerogatives of the high magistrate as legends about the father consul or dictator who killed his own son because of disobedience at war prove. In a society organized like a state the prerogatives of the pater were transmitted to the king or the magistrates in the republic. The punishment for being disobedient, treason and similar infringements were in the hands of state institutions.

In the Roman state the father's power mainly concerned family affairs, such as are exposure of children or *stuprum*, i.e. adultery and similar when it concerned adult sons or daughters. The son in Harris no.6 was accused of *stuprum*. *Stuprum* was named as one of the reasons for the application of the *patria potestas* in the legal texts: Dig. XLVIII 9,5: real cases could be those of a son or daughter punished for moral infringements, of the *dubia castitas* or *stuprum* (Harris, nos.5 and 6). Preserved laws concern the exposure of children (CJ V,4,16, VIII 51,2 or the question of *stuprum*, adultery (Papinian, *Collatio* IV 8,1; D.XLVIII 9,5) and

³¹ W. W. Harris, 88f.

³² Th. Mommsen, *Staatsrecht* II–1, 51: "Die Gemeindeverbrechen unterlagen, wie früher der königlichen, do jetzt der Ahnung der Magistrate der Republik und hinsichtlich ihrer änderte sich die Rechtsordnung im allgemeinen nicht, aber die sacralen Delikten stand jetzt nicht mehr das königliche Imperium gegenüber, sondern der Oberpontifex und dieser behielt zwar die Behandlung der rein sakrale Delikte, aber die Strafgewalt ging ihm nicht minder verloren, wie bei die Legislation".

³³ On sacral punishment for the father and the legal limitations see M. Kaser, *Das römische Privatrecht*, 61f.

similar but not the father's right to put his son to death. Killing children in general is the subject of the Later Roman law by Valentinian, Valens from 365, CJ IX 16,7, which states that every killing of a child, by man or woman, must be punished as murder: *Si quis necandi infantis piaculum adgressus adgressa sit, sciat se capitali supplicio esse puniendum*. However, the legal text provides the punishment in some cases like *Dig. XLVIII 9,51*.

Rather than the father's right to kill the adult son, an essential feature of the father's authority in the classical times and the core of the *patria potestas* was his right to dispose of all property, not only that belonging to him, but also everything that other family members acquired. The only subject of the private right in the family was the *pater familias*. Even adult sons could not have this right as long as the father lived³⁴. This father's right is explained by Linke who follows Leist, as an usurpation of the originally common right to property by individual society members³⁵. Power in the small community, clan or family in the primitive society was not based on the common agreement of all adult members, but was imposed by force. Disobedience must have been brutally punished, even if the son was at question. The son could have been a rival for power. The main right of the *pater* in the family was not to kill the members in the name of the state, but to preserve his position in economic control and to dispose of the property which was once common and eventually to control the moral behavior of the family members. The *pater's* right to dispose of all property, except the *peculium militare*, survived until the late Empire³⁶.

³⁴ E. Sachers, RE 1135 ff.

³⁵ Bernhard Linke, *Von der Verwandtschaft zum Staat, Die Entstehung politischer Organisationsformen in der frühromischen Geschichte*, Stuttgart 1995, 176: "Für die Analyse der Ursachen und des Ablaufs dieser sozialen Umwälzungen ist schon im 19 Jh der Indogermanist Wilhelm Leist einen entscheidenden Hinweis geliefert, indem er die Singularität der herausragenden Position des römischen *pater familias* im Familienrecht der indogermanischen Völker unterstricht. Die Überzeugung von Leist, daß sich dieses Phänomen aus der ursprünglich kollektiver Eigentumsrechte durch einzelne Mitglieder der Gesellschaft erklärt, offenbart eine weitgehende Übereinstimmung mit modernen ethnologischen Theorien".

³⁶ Antti Arjava, "Paternal Power in Late Antiquity", *JRS* 88, 1998, 147–153, especially 148 ff.