THE LEGAL NATURE AND DEVELOPMENT OF PARENTAL AUTHORITY IN ROMAN, GERMANIC AND ROMAN-DUTCH LAW - A HISTORICAL OVERVIEW

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1 Introduction

This article consists of a historical overview of the legal nature and development of the concept "parental authority" in Roman, Germanic and Roman-Dutch law. The aim of the investigation is to determine whether parental authority, as it was known in Roman-Dutch law, had a Roman or Germanic origin. The conclusion has important implications for the clarification of modern concepts regarding parental authority.

2 Roman law

2 1 Definition of concepts

In this section the fundamental concepts underlying parental authority in Roman law,[1] namely *potestas* (including *patria potestas*), *sui iuris*, *alieni iuris*, status and proprietary capacity will be defined. The concept *potestas* denotes the almost unfettered and complete legal power of the head of the Roman family, the *paterfamilias*. This power (*potestas)* was characterised by absolute rights over the persons and things belonging to the household. The power over the children of the house (*filii* and *filiae familias*) was called *patria potestas*, the power over the wife to whom the *paterfamilias* was married *cum manu*[2] was called *manus*, and the power over slaves was called ownership (or, according to Van Zyl,[3] *dominicia potestas*).[4]

The classification of persons as either *sui iuris* or *alieni iuris* was a characteristic of the Roman law of persons. If a person was *sui iuris,* that person was completely independent, in the sense that he or she had no male ancestors on his or her

1 From the beginning of the monarchy in 753 BC to the death of emperor Justinian in AD 565.
2 See 2 3 below.
3 Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 82 n 44.
4 Kaser *Roman Private Law* (4th ed) tr Dannenbring (1984) 12 I 2(b), 4 I 1(b).

father's side.[5] The *sui iuris* person was thus "free from power". This included the *paterfamilias*, the single man and the single woman. All other persons were "in power". This included the wife *in manu*, *filii* and *filiae familias* and slaves.[6]

A person who was *sui iuris* was totally independent, and had all the legal capacities of a Roman citizen. Where the *sui iuris* person was an adult male, he also had virtually unlimited power over persons who fell under his *patria potestas*. A person who was *alieni iuris* was totally dependent upon the person in whose power he or she was and, subject to certain exceptions,[7] this person had no status in private law.[8]

At the death of the *paterfamilias*, the following persons under his *potestas* became *sui iuris*:[9]

- his wife to whom he was married *cum manu*[10]
- his sons, married or unmarried[11]
- his unmarried daughters[12]
- his daughters who were married without *manus*, and who had been part of his *potestas* before they got married.[13]

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5 Van Zyl (n 3) 82.

6 G 1 48-49; *Inst* 1 8 *pr*. Also see Kaser (n 4) 12 I 3; Thomas *The Institutes of Justinian: Text, Translation and Commentary* (1975) 24.

7 See 2 6 below.

8 Van Zyl (n 3) 81f. Also see 2 6 below.

9 G 1 127; *Inst* 1 12 *pr.* Also see Kaser (n 4) 12 I 3, and 2 3 below.

10 This form of marriage was called *conventio in manum*, and the power that the *paterfamilias* had over his wife, was called *manus*. *Manus* was no different from *patria potestas* (G 1 109). See Kaser (n 4) 58 V 1-2; Van Zyl (n 3) 96.

11 Married sons became *patresfamiliarum* of their own families (G 1 127). See also Kaser (n 4) 12 I 3.

12 Kaser (n 4) 12 I 3. A daughter who was married *cum manu* was subject to the *potestas* of her husband, or to the *potestas* of her husband's father if her husband was himself still subject to *potestas* (G 1 49, 1 109, 1 136). Also see Buckland *A Textbook of Roman Law from Augustus to Justinian* 3 ed revised by Stein (1963) 101-102 and 2 3 below.

13 In later Roman law, some marriages were contracted without *manus.* The marriage without *manus* was made possible by the fact that *manus* could be established by means of *usus*. The Twelve Tables provided that a wife who did not wish to come under her husband's *manus* should stay away from his house for three nights per year and thus interrupt the one-year period required for the establishment of *manus* by means of *usus* (G 1 111; Kaser (n 4) 58 II 2). In the marriage without *manus* the woman did not become subject to the *patria potestas* of her husband, but retained the status she had before the marriage and remained in the family to which she had belonged. If she was thus *sui iuris* before the marriage, she remained *sui iuris*, and if she was subject to her father's *potestas*, she remained in her father's family (Buckland (n 12) 101 106; Kaser (n 4) 58 VI 2; Thomas (n 6) 33; Van Zyl (n 3) 96f). This so-called "marriage free of *manus*" was at first only an exception - most marriages were *manus* marriages up to the first century BC. Later the frequency of *manus* marriages declined rapidly, until this form of marriage was completely displaced by the "free marriage" towards the end of the classical period (Kaser (n 4) 58 II 2). Also see 2 3 below.

Patria potestas also came to an end on the emancipation of a son or daughter.[14] It thus follows that not only *patresfamiliarum* were *sui iuris*, but also some women and children.

In Roman law the concept "status" denoted the legal condition of the human being in general.[15] Status was closely connected to the capacity of being the bearer of legal rights. Roman law regarded every human being as a person, that is, a subject capable of acquiring and bearing legal rights. This capacity of having rights was also called freedom in Roman law. Three kinds of "status", or degrees of legal capacity, were recognised in Roman law: the *status libertatis* (according to which men were either freemen or slaves), the *status civitatis* (according to which freemen were either Roman citizens or foreigners), and the *status familiae* (according to which a male Roman citizen was either a *paterfamilias or a filiusfamilias*).[16]

In Roman law, persons had the following capacities: capacity to act (ie the capacity to perform juristic acts), proprietary capacity (which will be defined hereafter), and delictual capacity (ie the capacity to incur liability for unlawful acts).[17] Proprietary capacity was the leading characteristic of "persons" in Roman private law.[18] Proprietary capacity was also called the capacity of holding property, taking the word "property" in its widest sense to include both rights and debts. In other words, proprietary capacity meant both the capacity to acquire and bear rights and the capacity to incur liabilities.[19] Sohm[20] explains the difference between proprietary capacity and capacity to act by means of the example of the *infans*. An *infans* could, like others, acquire rights and incur liabilities through his or her guardian. Capacity to act, on the other hand, meant the capacity to acquire rights and incur liabilities by the manifestation of one's own will. An *infans* therefore had proprietary capacity, although he or she had no capacity to act.

14 See 2 4 below.
15 Kaser (n 4) 13 I 1.
16 Kaser (n 4) 13 I 1, 2; Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* (2nd ed) tr Ledlie (reprint 2001) 170-171.
17 Sohm (n 16) 228-231.
18 Sohm (n 16) 167.
19 Sohm (n 16) 164.
20 Sohm (n 16) 231.

2 2 Persons vested with *patria potestas*

Every male person (women could not establish *patria potestas*) who was not under the authority of a *paterfamilias* was himself a *paterfamilias*, whatever his age. The *paterfamilias* was the head of a Roman family — he had *patria potestas* over his family. The *paterfamilias* was *sui iuris*, he had capacity to act, and he was not subject to the authority of another person.[21]

2 3 Persons subject to *patria potestas*

As indicated above, the *paterfamilias* had *patria potestas* over his family. The first person included in this was his wife if she was married to him *cum manu*.[22] As explained previously, in early Roman law, marriages were concluded *cum manu* only. Entry into *manus* was effected by means of *confarreatio* (a sacral act performed by a priest in which bread was sacrificed to *Jupiter Farreus*), *coemptio* (the transfer of power over the woman to the husband by the father) or *usus* (the acquisition of power over the woman by her husband following one year's continuous residence in his house).[23]

The effect of marriage *cum manu* was to put a wife *in loco filiae* to her husband and as a sister to her own children. If she were previously *sui iuris*, she lost her proprietary capacity (ie capacity to own assets) and her assets became her husband's.[24] If she were *alieni iuris* prior to the marriage and thus had no proprietary capacity, she equally lacked that capacity when she got married *cum manu*.[25] If her husband was himself subject to *patria potestas*, the wife married *cum manu* was subject to the *patria potestas* of her husband's *paterfamilias*.[26]

In later Roman law,[27] marriage was concluded without *manus*. This meant that marriage was concluded by informal consent, followed by the *traditio* of the woman to her husband. Unlike marriage *cum manu*, this informal marriage did not

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21 G 1 48; D 1 6 4. Also see Buckland (n 12) 101-102; Thomas (n 6) 25; Van Zyl (n 3) 82 n 43.
22 G 1 109. Also see Buckland (n 12) 101; Sohm (n 16) 502; Thomas (n 6) 26-27.
23 G 1 111-115b. Also see Buckland (n 12) 118f; Kaser (n 4) 58 V 2(a)-(c); Thomas (n 6) 25-26; Van Zyl (n 3) 96f.
24 G 3 83. Also see Thomas (n 6) 25.
25 G 1 49. Also see Kaser (n 4) 59 I 2(a)-(b).
26 G 1 49, 1 109, 1 136. Also see Buckland (n 12) 102.
27 Marriage *sine manu* came into use during the time of the Republic. Marriage *cum manu* existed alongside marriage *sine manu* until marriage *cum manu* became obsolete not long after Gaius in the classical period (during the Principate). See Buckland (n 12) 121; Kaser (n 4) 58 II 2; Thomas (n 6) 26. Also see n 13 above.

affect the general legal status of the wife. She did not become subject to the power of her husband or his *paterfamilias*. If she was subject to her father's *patria potestas* (ie *alieni iuris*) before the marriage, she remained in that family. If she was *sui iuris* prior to the marriage, she remained *sui iuris* after the marriage. However, her husband had the *ius mariti*, which entitled him to determine all matters incidental to the common life of the spouses. He could thus decide issues such as household expenditure, education of the children and residence.[28]

The *paterfamilias* secondly had *patria potestas* over his legitimate sons, their wives to whom they were married *cum manu*, and their descendants. If a daughter of the *paterfamilias* was married *cum manu*, she and her children were subject to her husband's *potestas* (unless her husband was himself still under *potestas*, in which case the woman and her children were subject to his father's *potestas*).[29] A daughter of the *paterfamilias* who was married without *manus*, formed part of her father's family (unless she was *sui iuris* prior to the marriage, in which case she remained *sui iuris*),[30] but her children did not fall under her father's family. If her marriage was a valid civil marriage they formed part of her husband's family.[32] If she had married a *peregrinus* not capable of civil marriage, or if she was not married at all,[33] her children were *sui iuris*, irrespective of age or gender.[34]

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

Adrogatio was an ancient institution whereby a person without an heir could acquire one by taking into his *potestas* one who was himself a *paterfamilias*.[37] In the case of *adrogatio* the *adoptandus* (the person who was adopted) had to be *sui*

28 Hahlo *The South African Law of Husband and Wife* (5th ed) (1985) 2.
29 G 1 48, 1 55, 1 109, 1 136; *Inst* 1 9 *pr.* Also see Buckland (n 12) 101-102; Thomas (n 6) 26-27.
30 As was indicated above, the marriage *sine manu* did not change the general legal status of the woman. She retained the status that she had had prior to the marriage, whether *sui iuris* or *alieni iuris*. However, her husband had the *ius mariti*, which enabled him to control the common life of the spouses. See n 13 and n 27 above.
32 A valid civil marriage (*iustae nuptiae*) was a valid marriage between two persons who had *conubium* (ie the capacity to conclude a Roman marriage). One of the effects of a valid civil marriage was that the children were in the *potestas* of the *paterfamilias* (G 1 55-56; Buckland (n 12) 101, 104f).
33 Illegitimate children were *sui iuris* (G 1 64; Kaser (n 4) 61 II 1).
34 G 1 64. Also see Buckland (n 12) 101.
35 *Inst* 1 11 *pr.*
36 *Inst* 1 11 1. See Schulz *Classical Roman Law* (1951) 143-144; Thomas (n 6) 38f.
37 Thomas (n 6) 38.

iuris. *Adrogatio* was a legislative act effected by a decree of the *comitia curiata*.[38] Women could not be adrogated.[39]

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

The only purpose of adoption in the wider sense (ie through *adrogatio* and *adoptio*) was to bring *patria potestas* into existence. Since women could not establish *patria potestas*, they were incapable of adopting. Although it was not its primary purpose, one of the consequences of *adrogatio* (adoption of a person *sui iuris*) was to legitimate illegitimate children. Illegitimate children were *sui iuris*. Consequently, adoption of an illegitimate child by means of *adrogatio* resulted in *patria potestas* being established over the child. The child thus became *alieni iuris* and legitimate. Legitimation of illegitimate children distinct from *adrogatio* did not exist in classical law. During the Empire legislation was instituted to provide for the legitimation of illegitimate children.[41]

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

2 4 Duration of *patria potestas*

Patria potestas was terminated at the death of the father who was vested with *patria potestas*, or of the person (*alieni iuris*) over whom *potestas* existed. On the death of the *paterfamilias*, those immediately below him in the family structure

38 The *comitia curiata* was the original Roman popular assembly — Kaser (n 4) 60 III 2(a); Van Zyl (n 3) 8f.
39 Schulz (n 36) 144-147.
40 Schulz (n 36) 146; Thomas (n 6) 38-39. *In iure cessio* (cession before the court) was used for the transfer, cession or extinction of certain rights. It could also be used for other purposes, ie to establish *patria potestas* in the case of adoption — Kaser (n 4) 7 II 1-2.
41 Schulz (n 36) 143-147; Van Zyl (n 3) 84.
42 Schulz (n 36) 146-147.

became *sui iuris*. This included his wife (if they were married *cum manu*) and his married and unmarried sons. Married sons became *patresfamiliarum* over their own families. Grandchildren of the *paterfamilias* were transferred to the *potestas* of their father.[43] Unmarried daughters of the *paterfamilias* became *sui iuris*.[44] Daughters who were married *sine manu* but who were still part of their fathers' families also became *sui iuris*.[45] Children under *potestas* were not automatically freed from *potestas* upon reaching any particular age. *Potestas* existed until the death of the *paterfamilias*, unless he emancipated his children before his death.[46]

Secondly, *patria potestas* was terminated by emancipation. Emancipation was effected by the sale of the child to a trusted friend in order to terminate the *potestas* (a son three times, a daughter once).[47] After the third sale, the child was sold back to the emancipating father, who in turn freed the child by means of *manumissio*.[48] In the later Empire two simpler forms of emancipation were known, namely *emancipatio per rescriptum principis* (the so-called *emancipatio Anastasiana*)[49] and emancipation by entry on the judicial records (the so-called *emancipatio Justiniana*).[50] The child was not a party to the emancipation. His or her consent was not required. Nevertheless, if the child protested, the emancipation was void according to Justinian's law, except where it dissolved a mere adoptive relationship. With the exception of an *impubes adrogatus*[51] (who could, in certain circumstances, insist upon being emancipated), a child under the *patria potestas* was never entitled to demand emancipation as a matter of right.[52]

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43 G 1 127; *Inst* 1 12 *pr.* See Buckland (n 12) 130; Schulz (n 36) 157; Sohm (n 16) 507; Thomas (n 6) 42.

44 Daughters who were married *cum manu* were subject to the *potestas of* their husbands. See 2 3 above.

45 See n 13 and n 27 above.

46 Schulz (n 36) 150; Sohm (n 16) 507.

47 *Inst* 1 12 6-10. The child was sold to a trusted friend because the Twelve Tables stipulated that three sales of a son by a father terminated his power. As in the case of *adoptio*, one sale of daughters and grandchildren was sufficient (Kaser (n 4) 60 IV 2(a)). Also see 2 3 above.

48 Buckland (n 12) 131; Schulz (n 36) 158; Sohm (n 16) 506-507. The child could just as well have been freed by the imaginary buyer. However, since the person that effected the last manumission acquired certain rights of succession and guardianship, the child was sold back to the father so that the father could effect the last manumission and acquire these rights himself — Buckland (n 12) 131; Kaser (n 4) 60 IV 2(a); Van Zyl (n 3) 89.

49 This form of emancipation was used in cases where the child was absent. It was effected by means of a petition to the emperor, whose favourable answer resulted in the emancipation coming into effect automatically — Buckland (n 12) 131.

50 *Inst* 1 12 6. Also see Buckland (n 12) 131; Sohm (n 16) 507; Van Zyl (n 3) 90.

51 An *impubes adrogatus* was a child below the age of puberty who had been adopted by means of *adrogatio* — Buckland (n 12) 126. Also see 2 3 above.

52 *Inst* 1 12 10. Also see Buckland (n 12) 126, 131; Sohm (n 16) 507.

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

Thirdly, *patria potestas* was terminated by means of *adoptio*.[57] *Adoptio* and emancipation were effected by virtually identical procedures. Both were effected by selling the child *in causam mancipii*. However, in the case of emancipation there was an *adsertor libertatis* to participate in the process with the father, instead of an adopter. In the case of *adoptio* the child was transferred to the *potestas* of the adopter, whereas the child was released from the previous *potestas* and became *sui iuris* in the case of emancipation.[58]

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

Patria potestas was lastly automatically terminated by the acquisition of certain dignitary positions by the child. *Patria potestas* over a daughter was terminated

53 The relationship upon which the family was based in Roman law was not that of *cognatio* (blood relationship), but that of *agnatio*. Agnates were those who were in the *potestas* of a single male ancestor through the male line, either by birth or otherwise. Descendants through sons would be in the *pater*'s *potestas*. However, though the daughter herself would be an agnate and in her *pater*'s *potestas*, her own issue would be in the *potestas* of her husband or his family (Thomas (n 6) 28).

54 Buckland (n 12) 132; Sohm (n 16) 508. Children of the *emancipatus* with whom his wife was pregnant at the time of the emancipation (eg that were conceived prior to emancipation), remained in the previous *potestas*, but children that were conceived after the emancipation, formed part of the new family of the *emancipatus* (*Inst* 1 12 9).

55 Buckland (n 12) 132; Thomas (n 6) 43.

56 Buckland (n 12) 132.

57 See 2 3 above.

58 Buckland (n 12) 132; Schulz (n 36) 158; Thomas (n 6) 43.

59 G 1 48, 1 109, 1 136. Also see Schulz (n 36) 157-158.

if she became a *virgo Vestalis*, and over a son if he became a *flamen Dialis*.[60] Under Justinian's law *patria potestas* was terminated if the child acquired the dignity of bishop or *patricius*.[61]

2 5 The nature and content of *patria potestas*

2 5 1 The ius vitae necisque *(the power of life and death*)

Domestic discipline was in the hands of the *paterfamilias*. This implied even the right to kill the child. This *ius vitae necisque*, which was expressly mentioned in the Twelve Tables, was regarded by Roman lawyers as being the core of *patria potestas*. It was maintained throughout the classical period, but was abolished in the post-classical period. However, the father still had an obligation to kill a deformed child.[62] By the time of Justinian the father was allowed only reasonable chastisement.[63]

2 5 2 The power to alienate the child

Patria potestas furthermore included the authority to sell those under his *potestas* into slavery. This authority was abolished in the post-classical period. However, the *paterfamilias* still had the power to sell new-born children into slavery in case of poverty, subject to the right to redeem the child.[64]

2 5 3 The power over the child's estate and juristic acts

Subject to certain exceptions, any acquisitions by those under *patria potestas* automatically became the property of the *paterfamilias*. Initially only the *paterfamilias* was capable of concluding contracts in his own right.[65] The *paterfamilias* had the right to give his children in marriage even without their consent. In classical law, the consent of the child to the marriage was needed where he or she was competent to give it. The *paterfamilias* also had the right to dissolve the marriages of his children.[66] He could appoint tutors for his young

60 G 1 130. Also see Buckland (n 12) 130; Schulz (n 36) 157; Sohm (n 16) 506.
61 Sohm (n 16) 506.
62 Kaser (n 4) 60 I 3(a).
63 Buckland (n 12) 103; Sohm (n 16) 502-503; Schulz (n 36) 151; Thomas (n 6) 27.
64 Buckland (n 12) 103; Kaser (n 4) 60 I 3(c); Schulz (n 36) 151-152; Thomas (n 6) 27.
65 Buckland (n 12) 104; Sohm (n 16) 504; Thomas (n 6) 28. Also see 2 6 below.
66 Buckland (n 12) 103; Schulz (n 36) 152; Thomas (n 6) 27.

children at will.[67] He furthermore had the right to appoint an heir in his will to succeed a young child if the child died too young to make a will (ie if the child died while still under the age of puberty).[68]

2 5 4 The power to institute proceedings to recover the child

Patria potestas included the right to institute an action for recovery of a child against a third party who obtained possession of the child and exercised control over him or her.[69]

2 5 5 The absence of obligations between father and child

Actionable obligations between father and child did not exist in principle, but from the second century AD a mutual liability for maintenance was recognised by imperial constitutions.[70]

2 5 6 A few general comments on the nature of patria potestas

Patria potestas was essentially Roman. Both in content and in its lifelong duration, it had an intensity unknown to the forms of paternal power known in any of the legal systems with which Rome came into contact.[71] The archaic character of *patria potestas* was illustrated by the absolute power which the father had over the person of his child *in potestate*. The status of a child in power was similar to that of a slave. *Patria potestas* was in no sense a form of guardianship. It did not cease to exist when the child reached a certain age, but remained in effect as long as the father lived, unless he emancipated the child. *Patria potestas* existed entirely in the interest of the father. Its continuance depended not on the child's need for protection and educational requirements, but simply on the life or decision of the father.[72]

This system of absolute control diminished due to the following slight mitigations in classical times:[73]

67 *Inst* 1 13 3.
68 Buckland (n 12) 104; Schulz (n 36) 152; Thomas (n 6) 27.
69 D 47 2 38 1; G 3 199. Also see Buckland (n 12) 103.
70 G 4 78. Also see Schulz (n 36) 157.
71 Buckland (n 12) 102; Thomas (n 6) 27.
72 Schulz (n 36) 150; Sohm (n 16) 507.
73 Schulz (n 36) 151.

- The abolition of the *ius vitae necisque* and the right to sell family members into slavery during the post-classical period.[74]
- The mitigation, during the Empire, of the rule that the *filius* under *potestas* had no proprietary capacity.[75]
- The mitigation of the absolute power of the *paterfamilias* by the recognition in the second century AD of the mutual liability for maintenance between parent and child.[76]

The explanation for the retention of the absolute control inherent in *patria potestas* can probably be found in the Roman feeling for authority and discipline which inspired the jurists. Furthermore, the Roman respect for individual freedom rendered them loath to interfere with the internal management of the Roman home.[77] In the period of early Roman law the state interfered little with the family. Moreover, the *paterfamilias* was judge in his own home and exercised absolute authority. The only checks on his absolute authority could be found in the following:[78]

- The influence exerted by the relations in the family council (*concilium domesticum*) which custom required him to appeal to in cases of gravity.[79]
- The fear of a *nota censoria*.[80]
- The threat of spiritual punishment. In early times the abuse of the power over family members was punished as sacral offences committed against the gods.[81]

74 See 2 5 1 above.
75 See 2 6 below.
76 See 2 5 5 above.
77 Schulz (n 36) 151.
78 Buckland (n 12) 102-103; Sohm (n 16) 502.
79 Cases of gravity included the exercise of the *ius vitae necisque* and the sale of family members into slavery (Van Zyl (n 3) 82).
80 In the earlier Republic the *censor*, who exercised control over public morals, could interfere in cases of abuse by the *paterfamilias* of his far-reaching power over his family members, by publicly censuring the offender (*nota censoria*) (Kaser (n 4) 3 I 2(b); Van Zyl (n 3) 18).
81 Kaser (n 4) 3 I 2(b); Sohm (n 16) 502.

2 6 The status of the child under *potestas*

2 6 1 Capacity to act in general

Although initially there were distinct differences between children *alieni iuris* (those under *potestas*) and children *sui iuris* (who were under *tutela* or *cura*), some of the rules applicable to children *sui iuris* were also applied to those *alieni iuris* during the late classical and post-classical periods.[82]

Children under the age of seven (*infantes*) had no capacity to act whatsoever.[83] Children under *tutela,* or *impuberes* (ie children above the age of seven, but below the age of puberty (14 for boys and 12 for girls)) who were *sui iuris*, had limited capacity to act. They could conclude unilateral contracts without their guardian's consent, but the guardian's consent was needed for multilateral contracts.[84] Children under *cura*, or *minores* (ie children above the age of puberty, but below the age of 25) who were *sui iuris* initially had full capacity to act. Although the function of the *curator* was to assist the *minor* in the conclusion of juristic acts, the validity of the minor's contract was initially not dependent upon the consent of the *curator*. In the post-classical period a contract concluded by the *minor* without the assistance of his or her *curator* was sometimes regarded as void.[85]

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

82 Dannenbring "Oor die minderjarige se handelingsbevoegdheid: Romeinsregtelike grondslae" 1977 *THRHR* 316.
83 Kaser (n 4) 14 II 1. Also see Dannenbring (n 82) 317.
84 *Inst* 1 21 *pr.* Also see Dannenbring (n 82) 317; Thomas (n 6) 54.
85 Dannenbring (n 82) 326 328.

2 6 2 Capacity to make a will

In principle, only Roman citizens who were *sui iuris* and mentally healthy could make wills. As will be pointed out below,[86] the *filiusfamilias* (who was *alieni iuris*) could dispose of his *peculium castrense* and *quasi castrense* in a will. However, this was an exception to the general rule, and was dealt with as such. In early Roman law only male persons were allowed to act as testators. By the time of Justinian this restriction was removed, and women could also make wills.[87]

2 6 3 Capacity to marry

The *paterfamilias* had the right to give his children in marriage without their consent. In classical law, the consent of the child to the marriage was needed where he or she was competent to give it. The *paterfamilias* also had the right to dissolve the marriages of his children.[88]

2 6 4 Proprietary capacity

2 6 4 1 Introduction

The position of the son under *potestas* was similar to that of a slave. In early Roman law he had no proprietary capacity[89] whatsoever and was incapable of owning any property of his own. His position was one of involuntary representation: whatever the *filiusfamilias* acquired passed, by operation of law, to the *paterfamilias*. The rigid position of early Roman law was mitigated during the Empire. The *filiusfamilias* gradually acquired proprietary capacity.[90] In the course of the development of Roman law, three types of property developed, namely *peculium profecticium*, *peculium castrense*, and *peculium adventicium*.

2 6 4 2 *Peculium profecticium*

Peculium profecticium was property derived from the father, or given to the son by a third person with the intention of conferring a benefit on the father. This

86 See 2 6 4 below.
87 Van Zyl (n 3) 211.
88 Buckland (n 12) 103; Schulz (n 36) 152; Thomas (n 6) 27. Also see 2 5 3 above.
89 See 2 1 above.
90 G 1 86-87. See Sohm (n 16) 185 504.

property belonged to the *paterfamilias*, but the son could manage the property with the permission of the father.[91]

It is unclear what is meant by the term "manage" used by the sources.[92] Kaser[93] sheds some light on this question when he says that "sons could administer [*peculium profecticium*] independently, its income being used by the sons themselves". According to Schulz[94] "the son might manage this separate property (*peculium*, literally 'property in cattle') like an owner and even dispose of it or charge it with his debts". Sohm[95] states that the son was competent to deal with the *peculium* he had received, and to bind his father by his contracts to the extent of the *peculium*. The son could only dispose of the property *inter vivos*. Disposition by means of a will was not possible.[96] In certain circumstances, creditors who contracted with the son could sue the father (and, in certain circumstances, the son) and recover from him the extent of the *peculium*.[97]

From the above it appears that in early Roman law the concept “manage” also included the capacity to contract in respect of the property. However, as pointed out above, the son could only manage the property with the permission of the *paterfamilias*. The son thus had what is known in contemporary South African law as "limited capacity to act".[98]

Sohm[99] points out that by the time of Justinian the son had full powers of disposition over *peculium profecticium*. Although the father remained the owner of *peculium profecticium*, the son was competent to deal with it and to bind his father by his contracts to the extent of such *peculium*.

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

91 *D* 14 6 1. Also see Schulz (n 36) 154 156-157; Sohm (n 16) 185, Spiro “The law of *peculium* in South Africa” 1954 *THRHR* 256.
92 See n 91 above.
93 Kaser (n 4) 60 II 3(d).
94 Schulz (n 36) 154.
95 Sohm (n 16) 446 506.
96 Schulz (n 36) 154.
97 *D* 14 6 1. See Schulz (n 36) 154 156-157; Spiro (n 91) 256.
98 Van der Vyver & Joubert *Persone- en Familiereg* (3rd ed) (1991) 146f.
99 Sohm (n 16) 185 506.

adiecticiae qualitatis), by means of which execution could be obtained against the father to the extent of the *peculium profecticium*.[100]

2 6 4 3 *Peculium castrense*

Peculium castrense was property acquired by the son while he was on active military service. The son's power over *peculium castrense* was more complete than his power over *peculium profecticium*. The son was the owner of this property,[101] and he could use and manage this property at his discretion and thus contract in respect of it, provided the contract was authorised by the father.[102] In the post-classical period *bona quasi castrense* (property acquired in a public capacity) was also recognised.[103] The son could freely dispose of *peculium castrense* and *peculium quasi castrense inter vivos* and in his will. Eventually such property no longer automatically reverted to the father if the son died without a will as was the case earlier, although the property could devolve upon the father by right of succession.[104]

2 6 4 4 *Peculium adventicium*

Peculium adventicium consisted of everything earned by the son, and everything acquired from other sources than from the father, and that was bequeathed or donated with the intention to benefit the son.[105] This included *bona materna* (ie property inherited by the son from the mother), *bona adventicia* (ie property derived from other sources than the father), and *bona adventicia irregularia* (property in respect of which the father's usufruct and control had been expressly excluded).[106]

The ownership of the *peculium adventicium* vested in the son, but the father retained the usufruct of the property (except if his usufruct and control had been expressly excluded, as in the case of *bona adventicia irregularia*). The father's usufruct was no ordinary one — it was not only a right of use, it also vested the

100 Kaser (n 4) 49 I; Schulz (n 36) 156-157; Sohm (n 16) 506; Thomas (n 6) 28.
101 *D* 49 17. Also see Sohm (n 16) 185 504, *contra* Schulz (n 36) 154.
102 Sohm (n 16) 446.
103 *Inst* 2 11 6. See Kaser (n 4) 60 II 4(b).
104 *D* 49 17; *Inst* 2 12 *pr*; *Inst* 2 11 6. Also see Buckland (n 12) 280; Schulz (n 36) 154-155; Sohm (n 16) 504; Spiro (n 91) 257; Thomas (n 6) 28; Van Zyl (n 3) 83 n 48.
105 Van der Vyver & Joubert (n 98) 611.
106 Spiro (n 91) 257-258.

father with the power of control and administration.[107] Kaser[108] speaks of a functionally divided ownership. The *paterfamilias* enjoyed a sort of ownership in that he could enjoy and administer the property (although he did not have the capacity to alienate the property). The son's right of ownership was restricted to the remaining functions. The child could not dispose of the property in his will, nor alienate it *inter vivos* without the consent of the *paterfamilias*.[109] Should the son die while still in *potestas*, the property automatically became the property of the father. Like *peculium castrense*, *peculium adventicium* reverted to the father on the son's death only by right of succession in the late post-classical period.[110]

2 6 4 5 The proprietary capacity of the *filiafamilias*

In the preceding paragraphs, only the male pronoun was used. The reason for this is the fact that the sources only refer to the proprietary capacity of the son (*filiusfamilias*).[111] Furthermore it is mentioned that the daughter (*filiafamilias*) could still not bind herself contractually in classical law, whereas the son in power was now capable of binding himself contractually in respect of all property.[112] According to Kaser[113] daughters in power, as well as the *uxor in manu*, were probably altogether incapable of binding themselves, nor could they be sued.

2 6 5 Delictual capacity

Children *in potestas* were not liable for their delicts. The father was liable for the delicts of his children in *potestas*, but this was only a noxal liability in terms of which the father could hand over the child (*noxae datio*) instead of paying the penalty for the child's delict.[114] *Noxae datio* of daughters was obsolete long before the Empire, while *noxae datio* of sons was abolished by Justinian. It never applied to a wife *in manu*.[115]

107 Sohm (n 16) 505; Spiro (n 91) 257-258.
108 Kaser (n 4) 60 II 4(c).
109 Buckland (n 12) 280; Kaser (n 4) 60 II 4(c); Sohm (n 16) 505; Thomas (n 6) 28.
110 Spiro (n 91) 257.
111 See eg Schulz (n 36) 156; Sohm (n 16) 504f; Thomas (n 6) 27f.
112 Schulz (n 36) 156.
113 Kaser (n 4) 49 I.
114 G 1 75f.
115 Buckland (n 12) 104; Schulz (n 36) 157; Sohm (n 16) 502-503.

3 Germanic law

3 1 Introduction

When dealing with the development of the concept "parental authority" in Germanic law below,[116] the early Germanic period (from the birth of Christ to the fall of the Western Roman Empire in AD 476[117]) and the Frankish period (AD 476 to AD 843[118]) will be dealt with in detail, but a few references to the Middle Ages (AD 843 to AD 1581[119]) will also be included.

3 2 Definition of the concepts *munt*, *sib* and "house"

The head of the family in Germanic law had authority (the so-called *munt* or *mundium*) over his family members. The family of early Germanic society was known as the *sib*. This term was used to denote both the extended family and the elementary family or "house".[120]

In its wider meaning the term *sib* included all those who were related to each other by blood, no matter how distant the relationship. The "house" or family in the narrow sense corresponded broadly to the modern conception of the family. The extended family was ruled by the patriarch of the family assisted by a family council, made up of the heads of the various "houses", whereas the family in the narrower sense (the "house") was under the *munt* of the male head of the house (who was similar to the *paterfamilias* of Roman law).[121]

3 3 Persons vested with *munt*

The family in the narrower sense ("house") was under the *munt* of the head of the household — the father, paternal grandfather, or father's brother, as the case may be.[122]

3 4 Persons subject to *munt*

116 See 3 2 - 3 9 below.
117 Hahlo & Kahn *The South African Legal System and its Background* (1968) 330.
118 *Ibid*.
119 Hahlo & Kahn (n 117) 330-331.
120 Hahlo & Kahn (n 117) 343.
121 Hahlo & Kahn (n 117) 343-344. Hahlo & Kahn use the term *paterfamilias* to denote the male head of the household. However, to avoid confusion, I will use the term *paterfamilias* only in respect of Roman law.
122 Hahlo & Kahn (n 117) 344.

By marriage, the husband acquired the *munt* over his wife and any children born to her, regardless of whether or not he was their father. This is so because, in primitive society, the child was regarded as an economical asset that belonged to the man who has purchased the *munt* over the woman. The father's power was thus not based on the fact that he had conceived the child, but upon his *munt* over the child's mother. Adopted children were also subject to the *munt*. [123]

3 5 The duration of *munt*

In Germanic law, the father's *munt* over his children did not end with their attainment of a certain age, but with their departure from the paternal household.[124] However, fixed ages were laid down at which boys reached majority. These ages differed from one place to the next, but preference was given to the ages of 10, 12 (eg according to the *Lex Salica* and the *lex Frisionum*) and 15. As indicated above, paternal authority did not come to an end when children attained these ages. On attainment of the age, the young man became a major (*mondig)*. As long as he remained under his father's roof, he remained subject to his father's power. However, his *mondigheid* enabled him to set up a household of his own, and if he did so he became completely independent (*selfmondig*) and his father's *munt* came to an end. This meant that he could now enter into juristic acts without his father's consent.[125] Unlike Roman law, Germanic law did not permit a father to retain a son in his power indefinitely.[126]

Daughters never became *mondig*. On marriage a girl was transferred from the *munt* of her father to the *munt* of her husband. Females were subject to perpetual tutelage.[127]

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123 Hahlo & Kahn (n 117) 344; Huebner *A History of Germanic Private Law* tr Phi brick (1968) 657 659f.

124 Brunner *Grundzüge der deutschen Rechtsgeschichte* 5 ed (1912) 229; Hahlo & Kahn (n 117) 382-383; Huebner (n 123) 662-663. Against the background of these sources, the following statement of Van der Vyver & Joubert (n 98) 594 is confusing: "Die ouerlike gesag oor die manlike kinders het tot 'n einde gekom by die mondigwording van die kind. Daar was in dié verband verskillende ouderdomsbepalings ..." The same applies to the statement of Spiro *Law of Parent and Child* 4 ed (1985) 2: "Majority ... brought the *munt* to an end."

125 Hahlo & Kahn (n 117) 345 382-383; Huebner (n 123); Wessels *History of the Roman-Dutch Law* (1908) 417f.

126 Hahlo & Kahn (n 117) 345.

127 Hahlo & Kahn (n 117) 345 383; Huebner (n 123) 663.

3 6 The nature and content of *munt*

Like the *patria potestas* of early Roman law, the *munt* was initially a complex of powers. The idea that the head of the family owed duties to those subject to his power developed only later, in the Middle Ages.[128] In Germanic law, legal capacity depended on the capacity to bear arms. Since women and children were not capable of bearing arms, they were subject to *munt*. The reason for the subordination of women and children was thus the physical helplessness of the woman or child. *Munt* had to be exercised in the interests of the woman or child. For this reason *munt* gradually lost the characteristic of power, and became an obligation to care for the woman or child.[129]

Munt initially vested the head of the family with the right to kill his wife and children, the right to sell his wife and children into slavery, and the right to decide whom his children were to marry. Furthermore, the father held the son's property "absolutely in his hand".[130] He could dispose freely of his son's property, all the profits from the property went to the father, and as long as the father's *munt* existed he was under no obligation to deliver anything from the child's estate when a third party had a claim against the child. The severity of the powers of the head of the family gradually disappeared in the Middle Ages, presumably under the influence of Christianity. The father's obligation to care for his children, and to protect and support them, became more prominent. After the reception of Roman law, the father's duty to care for his children was treated in the law of persons as the chief element of the *munt*. It was required that he should exercise his power to educate his child, determine his or her religious faith, and appoint his or her guardians in the best interests of the child.[131]

Unlike in Roman law, in Germanic law the mother enjoyed some authority over her children. In practice she had considerable say over the care and education of the children, although her position was never equated with that of the father.[132] Initially the *princeps* was the upper guardian of all minors. Later the courts exercised a right of control over minors (known as *obervormundschaft*), and was recognised as upper guardian of minors. This Frankish practice was received in

128 Hahlo & Kahn (n 117) 344 446. Also see Huebner (n 123) 657-659.
129 Studiosus "Die aard van die gesagsregte van ouers ten opsigte van hul minderjarige kinders" 1946 *THRHR* 33-34 36; Wessels (n 125) 417f.
130 Huebner (n 123) 666.
131 Huebner (n 123) 657-659 666f.
132 Huebner (n 123) 664-665.

Holland (where the Court of Holland assumed the function) and the rest of the Netherlands in the Middle Ages.[133]

3 7 The status of the child under *munt*

Unlike Roman law, minors had the capacity to own property of their own in Germanic law. As long as the child lived in his or her father's house, the child's father administered his or her estate and was entitled to the usufruct.[134] The father held the child's property "absolutely in his hand".[135] He could dispose freely of his child's property, all the profits from the property went to the father, and as long as the father's *munt* existed he was under no obligation to deliver anything from the child's estate to a third party who had a claim against the child. However, it remained the property of the child. The father was obliged to deliver it to the child undiminished in value upon the termination of his *munt*. The father was not permitted to alienate property belonging to the child without the latter's consent, which the child was unable to give before attaining majority.[136]

The child under *munt* was unable to dispose of his or her property. On the contrary, any juristic act concluded was ineffective against the father. Moreover, the child was not bound by juristic acts concluded during his or her minority.[137]

3 8 Guardianship

If the father died before his son left the family home, or before his daughter got married, the nearest male agnate was automatically appointed as the child's guardian.[138] From the 13th century recognition was given to testamentary guardians and guardians appointed by public authorities.[139] In early Germanic law, the guardian controlled both the child's person and property. His legal relationship to the child corresponded exactly with that of a father to his son. The guardian was not a mere administrator of the child's estate, but he took the child's property

133 Huebner (n 123) 659; Van Apeldoorn "Het vruchtgenot van de ouders in het Oud-Nederlandsche recht" 1938 *THRHR* 180; Van Heerden, Cockrell & Keightley (eds) *Boberg's Law of Persons and the Family* (1999) 500 (n 7); Wessels (n 125) 423-424. See further Labuschagne "Die hooggeregshof as oppervoog van minderjariges — 'n historiese perspektief" 1992 *TSAR* 353.

134 The question whether the father was entitled to usufruct is controversial — see Hahlo & Kahn (n 117) 83; Huebner (n 123) 665-666; Van Apeldoorn (n 133) 165.

135 Huebner (n 123) 666.

136 Huebner (n 123) 666; Spiro (n 124) 2.

137 Huebner (n 123) 666; Hahlo & Kahn (n 117) 382.

138 Huebner (n 123) 684-685.

139 Huebner (n 123) 680 687.

into his power. For this reason he brought an action in his own name, and not in the name of the ward, against any third person who refused to deliver objects belonging to the estate.[140] The guardian was entitled to the usufruct but he could not dispose of the substance of the estate. All juristic acts were concluded in the guardian's own name and he was liable for any debts.[141] The guardian was obliged to support the minor at his (the guardian's) own expense. He could use the profits of the minor's estate for the child's maintenance.[142]

From the 14th century the guardian's obligations were mitigated to mere administration of the minor's estate subject to an obligation of accounting.[143] The guardian was permitted to act in the minor's name, or the minor was permitted to act personally with the guardian's consent.[144] Guardianship came to an end when the son attained the age of majority or when the daughter married.[145]

3 9 Differences between the Roman and Germanic concepts of parental authority

The most prominent difference between the Roman and Germanic concepts of parental authority can be found in the nature of parental authority. In Roman law the *paterfamilias* was vested with a kind of quasi-ownership in respect of his children. This quasi-ownership is evident from the following examples: In early Roman law, the father had the *ius vitae necisque* in respect of those in his *potestas*, he could sell them into slavery, and he could claim possession of his child from a third person. Furthermore, the father could hand the child over as a *noxa* instead of paying the penalty for a delict committed by the child. In Roman law, parental authority was thus exercised in the interests of the *paterfamilias*. Its continuance depended on the life or decisions of the father and not on the child's needs and interests.[146]

In Germanic law, on the other hand, legal capacity depended upon the ability to bear arms. Since women and children were incapable of bearing arms, they were subjected to *munt*. The reason for the subordination of women and children was thus not possible financial benefit for the father, but the physical helplessness of

140 Huebner (n 123) 690-691.
141 Huebner (n 123) 691.
142 Huebner (n 123) 692.
143 Scröder *Lehrbuch der deutschen Rechsgeschichte* (5th ed) (1907) 768.
144 Huebner (n 123) 691-693.
145 Huebner (n 123) 693.
146 Sohm (n 16) 507.

the woman or child. Parental authority had to be exercised in the interests of the child. For this reason the *munt* concept of Germanic law was gradually stripped of its power character and became an obligation to care for the child.[147]

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

In Germanic law, on the other hand, parental authority was exercised for the protection of the child. Consequently, the child was only subjected to the authority of another while physically dependent. That marriage makes a child of either sex a major is a doctrine unknown to the Roman law, though it was found in nearly all the branches of Germanic law. This was of course the case with regard to males, who became *selfmondig* as soon as they established their own households,[148] which was customarily associated with their marriage. A daughter, on the other hand, was merely transferred from the *munt* of her father to her husband's authority upon her marriage. She was thus always regarded as a minor in the eyes of the law.[149]

Thirdly, the Germanic concept of parental authority differs from the Roman concept of *patria potestas* in that in Roman law *patria potestas* was exercised by the *paterfamilias*. The child's mother had no authority in respect of her children — she was herself subject to *potestas*.

In Germanic law, on the other hand, although also subject to her husband's *munt*, the mother had some authority in respect of her children. In practice, she had considerable say in the care and education of the children, although her position was never equated with that of the father. Studiosus[150] points out that the protection concept, which formed the basis of the Germanic *munt*, created an opportunity for the development of the status of the woman. Due to the woman's inability to bear arms, the assembly of the tribe was forbidden territory and thus

147 Studiosus (n 129) 33-34 36.
148 See 3 5 above.
149 Huebner (n 123) 662; Wessels (n 125) 417 421.
150 Studiosus (n 129) 34.

she did not have full legal capacity. When an independent state authority was later instituted, the social conditions that initially led to the dependence of the woman fell away. This created an opportunity for the improvement of the woman's position.

4 Roman-Dutch law

4 1 Introduction

When discussing the development of the concept "parental authority" in Roman-Dutch law below,[151] it will be indicated that Roman-Dutch law followed Germanic rather than Roman law regarding parental authority. *Patria potestas* as it was known in Roman law was never recognised in Holland and the rest of the Netherlands.[152]

4 2 Persons vested with parental authority and persons subject to parental authority

In Roman-Dutch law, parental authority was shared by the mother and the father. Although the father acted as guardian of the children during the lifetime of the parents, both parents were in Roman-Dutch law vested with parental authority over the person of the child.[153] It is for this reason that authors prefer the term "parental power" over the term "paternal power".[154]

Although both parents were vested with parental authority over the person of the child, the mother's position was subordinate to that of the father.[155] This is evident from the fact that in cases of a difference of opinion between the parents concerning decisions regarding the duty of obedience of the children,[156] the children had to obey the orders of the father.[157] Furthermore, in cases of

151 See 4 2 - 4 5 below.
152 Grotius *Inleidinge* 1 6 3; Van der Linden *Institutes* 1 4 1. Grotius indicates that "[d]e groote ende zonderlinge macht der vaders over de kinderen onder haere hand staende is in deze landen onbekent", and that children who had already reached the age of discretion were free to do and act as they saw fit, and could dispose of their property by will to whomever they thought fit. Also see Wessels (n 125) 417.
153 Voet *Commentarius* 1 6 3; *Calitz v Calitz* 1939 AD 56 61.
154 Voet *Commentarius* 1 6 3; DP "*Cook v Cook*" 1938 *THRHR* 65; Studiosus (n 129) 35 42; *Meyer v Van Niekerk* 1976 1 SA 252 (T) 256; *contra* Aquilius "Insake *Cook v Cook*" 1938 *THRHR* 232.
155 Voet *Commentarius* 26 1 1.
156 On the duty of obedience of the children see 4 4 2 1 below.
157 Schorer *Aantekeningen* 1 3 8; *Calitz v Calitz* (n 153) 56 62.

difference of opinion between the parents on decisions relating to consent to the marriage of a child,[158] the father's wishes were conclusive.[159]

Parental authority over an illegitimate child vested in the child's mother according to the maxim *een moeder maakt geen bastaard*.[160]

Initially the *princeps* was the upper guardian of all minors. Later the courts exercised a right of control over minors (known as *obervormundschaft*) and was recognised as upper guardian of minors.[161]

4 3 The duration of parental authority in Roman-Dutch law

Parental authority over a child was terminated when the child reached the age of majority (with the exception of the right of obedience owed to the parents).[162] In the 16th century men reached majority at the age of 25, and women at the age of 20.[163]

Parental authority also came to an end if the child was released from authority through marriage, or the granting of *venia aetatis* (declaration of majority by the sovereign).[164] Roman-Dutch law did not recognise adoption. An exception was Friesland, where adoption was recognised.[165]

158 On consent to the marriage of a child, see 4 4 2 3 below.

159 Voet *Commentarius* 23 2 13. Voet gives three reasons for giving preference to the wishes of the father. First, the advice of the father is considered to be the best thing for his children. Secondly, the father is considered to be more observant of the position of the rest of the citizens than the mother. Thirdly, the power of a husband over his wife is considered so great that she can do nothing without her husband's assent. Grotius *De Jure Belli ac Pacis* 2 5 1 regards the superiority of the male sex as the reason for giving preference to the wishes of the father. Schorer *Aantekeningen* 1 3 8 questions this statement of Grotius and gives a different reason for giving preference to the wishes of the father, namely that a partnership cannot function properly if both members have the same capacities. This argument of Schorer does not explain why the *father's* wishes are given preference. Also see *Calitz v Calitz* (n 153) 56 62.

160 Van der Linden *Institutes* 1 4 2.

161 See 3 6 above.

162 See 4 4 2 1 below.

163 Van der Linden *Institutes* 1 4 3; Voet *Commentarius* 1 7 15; Hahlo & Kahn (n 117) 446; Wessels (n 125) 420.

164 Grotius *Inleidinge* 1 6 4; Voet *Commentarius* 1 7 11 13.

165 Grotius *Inleidinge* 1 6 1; Van der Linden *Institutes* 1 4 2; Voet *Commentarius* 1 7 7.

4 4 The nature and content of parental authority in Roman-Dutch law

4 4 1 The nature of parental authority

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

4 4 2 The content of parental authority

4 4 2 1 Power over the person of the child

Both parents were entitled to inflict moderate chastisement.[166] The children, on the other hand, had a duty of obedience towards both parents.[167] This duty of obedience did not come to an end when the children reached the age of majority.[168]

4 4 2 2 Power over the estate and juristic acts of the child

As indicated above,[169] the father was the guardian of the children. In this capacity, he had to assist his children in the conclusion of juristic acts, he had to appear for them in court, and he had to manage all property which came to the children by inheritance or otherwise.[170]

4 4 2 3 Power to consent to the child's marriage

Although the father had to assist the child in the conclusion of juristic acts, both parents had to consent to the marriage of a child. In cases of difference of opinion between the parents, the father's decision was conclusive.[171]

166 Van der Linden *Institutes* 1 4 1; Van Leeuwen *Censura Forensis* 1 1 9 4.
167 Grotius *Inleidinge* 1 6 4; Van der Linden *Institutes* 1 4 1; Van Leeuwen *Censura Forensis* 1 1 10 1; Van Leeuwen *Commentaries* 1 13 1.
168 Grotius *Inleidinge* 1 6 4. Grotius is silent on the question whether the parents still have the right to inflict chastisement after the children had reached the age of majority.
169 See 4 2 above.
170 Grotius *Inleidinge* 1 6 1; *Calitz v Calitz* (n 153) 56 61-62.
171 Voet *Commentarius* 23 2 13. Also see 4 2 above.

4 4 2 4 Power to appoint testamentary guardians

Both parents were entitled to appoint a testamentary guardian to assist the surviving parent after the death of the other parent. However, one parent could not, by the appointment of a testamentary guardian, deny the other parent his or her control over the person of the child. On the death of either parent parental authority thus vested in the surviving parent, but the latter was assisted by a testamentary or appointed guardian. In addition to control over the person of the child (and the accompanying duty to care for the child and the right of chastisement), the surviving spouse had the capacity to make decisions regarding the marriage and education of the child without the assistance of the guardian. However, the guardian had to assist the child in the conclusion of juristic acts and had to manage the child's estate.[172]

4 4 2 5 Duties of the parents in terms of parental authority

Both parents had to care for their children.[173] This duty to take care of the child was not limited to the material needs of the child, but included nearly every aspect of the care of the child. It included the provision of food, clothing, accommodation, medical care and education.[174]

4 5 The status of the child under parental authority in Roman-Dutch law

Voet[175] indicates that the distinction between *peculium castrense*[176] and *quasi castrense*[177] on the one hand, and *peculium profecticium*[178] on the other hand, still applied in Roman-Dutch law. *Peculium castrense* and *quasi castrense* belonged to the child who could use and manage the property as he or she saw fit, while *peculium profecticium* belonged to the father. The child could, however, manage it with the father's consent. Property not derived from or acquired for the father (known as *peculium adventicium* in Roman law) belonged to the son, but the father retained management of the property, except if his control had been expressly excluded.[179]

172 Grotius *Inleidinge* 1 7 8. Also see Studiosus (n 129) 41-42.
173 Voet *Commentarius* 25 2 4-6.
174 Voet *Commentarius* 25 3 4. See Studiosus (n 129) 38.
175 Voet *Commentarius* 15 1 4. See Spiro (n 97) 258.
176 Property acquired by the son while he was in military service (see 2 6 4 3 above).
177 Property acquired in a public capacity (see 2 6 4 3 above).
178 Property derived from the father, or given to the son by a third person with the intention of conferring a benefit on the father (see 2 6 4 2 above).
179 Voet *Commentarius* 15 1 3 6.

However, a considerable amount of legal development took place in the field of *peculium* in Roman-Dutch law. First of all property that had been donated by a father to his child[180] did not form part of the *peculium profecticium* (ie property that belonged to the father). The reason for this is that the purpose of the donation was to secure such property against any liability of the parents. It thus formed part of the *peculium adventicium* (ie the property of the minor).[181] Since property donated by a father to his son formed part of the *peculium profecticium* (ie the property of the father) in Roman law, Roman-Dutch law differs from Roman law in this respect.[182] As far as donations by third parties were concerned, it depended on the intention of the donor whether the donation became the property of the father or the son.[183]

Secondly, unlike Roman law, in Roman-Dutch law the father no longer had an interest in the property of his child for as long as his parental authority lasted.[184] The parent was not entitled to the usufruct over property not derived from, nor acquired for the father (in Roman law known as *peculium adventicium*), unless the person by whom the property had been conferred had expressly granted the usufruct to a parent, or the parent needed the usufruct for the maintenance and upbringing of the child.[185] Roman-Dutch law differs from Roman law in this respect. Subject to certain exceptions, the father had an usufruct over the *peculium adventicium* in Roman law. The father's usufruct was not a right of use only, it also vested him with the power of control and administration.[186] However, neither in Roman law nor in Roman-Dutch law was the father entitled to alienate the child's immovable assets without a court order.[187]

Property earned by minor children while they lived with their parents and while they were being supported by their parents was *peculium profecticium* and belonged to the father.[188] This rule applied to property acquired by the children's services or out of their father's property. The reason for this was that parents had

180 According to Grotius *Inleidinge* 3 2 8 donations between parent and child were prohibited, but Van Leeuwen *Censura Forensis* 1 4 12 8 indicated that, due to the fact that *patria potestas* (and the unity of assets between parent and child) no longer existed, this rule of Roman law no longer applied. Also see Conradie "Power of natural guardians to alienate immovable property" 1948 *SALJ* 63.
181 Spiro (n 97) 259.
182 Conradie (n 180) 63.
183 Spiro (n 97) 260. Voet *Commentarius* 15 1 4 indicated that donations by a godparent to a child formed part of the *peculium profecticium*, except if the donor expressly indicated that he or she intended otherwise.
184 Grotius *Inleidinge* 1 6 3; Voet *Commentarius* 15 1 6.
185 Voet *Commentarius* 15 1 6.
186 Spiro (n 97) 257-258.
187 Grotius *Inleidinge* 1 8 6; Conradie (n 180) 65-66.
188 Grotius *Inleidinge* 1 6 1; Voet *Commentarius* 15 1 4.

to be compensated from this property for the money they spent on the maintenance and education of their children.[189] When the child's earnings exceeded the cost of maintenance and education, the child was entitled to compensation when his parents' estate was divided.[190]

5 Conclusion

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

- The most prominent difference between the Roman-Dutch and Roman concepts of parental authority can be found in the nature of parental authority. As indicated above,[191] parental authority in Roman law vested the *paterfamilias* with a kind of quasi-ownership in respect of his children. *Patria potestas* was exercised for the benefit of the *paterfamilias*, and its continuance depended on the life and decision of the father and not on the needs and interests of the child.[192] The protective character of parental authority in Roman-Dutch law is in sharp contrast with the absolute control which the *paterfamilias* had over his children in Roman law. In Roman-Dutch law, parents were obliged to care for and educate their children. This protective character of parental authority in Roman-Dutch law had its origin in Germanic law. As indicated above,[193] legal capacity in Germanic law depended on the ability to bear arms. Since women and children were physically unable to bear arms, they were subjected to *munt*. *Munt* had to be exercised in the interests of the child.[194]
- The second difference between the Roman-Dutch concept of parental authority and the *patria potestas* of Roman law lies in its duration. The

189 Voet *Commentarius* 15 1 4. Conradie (n 180) 63 indicated that "the view that earnings of a child who is being maintained by the father or mother pass *by right of peculium profecticium* to the parents is also incorrect. It is true that the whole of the earnings must be paid to the parents, but such earnings are payable to the parents *as a set-off against the cost of maintenance and education*" (my italics).

190 Voet *Commentarius* 15 1 5. Also see Conradie (n 180) 63 (who erroneously quotes Voet *Commentarius* 25 1 5 as authority for this statement); Spiro (n 97) 262.

191 See 2 1 and 2 5.

192 Sohm (n 16) 507.

193 See 3 6 above.

194 Sohm (n 16) 507; Studiosus (n 129) 33-34 36.

Roman *patria potestas* lasted until the death of the father, unless it was terminated before that date by emancipation, adoption or the marriage of a daughter. In Roman-Dutch law, on the other hand, parental authority was automatically terminated when the child reached a certain age or when the child got married. As indicated above,[195] the termination of parental authority when the child reached a certain age, or when the child got married, also has a Germanic origin.

- The third difference between the Roman and Roman-Dutch concepts of parental authority can be found in the person that exercises the authority. In Roman law *patria potestas* was exercised by the *paterfamilias*. The mother, who was herself subject to *potestas*, had no authority in respect of her children. In contrast, parental authority over the person of the child was shared by both parents in Roman-Dutch law, while the father was vested with guardianship. As indicated above,[196] the origin of this rule can also be found in Germanic customary law.

In this article I pointed out the differences between parental authority in Roman and Roman-Dutch law. I also illustrated the marked similarities between the Germanic and Roman-Dutch concepts of parental authority. In view of the aforementioned, I conclude that parental authority as it applied in Roman-Dutch law was based on Germanic customs, and not on Roman law.[197]

195 See 3 5 above.
196 See 3 6 above.
197 Spiro (n 124) 3; Studiosus (n 129) 35; Wessels (n 125) 417.