ИЗСЛЕДВАНЕ НА ЕФЕКТИТЕ НА *PATRIA POTESTAS* ПО ОТНОШЕНИЕ НА ИМУЩЕСТВОТО НА ПОДВЛАСТНИТЕ СИНОВЕ (*FILII FAMILIAS*) (НА АНГЛИЙСКИ ЕЗИК)

Проф. д-р Салвадор Руис Пино
Папски Университет на Comillas, Испания

Резюме: *Patria potestas* оказва значително въздействие върху личността и имуществото на римските подвластни синове – *filii familias*. Статията има за цел да представи правните последици в контекста на едно общо изследване на римската фамилия.

Ключови думи: *patria potestas*; *pater familias*; *filii familias*; *peculium.*

STUDY OF THE EFFECTS OF *PATRIA POTESTAS* ON THE GOODS OF *FILII FAMILIAS* (ENGLISH LANGUAGE)

Prof. Salvador Ruiz Pino, PhD
Comillas Pontifical University, Spain

Abstract: *Patria potestas* deploys a great amount of effects on the persons and the goods of the roman *filii familias*. This study aims to approach these legal effects and brings a general investigation in the roman family law context.

Keywords: *patria potestas*; *pater familias*; *filii familias*; *peculium.*

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The Roman family, strictly understood as a domestic community formed by a group of people and a group of things under the power of a leader, the *pater familias,* granted legal powers over it, acquires all its foundation on the concept of *patria potestas.* Therefore, the importance of the effects of the power of the *pater familias* can be affirmed, considering it as a sovereign, original and unitary right. In this regard, it is deeply known the opinion of Alburquerque[1], who excused that the paternal function would spread, and sometimes exceed, the maximum discretion regarding the patrimonial structure and the exercise of *patria potestas,* on the basis of the subsistence of the conception of the family primarily based on the field of the appropriate organization of *agnatio*.

[1] ALBURQUERQUE, J. M. La prestación de alimentos en Derecho Romano y su proyección en el derecho actual. Madrid, Dykinson, 2010, p. 34 ss.: "El *pater familias*, jefe de familia o autoridad única, cabeza de familia, ejercerá todas las funciones potestativas tanto en el orden doméstico, aunque no tenga hijos" [Hereinafter, at the insistence of the author, the quotations are in the original language – editor's note] (D. 50.16.195.2: *Pater autem familias appellatur, qui in domo dominium habet*), como en el contexto externo". See ORTEGA CARRILLO de ALBORNOZ, A. Derecho privado Romano y su práctica a través del Código Civil. Málaga, Del Genal, 2004, p. 35 ss.; See also Id., Terminología, definiciones y ritos de las nupcias romanas: la trascendencia de su simbología en el matrimonio moderno. Madrid, Dykinson, 2006; FERNÁNDEZ de BUJÁN A. El filius familias independiente en Roma y en el derecho español. Madrid Universidad Autónoma de Madrid, 1984, p. 21 ss.; BLANCH NOUGUÉS, J. M. La filiación en el pensamiento jurídico romano: ueritati locum superfore. – *RGDR*, no. 3, diciembre 2004, p. 4: **"**La naturaleza de mando que inviste la figura del pf. relega a un segundo plano la de la paternidad biológica hasta el punto de llevar a negarla a un célebre romanista de principios del siglo XX muy influyente – nos referimos al italiano Bonfante-, a través de su famosa teoría sobre la soberanía del pf., que hace aparecer a éste como titular de una potestad omnímoda al frente de la familia concebida como un micro-Estado. Apoyos para su formulación no le faltan si nos referimos a los diferentes poderes que ciertamente parecen asemejar el jefe de familia a un rex. Al pf. se le atribuye la dominica potestas (o poder en concepto de dueño sobre las cosas que integran el patrimonio familiar, incluidos esclavos); la manus sobre la mujer que ha ingresado en la familia mediante una conventio in manum (procedimiento realizado a través de ciertas formas con el fin apuntado y no con el de constituir formas de celebración del matrimonio); la patria potestas sobre hijos y descendientes incorporados a la familia biológicamente o artificialmente (adopción o arrogación). Ésta a su vez aparece integrada por un haz de poderes: ius vitae necisque (derecho de vida y muerte – en cierto modo similar al ius gladii o derecho de espada, es decir de dar muerte a los súbditos-), ius exponendi (derecho de abandono de hijos recién nacidos), ius noxae dedendi (derecho de entrega a la víctima de un delito cometido por una persona sometida a su potestad), ius vendendi (o derecho de venta de hijos bajo su poder). Incluso la paternidad biológica parece basarse en la regla que atribuye la condición de padre a los nacidos de justas nupcias en determinadas condiciones por lo que el vínculo que se destaca es el político (agnaticio) más que el de sangre (cognaticio). Sin embargo, una exasperación de estos indicios puede conducir a la conclusión errónea de no aceptar en la mentalidad romana la realidad física del engendramiento paterno."

It can be stated that, with Rodríguez Ennes[2], the *patria potestas* shows the sovereign and exclusive power that the *pater familias* has over the children born in a legitimate marriage or those who became part of it through any of the right means to that effect. The power of the head of the household in relation to the people submitted to them is stated through the entitled effects of *patria potestas,* being written on the people[3] and the goods of the *alieni iuris*, among which a draft considering the most relevant parts concerning the *filii familias* will be shown.

EFFECTS OF THE *PATRIA POTESTAS* OF THE *PATER FAMILIAS* ON THE GOODS OF THE *FILII FAMILIAS*

It should be recalled that only the *pater familias* was a *sui iuris* subject for the Roman law, what means that he was the only person who had complete legal and acting capacity in the law, in the bosom of the family, in the private law framework, and especially, in the patrimonial[4] scope. It can be affirmed that, with A. Fernández de Buján[5], properties in the ancient times were confused with the family power, the domestic power; hence the term *manus*. The only member with legal capacity to own a patrimony in the bosom of the Roman family was the *pater familias*, particularly because of it being a feature of a *sui iuris* subject, and it is shown in many sources when they establish the *filius nihil suum habere potest* principle:

D. 41.1.10.1 (Gaius libro secundo institutionum): Igitur quod servi nostri ex traditione nanciscuntur sive quid stipulentur vel ex qualibet alia causa adquirunt, id nobis adquiritur: ipse enim, qui in potestate alterius est, nihil suum habere potest. Ideoque si heres institutus sit, nisi nostro iussu hereditatem adire non potest, et si iubentibus nobis

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2 RODRÍGUEZ ENNES, L. Bases Jurídico-Culturales de la Institución Adoptiva. Santiago de Compostela, Universidad de Santiago de Compostela, 1978, p. 34.

3 See MORDECHAI RABELLO, A. Effetti personali della “patria potestas”. Dalle origini al periodo degli Antonini, A. Milano, Giuffrè, 1979.

4 FERNÁNDEZ de BUJÁN, A. Derecho Privado Romano. 10. ed. Madrid, 2010, p. 276.

5 FERNÁNDEZ de BUJÁN, A. El filius familias independiente en Roma, cit., p. 24, keep stating: “Manus y mancipium tienen que ver con estas ideas primitivas que reflejan la existencia de un poder único doméstico sobre cosas y personas que luego se va diversificando. No hay un concepto de propiedad fuera del ámbito de los bienes familiares probablemente hasta fines de la República. Ahora bien, suponiendo una familia amplia, comprensiva de tres generaciones por lo menos, es posible que existiese una comunidad familiar para ciertas cosas -como eran los esclavos, los animales de tiro y carga (es decir, los animales para el servicio agrícola), y los fundos en terreno itálico- que constituían las res mancipi.”

adierit, hereditas nobis adquiritur, perinde atque si nos ipsi heredes instituti essemus. Eet his convenienter scilicet legatum nobis per eundem adquiritur.

The progressive individualisation and independence that the person of the filius familias was achieving throughout the history (some authors even show that it was an increasing process after the Second Punic War[6]) was making flexible this principle included in the sources of filius nihil suum habere potest, producing the eventuality of tenancy, possession and even property of goods by the children of the family[7].

According to professor A. Fernández de Buján[8], it can be stated that from a primitive age children under the patria potestas could not acquire anything for themselves, so all they acquire, coming from formal business accessible to them or from free access business they make or from any other kind, increases the patrimony of the pater. This constituted a serious conflict in the bosom of the old ius civile, since those under custody could improve but never degrade the position of the patria potestas holder. This was modified by the action of magistrates by means of the so called actiones adiecticiae qualitatis, through which the pater familias was forced to respond mutually next to the filius familias when he was part of the business traffic by virtue of an operation or paternal initiative[9].

Peculium profecticium

A first sign of modification or relaxation of the general principle *filius nihil suum habere potest* was constituted by the establishment of the *peculium,* which supposed the delivery of a part of the goods of the *pater familias* to the children

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6 See Kaser, who indicates that the process was developed from the end of the agrarian era. See also VALENTÍ ABREU, J. Op. cit., p. 83, n. 14, p. 74.

7 See FERNÁNDEZ de BUJÁN, A. El filius familias independiente en Roma, cit., p. 24: "acaso cada hijo púber podría actuar como manceps o adquirente bajo la auctoritas del paterfamilias integrando así los bienes en el mancipium o titularidad dominical paternal. Se trataría, por tanto, de bienes de uso común y en este sentido res comunes de todos los hijos púberes que podían realizar una mancipatio a nombre del paterfamilias, los cuales -según algunos testimonios todavía de la época clásica- vivo quoque patre quodammodo domini existimantur"; VALENTÍ ABREU, J. Op. cit., p. 71 ss.

8 FERNÁNDEZ de BUJÁN, A. Derecho Privado Romano, cit., p. 276, 277.

9 Ibidem. In addition, this author points out that such intervention or parental initiative could well be "el haberle otorgado un peculium, haberle puesto al frente de un negocio o haberle encomendado una gestión de tipo patrimonial". Regarding the protection of the child through the legal remedies provided by the Lex Laetoria of circumscriptione adulescentium (actio legis Laetoriae, except legis Laetoriae and restitutio in integrum) see an interesting study by GARCÍA GÉRBOLES, L. La protección procesal del minor viginti quinque annis en Derecho Romano. Madrid, Servicio de Publicaciones Facultad de Derecho de la Universidad Complutense de Madrid, 2008, which we refer to in these matters.

(it could also be granted to other people under his power or even the slaves) so that they could be managed or used for any activity. That delivery was not done, strictly in legal terms, as a property, but as revocable concession, which supposed that, in case of predeceasing of the *filius familias*, the father could take back the goods *non in iure successionis*, but *in iure peculii*[10]. The children, on the other hand, held the administration of the *peculio,* but could not donate or have it as an act of last will.

This *peculium* was known as *profecticium*[11], precisely as a concession of the *pater familias* (*quasi a patre profectum*), even though it is found in different sources that it was enough that the *pater familias* did not suppress what the *filius* or the *servus* had acquired, not being strictly necessary the process of the concession of the goods for the existence of the institution:

D. 15.1.7.1 (Ulpianus libro 29 ad edictum): Et adicit pupillum vel furiosum constituere quidem peculium servo non posse: verum ante constitutum, id est ante furorem vel a patre pupilli, non adimetur ex his causis. Quae sententia vera est et congruit cum eo, quod Marcellus apud Iulianum notans adicit "posse fieri, ut apud alterum ex dominis servus peculium habeat, apud alterum non, ut puta si alter ex dominis furiosus sit vel pupillus, si (ut quidam, inquit, putant) peculium servus habere non potest nisi concedente domino. Ego autem puto non esse opus concedi peculium a domino servum habere, sed non adimi, ut habeat". Alia causa est peculii liberae administrationis: nam haec specialiter concedenda est.

Generally, the etymology of the term peculium was even more discussed by the doctrine. If the sources are consulted, a text by Ulpian en D. 15.1.5.3 will be found, where it is defined as a cuasi pusilla pecunia.

D. 15.1.5.3. (Ulpianus libro 29 ad edictum): Peculium dictum est quasi pusilla pecunia sive patrimonium pusillum.

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10 See VALENTÍ ABREU, J. Paternidad y filiación, su régimen jurídico en el Derecho Romano y en el Derecho Español moderno, cit, p. 74; FERNÁNDEZ de BUJÁN, A. El filius familias independiente en Roma, cit., p. 26 ss.; De FRANCICI, P. Síntesis Histórica del Derecho Romano. Madrid, Revista de Derecho Privado. 1954, p. 455; JÖRS, P. y KUNKEL, W. Derecho Privado Romano. Barcelona, Labor, 1937, p, 413: "mientras que el verdadero peculium es una porción de bienes que el pater familias confiere al hijo voluntariamente, y de la cual podía privarle en todo momento, con lo que, no sólo jurídica, sino también económicamente continuaba siendo una parte del patrimonio paterno, los peculios nuevos del derecho imperial son porciones de bienes cuya administración corresponde enteramente al hijo independientemente de la voluntad del padre, y de la cual éste no le podía privar".

11 Keep in mind that this denomination may well be post-Justinian.

It can be asserted that, with A. Fernández de Buján[12], even though a majority segment considers that peculium is a diminutive form of pecus, a cattle, it cannot be forgotten that the thesis of Bonfante, who considers the peculium as the diminutive form of pecunia[13], meaning a small patrimony, it would be probable that in the primitive age the peculium consisted on an amount of money or a small patrimony, thus its administration would be delimited inside the scope of the *creditum* and hence the *actiones adiecticiae qualitatis*.

It is undeniable that the peculium places whoever receives it in a position of certain economic and social independence, and even though their property belongs entirely to the pater familias, it is true that it constitutes a mass of goods separated from his patrimony, whose administration was handed over to the person under his custody[14]. However, the basic principle that the subject alieni iuris cannot be an owner was maintained during the entire late Republic and the Princedom, even having become obsolete in the late Republican time because of coming into flagrant conflict with the requests and realities of the time. Constantine, since the year 319 A.D., was who allowed children to get the adventitious peculium and in times of Justinian the property of the peculium belonged to the filii familias, making the pater familias as a simple administrator and beneficial owner. From that time on it cannot be affirmed, *strictu sensu*, that the

12 FERNÁNDEZ de BUJÁN, A. El filius familias independiente en Roma, cit., p. 26 ss.; See Id., Derecho Privado Romano, cit., p. 277.

13 BONFANTE, P. Corso di diritto romano. Vol. I. Diritto di famiglia. Milano, Giuffrè, 1963, p. 128 ss.: "Questo piccolo patrimonio assegnato ai filiifamilias o da essi formato ed acreisciuto dicesi peculium. Il nome peculium è un diminutivo di pecunia, sicché non significa se non appunto piccolo patrimonio, e tale é la derivacione e la definizione che ne dànno pure gli antichi: peculium dictum est quasi pusilla pecunia sive patrimonium pusillum, dice Ulpiano nella L 5 § 3 D. De pec. 15.1. A questo riguardo i moderni si sono rivelati nella etimologia e nella induzione storica più varroniani degli antichi per il vezzo di saltare i gradi intermedi della derivazione linguistica. Senza dubbio pecunia deriva da pecu, e ciò ben significa che la ricchezza o piuttosto la moneta primitiva consisteva in bestiame; ma da pecu non può derivare direttamente peculium, onde no se può argomentare che il peculium fosse nell'ettà più antica un gregge". This author at the bottom of the page add to clarify his etymological interpretation: "L'equivoco di simili etimologie-sofismi, fondate sul salto di un membro intermedio, è fenomeno purtroppo frequente, e non lieve il danno, per le conclusioni storiche errate che se ne traggonno. Tale è la costante derivazione di mancipare da manucapere (anziché da mancipium), di iudicare da ius dicere (anziché da iudicium), di superficies da super facere (anziché da super facies) ecc.". Thus, we can summarize that even when pecunia derives from pecus, since the primitive currency came to consist of cattle, we should not fall into the sophistry of the jump of an intermediate etymological member affirming that of pecus derives directly peculiar, which does not seem reasonable, well, in the words of Bonfante, "no se puede argumentar que el peculium fuese en la época más antigua un rebaño".

14 FERNÁNDEZ de BUJÁN, A. Derecho Privado Romano, cit., p. 277; See Id., El filius familias independiente en Roma, cit., p. 27.

peculium exceptionally supposes that everything acquired by the filius familias increases the patrimony of the pater familias, since until then the goods that were included in the peculium were still part of his power[15]. Therefore, a change of understanding in the legal situation of the *filii familiae* regarding patrimony occurred in the postclasic time, which was mainly reached by means of the progressive extension of the institution of the peculium[16].

With regard to the *administratio peculii,* it can be affirmed that this ability of having the peculium, obtained by a concession administration or liberal administration, did not allow "the realization of any act of acquisition of the res peculiars without a compensation," as in D. 39.5.7.pr.:

(Ulpianus libro 44 ad Sabinum): Filius familias donare non potest, neque si liberam peculii administrationem habeat: non enim ad hoc ei conceditur, libera peculii administratio, ut perdat.

Additionally, it can be maintained with A. Fernández de Buján[17], that in the context of this *administratio peculii* it could be reasonable to think that the acts of sale and responsibility of the goods of the *peculium* demanded an express written consent of the *pater familias*. According to the thesis of the same author, despite the capacity of the *pater familias* of revoking the *peculium* anytime, the capricious revocation of it was hindered by the tradition and the social usages that condemned it. *Peculium* was socially recognized as something related to the *filius* or the *servus* – even though it was not legally constituted as such, because of the reasons explained above-, what it can be proved with suppositions as: the slave was sometimes sold with their *peculium*; in the scope of the inheritances in abeyance the activity of the *servus* concerning the *peculium* was not detained with the passing of the *dominus;* in the realization of acts of ownership by the *filius* or the *servus* with the ignorance of the *pater familias*, this was only valid in the scope of the respective *peculium*, meaning that in those circumstances the concession of the *peculium* implies a generic authorisation to possess *voluntate domini*[18]:

15 VALENTÍ ABREU, J. Paternidad y filiación, su régimen jurídico en el Derecho Romano y en el Derecho Español moderno, cit., p. 78–79.

16 FERNÁNDEZ de BUJÁN, A. El filius familias independiente en Roma, cit., p. 28.; Id., Derecho Privado Romano, cit., p. 277.

17 FERNÁNDEZ de BUJÁN, A. Derecho Privado Romano, ibid.

18 FERNÁNDEZ DE BUJÁN, A. El filius familias independiente en Roma, cit., p. 30–31.

D. 41.2.1.5: Paulus libro 54 ad edictum): Item adquirimus possessionem per servum aut filium, qui in potestate est, et quidem earum rerum, quas peculiariter tenent, etiam ignorantes, sicut Sabino et Cassio et Iuliano placuit, quia nostra voluntate intellegantur possidere, qui eis peculium habere permiserimus. Igitur ex causa peculiari et infans et furiosus adquirunt possessionem et usucapiunt, et heres, si hereditarius servus emat.

Peculium castrense

This form of *peculium*, institutionally formed during the imperial time, supposes an enshrinement of the breakdown of the general principle *filius nihil suum habere potest*.[19] Its origins come from Augustus, who granted the right of having freely *mortis causa* of the goods acquired *in castris* or during the military service to the soldiers that were still *in patria potestate:*

I. 2.12.pr.: Non tamen omnibus licet facere testamentum. statim enim hi qui alieno iuri subiecti sunt testamenti faciendi ius non habent, adeo quidem ut, quamvis parentes eis permiserint, nihilo magis iure testari possint: exceptis his quos antea enumeravimus, et praecipue militibus qui in potestate parentum sunt, quibus de eo quod in castris adquisierint permissum est ex constitutionibus principum testamentum facere. quod quidem initio tantum militantibus datum est tam ex auctoritate divi Augusti quam Nervae nec non optimi imperatoris Traiani; postea vero subscriptione divi Hadriani etiam dimissis militia, id est veteranis, concessum est. itaque si quidem fecerint de castrensi peculio testamentum, pertinebit hoc ad eum quem heredem reliquerint: si vero intestati decesserint, nullis liberis vel fratribus superstitibus, ad parentes eorum iure communi pertinebit. ex hoc intellegere possumus, quod in castris adquisierit miles qui in potestate patris est, neque ipsum patrem adimere posse neque patris creditores id vendere vel aliter inquietare neque, patre mortuo, cum fratribus esse commune, sed scilicet proprium eius esse id quod in castris adquisierit, quamquam iure civili omnium qui in potestate parentum sunt peculia perinde in bonis parentum computantur acsi servorum peculia in bonis dominorum numerantur: exceptis videlicet his quae ex sacris constitutionibus, et praecipue nostris, propter diversas causas non adquiruntur. praeter hos igitur qui castrense peculium vel quasi castrense habent, si quis alius filius familias testamentum fecerit, inutile est, licet suae potestatis factus decesserit.

It was stated above that this institution supposed an enshrinement of the breakdown of the general principle *filius nihil suum habere potest* and it is constituted as such, since the imperial precedent considered it as a fortune of the children from which the pater familias could not expect any kind of rights. The rules of the former peculium were applied only in cases in which the children died intestate, and the patrimony passed to paternal power, not by succession, but by *iure peculii*, proving, with retroactive effect, the dispositions taken by the pater

[19] VALENTÍ ABREU, J. Paternidad y filiación, su régimen jurídico en el Derecho Romano y en el Derecho Español moderno, cit., p. 75 ss.

familias about that peculium, which became abolished by Justinian when all difference between the succession of people under custody or those who were not was abolished[20].

Novela 118 (CAPUT IV): Nullam vero esse volumus differentiam in quacumque successione aut hereditate inter eos qui ad hereditatem vocantur masculos ac feminas, quos ad hereditatem communiter definivimus vocari, sive per masculi seu per feminae personam defuncto iungebantur, sed in omnibus successionibus agnatorum cognatorumque differentiam vacare praecipimus, sive per femineam personam sive per emancipationem vel per alium quemlibet modum prioribus legibus tractabatur, et omnes sine qualibet huiusmodi differentia secundum proprium cognationis gradum ad cognatorum successionem ab intestato venire praecipimus.

Professor P. Bonfante[21] claims that during all the truly classic Roman time the patrimonial unity of the family only underwent a single abolition in the imperial time in favour of the soldiers, with certain limits not to transgress the principle directly though. This Italian author, based on the texts of different legal sources, affirms: "Augustus per il primo (forse anche Caesare) concese ai figli di famiglia militari di far testamento sui beni che fossero acquistati in occasione del servizio. Nerva e Traiano confermarono il privilegio, Adriano lo estese ai congedati o veterani. Così venne a costituirsi il peculio castrense, cioè dei beni acquistati in campo (*in castris*). Non fu soltanto la ragione mera di favore per questa classe che mosse gli imperatori ad una siffatta deroga, non è dessa, vale a dire, la sanzione di uno schietto privilegio, bensì la costituzione di un *ius singulare*: a partire dall'imperatore Augustus il definitivo stabilirsi degli eserciti permanenti accampati alle frontiere, sulla linea dei grandi fiumi, collocava i *filii familias* militari in una stabile indipendenza di fronte al pater familias, con economia separata, e la disciplina militare sustituiva quasi la paterna". It should also be

20 See JÖRS, P. and KUNKEL, W. Derecho Privado Romano, cit., p. 413 ss.; VALENTÍ ABREU, J. Paternidad y filiación, su régimen jurídico en el Derecho Romano y en el Derecho Español moderno, cit., p. 75; De FRANCICI, P. Síntesis Histórica del Derecho Romano. Madrid, Revista de Derecho Privado, 1954, p. 455; FERNÁNDEZ de BUJÁN, A. Derecho Privado Romano, cit., p. 280: "Por otra parte, en la esfera del peculium castrense, se vislumbran rasgos que suponen novedades esenciales respecto al peculium profecticium, empezando por la propia equiparación de los filiifamiliae militares, en este ámbito, a los titulares de plena capacidad jurídica, así en D. 14.6.2: «… los hijos de familia, respecto al peculio castrense, son como cabezas de familia». De forma progresiva se reconoce al filius familias militar, en relación con el peculium castrense, capacidad de testar, de disponer inter vivos y de donar, si bien los bienes no pierden la consideración de peculiares, dado que si el filius no dispuso de ellos, ni por actos inter vivos ni mortis causa, a su fallecimiento, revierten automáticamente al pater o a sus herederos, no por derecho de sucesión, iure sucessionis, sino por derecho de peculio, iure peculii."

21 BONFANTE, P. Corso de diritto romano. Vol. I. Diritto di famiglia, cit., p. 129 ss.; See FERNÁNDEZ de BUJÁN, A. El filius familias independiente en Roma, cit., p. 33–34.

noted that according to P. Bonfante, it can be said that a simple privilege was not fined, but a true *ius singulare* was constituted, which granted the soldiers *alieni iuris* a stable independence when they were given a separate economy from the *pater familias*, which implies to claim that the paternal discipline was almost replaced by the military discipline. This leads us to be able to affirm an emerging comparison of the military *filii familiae*, being in this scope the owners with full legal capacity, which could be discerned in D. 14.6.2: "[...] the children of the family, with regard to the military *peculium*, are similar to heads of household.".[22]

Professor Bonfante[23], after estimating the goods that were part of this *peculium castrense,* affirms that in the classic jurisprudence it was done with a certain generosity: "esso comprende non soltanto il soldo ed il bottino di guerra, ma altresì i donativi in qualunque momento fatti. Fin qui forse poteva giungere anche l'interpretazione della giurisprudenza, ma certamente in questo campo l'opera precipua e l'intenso favore deve attribuirsi alle costituzioni imperiali: l'imperatore Adrian, come era passato sopra alla giustificazione possibile di questa deroga, con l'accordare il peculio ai veterani, così oltrepassò ogni limite logico circa il contenuto di questo peculio, pronunciando con un suo rescritto che vi dovesse rientrare anche l'eredità della moglie."

Here, certainly, the decision on the goods which defined the military *peculium* constitutes an important matter of doctrinal controversy. Professor A. Fernández de Buján[24], claims that because of the proofs in the sources it is well-known that this was constituted by two elements: on the one hand, the goods acquired *in castris,* and the donations and inheritances, on the other hand; and the first of these is the oldest. However, the determination of the way through which the second of these becomes part of the *peculium castrense* of

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22 FERNÁNDEZ de BUJÁN, A. Derecho Privado Romano, cit., p. 280: "Respecto a las relaciones obligatorias entre un paterfamilias y un filius familias en orden al peculium castrense, las opiniones encontradas pueden reducirse a dos posturas prevalentes. Para un sector doctrinal, mientras el paterfamilias podía llamar a juicio al filius familias que tuviese un peculium castrense éste, por el contrario, no podía en ningún caso llamar a juicio a su padre. Correlativamente, el filius familias militar con peculium castrense, podía mediante contrato obligarse en sus relaciones con su propio padre, mientras que no estaba admitido que el padre se obligase en las relaciones con su hijo. Por el contrario, para otro sector doctrinal, existe ya desde la época clásica, plena admisibilidad de las relaciones obligatorias entre un paterfamilias y su filius familias, en orden al peculium castrense de éste y, de forma correlativa, posibilidad de que ambos sean partes, siempre por causa de dicho peculio, en un procedimiento judicial."

23 BONFANTE, P. Corso de diritto romano. Vol. I, cit., p. 130.

24 FERNÁNDEZ de BUJÁN, A. El filius familias independiente en Roma, cit., p. 38–39.

the *filius familias miles* is object of doctrinal controversy. This same author, quoting Albertario[25], points out that "from an imperial constitution promulgated around 200 A.D., all the goods donated to the *filius* soldier by their parents, wife or other relatives at the moment of their joining the militia were considered object of this *peculium*. Postclassic and Justinianian innovations would have broaden the content of the military *peculium* with regard to the following objects: donations by third parties in the departure for the camp, inheritances obtained by the *filius familias miles* on the part of his fellows, and the inheritance received on the part of his wife", having into account that the inheritance must be received on the occasion of the service, as it is stated in D. 49.17.19.pr.:

(Tryphoninus libro 18 disputationum): De hereditate ab adgnato commilitone data Scaevola noster dubitabat, quia potuit et ante notus et amicus dare, potuit et non dare, nisi commilitium caritatem auxisset. Nobis ita videtur, si ante commilitium factum sit testamentum, non esse peculii castrensis eam hereditatem, si postea, contra.

Peculium quasi castrense

All these orders established in the height of the Roman Empire in favour of the soldiers were spread out to the public workers and the Christian clergymen until the Late Empire, and since Constantine, the regime of the *peculium castrense* was compared to the goods acquired by the *filii familias* who were public workers of the imperial court, which was also extended to the lawyers, judges and advisers by means of a constitution by Honorius and Theodosius[26]:

*C. 2.7.4: Imperatores Honorius, Theodosius. Fori tui culminis et universorum iudiciorum advocati quidquid ex huiuscemodi professione vel ipsius occasione quaesierint vel quaesierunt, id post patris obitum praecipuum veluti peculium castrense ad exemplum militum proprio dominio valeant vindicare. * HONOR. ET THEODOS. AA. EUSTATHIO PP. *<A 422 D. X. K. APRIL. CONSTANTINOPOLI HONORIO XIII ET THEODOSIO X AA. CONSS.>*

The different cases of comparison of the *military peculium*, some of which were nearly admitting an intestate succession, were grouped by Justinian under the designation of *peculium quasi castrense,* and which were added the dona-

25 FERNÁNDEZ de BUJÁN, A. Derecho Privado Romano, cit., p. 279–280; See Id., El filius familias independiente en Roma, cit., p. 39–40: "finalmente Justiniano habría reservado como peculio castrense en beneficio del paterfamilias arrogado lo que éste hubiese adquirido en el periodo de su milicia".

26 FERNÁNDEZ de BUJÁN, A. Derecho Privado Romano, cit., p. 280: "León y Antemio extienden el beneficio a los Obispos, presbíteros y diáconos, y Anastasio a los funcionarios de la corte imperial encargados del silencio. Finalmente Justiniano consideró incluidos en este peculio los donativos hechos por el emperador o la emperatriz."

tions of the emperor or the empress[27]. The legal regime which regulated this kind of *peculium* was quite similar to the military *peculium*, with some doctrinal controversy though. Indeed, the concession of the faculty of attesting regarding the *peculium quasi castrense* to the children of the family was specifically recognised in the imperial constitutions only in favour of the clergymen. The jurists of the Roman-Hellenic time disputed if a military concession must be implicit with regard to the rest of *peculii* as planned in the legislation. Such controversy was solved by Justinian after recognising explicitly the faculty of attesting for all the cases of *peculium quasi castrense*, as the consequent protection of the testament granted by the *filius familias* in all those cases by means of the *querella inofficiosi testamenti.*[28]

Peculium adventicium

This type of *peculium* clearly supposes an important progress towards the full acquisition of the ownership of the goods of the *filius familias.* According to P. Bonfante[29], Constantine established an important stimulus towards a more profound abolition of that filius nihil suum habere potest principle, since “con una sua costituzione del 319 egli serbò legalmente ai figli l’eredità sia legittima sia testamentaria della madre (*bona materna*), togliendo al padre il diritto di alienare a suo piacimento siffatti beni”.

The *peculium adventicium* clearly consisted in the ability of acquiring the legitimate or testamentary inheritance of the mother granted to the *filii familias,* and all the acts of disposition over these *bona materna* were prohibited for the *pater familias*. Those were added the goods inherited from maternal ancestors (*bona maternis generis)* when compared to the following emperors and always according to the Hellenic use. In times of Justinian, those were compared to the *bona adventicia*, all the acquisitions made by the children, except from those acquired with money of the *pater familias* and those entrusted by a third party *ex contemplatione patris*.[30]

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27 VALENTÍ ABREU, J. Paternidad y filiación, su régimen jurídico en el Derecho Romano y en el Derecho Español moderno, cit., p. 75–76.

28 FERNÁNDEZ de BUJÁN, A. El filius familias independiente en Roma, cit., p. 42–43.

29 BONFANTE, P. Corso de diritto romano. Vol. I, cit., p. 134.

30 VALENTÍ ABREU, J. Op. cit., p. 76; See BONFANTE, P. Op. cit. p. 134: “La precisa e diretta influenza dell’ellenismo qui si può costatare. I beni materni (μητρώια) avevano nei

Pietro Bonfante believes that the right of administration of the *pater familias* over those goods is understood as a legal usufruct, “alquanto più ampio e libero dell’usudrutto ordinario, e in quella vece il diritto di aspettativa dei figli si riguardò veramente come proprietà”[31].

Therefore, it can be affirmed that the patrimonial inability of the *filii familias* was nearly eliminated in the time of Justinian, since all the goods that the *filius familias* could have acquired by any means or any origins, with the two exceptions mentioned above, that is to say, the goods acquired *ex re patris* (with paternal money or with something similar at the expense of the father) and the goods given by a third party *ex contemplatione patris* (by consideration or gratitude towards the father) were declared as property of the children, only with paternal faculty of administration and use[32].

diritti e negli usi ellenici un’entità distinta. Estesero questa riserva a tutti i beni ottenuti per eredità o lagato o donazione dagli ascendenti materni (bona materni generis), sempre conforme agli usi ellenici, Graziano, Valentiniano II e Teodosio I nel 379, e di nuovo Arcadio ed Onorio nel 395, ai lucri nuziali Teodosio II e Valentiniano III negli anni 426, 428 e 439, e di nuovo ai lucri nuziali e ai lucri sponsalizii Leone I ed Antemio negli anni 472 e 473.”

31 BONFANTE, P. Op. cit., p. 134.

32 FERNÁNDEZ de BUJÁN, A. El filius familias independiente en Roma, cit., p. 43–44.