

THE PROTECTION OF CHILDREN IN THE POST-CLASSICAL ROMAN LAW

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Abstract

In Ancient Rome, children were under the absolute power of the head of the family, who could dispose of them as he wished and could abandon them immediately after birth, which is an act that would most of the time result in their death or slavery. With time, this power was diminished, especially in the imperial period, when, under the influence of Christianity, legislative measures were taken in order to protect the children's lives. At first, these measures had an incomplete character, as they needed to mind the power of the traditions and economic realities of the time. Emperor Constantine the Great played an important role in the edicts that promoted them, succeeding, even by paradoxical means, in protecting the family and children.

Key Words: *Child, protection, abandonment, slavery.*

JEL Classification: [K36]

1. Introduction

Patria potestas, the perpetual power that the *pater familias* had over his descendants, had, in the archaic times, an unlimited character. He could punish them, sell them, banish them from home, marry them without their consent or even murder them (BOB, 2016). As such, we cannot speak of any protection for children through legislative measures, but, on the contrary, they were treated as objects within the familial patrimony.

With the passage of time, the statute of children started to change, as parental power was steadily diminished, especially in the imperial era. Christianity positively influenced Roman law, especially in what concerns the rights of individuals and the protection of family (MAC MULLEN, 1986), and children were the effective beneficiaries of this evolution.

The era most characteristic for this tendency happened under the rule of Emperor Constantine, also called the Great, who, although he himself was christened on his deathbed, acted to promote Christian values (ODAHL, 2004). This makes the disposition contained within an imperial constitution¹ through which the Emperor authorized the sale of newborns by their father as soon as they've seen the light of day (*sangvinolenti*) that much more incomprehensible. It is well-known that selling one's sons was discouraged ever since the Law of the

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¹ Th. C. 5, 10, 1.

XII Tables, which stated: “*si pater filius ter venum duuit filius a patre liber esto*” (if the father has sold his son three times, the son is to be free of his father).² Legal advisor Paul³ stated that the sale of a free individual is not possible, as he or she holds no economic value, *nullum pretio aestimatur* (BUCKLAND, 1908), and, as we put it today, he or she is not within the civil circuit.

In order to discover the meaning of the measure taken by Emperor Constantine, we must analyze what the true reasons behind it were.

2. The exposure of children

In Ancient Rome, contraception was much less resorted to than it is nowadays. The methods used were themselves very inefficient. For example, in the case of the calendar method, a period of the menstrual cycle was recommended, which today we know is a fertile one. Many times, methods that were possibly efficient (PRIORESCHI, 1995) were mixed with others, of a magical sort, with a limited or non-existent contribution (HOPKINS, 1965). As a result, birth control could not be done in a satisfying manner for poor families, who were confronted with a serious problem when their economic means would not allow them to care for a large number of children.

Even if efficient means of contraception and abortion had been known in Ancient Rome, as some authors claim (RIDDLE, 1992), these methods did not allow parents to choose the sex of their child. And it is very well known that, in those times, male descendants were preferred to female ones. What then could a *pater familias* who did not wish to keep the children whose birth he could not have avoided do? Given that, as we have pointed out above, the sale of children was prohibited, their exposure was used on a large scale.

The problem of exposing newborns is a complex one, in need of an ampler treatment.

Exposure meant abandoning the child in a public place, an act through which, starting from a certain era, the *pater familias* lost his power over him or her (BERGER, 1953). This was the principal way in which the old *ius vitae necisque*, the right to life and death, which *pater* had over all of those under his power, manifested (DIXON, 1992). If the abandoned child was found and taken by a person (*nutritor*), they could keep the child as one of their own (*alumnus*) or treat him as a slave. Many times, the child was either found too late or no one wanted him, two situations that lead to the unfortunate event of death.

For the Romans, killing or abandoning a child was an act of extreme gravity, once he was accepted into the family. In this sense, the newborn was laid at the *pater familias*' feet, and he would have two options: either taking the child in his arms (*liberum tollere suscipere*) and, when presenting him in front of the

² Gaius, *Institutiones*, 1, 132.

³ *Sent.*, 5, 1, 1.

family altar, giving him a name (the moment that marked his addition to the family with full rights), or refusing to lift the new born off the ground (*liberum negare repudiare*), which meant the refusal to welcome him in that family and the child's subsequent exposure (GIDRO & GIDRO, 2014). Although the *pater familias* had *ius vitae necisque* over those under his power, it was a rare occurrence for this right to be exercised on children under 3 years of age (HARRIS, 1994). However, many very young children died due to negligence, and this seems to have happened especially in the case of females.

But what were the chances of survival for exposed children? This depended on numerous factors, such as: the place where they were abandoned, the physical state of the child, the way they were dressed, whether there was an increased demand for slaves on the market (and, thus, people interested in raising these children), the child's sex (male children were preferred to female ones), etc. (Harris, 1994). If the person who exposed the child wanted him or her to survive, he would place him or her in populated places, known for the fact that such children could be found there (as was the case with the *columna lactaria* in Rome). More than that, many times, a token was left upon the child, so that he or she could be recognized afterwards. If the intent was, on the contrary, to suppress the child's life, he or she would be left in a hardly accessible place, with no clothes, where he or she would die either because of the cold or eaten by animals.

What were the reasons that stood at the basis of exposing children in Ancient Rome, beside the one already stated, referring to the choice over the child's gender, as males were preferred? The very diverse reasons that could determine a *pater familias* to resort to exposing his newborn can be split into four principal categories: deformity or other significant physical deficiencies of the child, illegitimacy, economic issues and the belief there are curses bound to the child (HARRIS, 1994). Also, the shaming and social marginalization could lead to abandonment (for example, in the case of young, unmarried mothers). Out of all of these reasons, it is probable that the most frequent cases had to do with money. This was not limited to the lack of means for subsistence (extreme poverty), as there were also families who wanted to avoid the splintering of their fortune because of too many descendants.

It was especially to discourage the exposure of newborns because of economic issues that the Roman food institutions were expressly directed towards children.

3. The legislative intervention of Emperor Constantine

As we have established, Emperor Constantine formulated an edict to protect children, in accordance with the Christian values he had adhered to. The main legislative measures taken in this sense have been preserved through the Theodosian Code. In a constitution from 319, he set severe punishments against

fathers who kill their child⁴. This constitution did not address newborns, however, who were subject to a distinct regulation. On one hand, the exposure of children was seen as a crime (*parricidium*)⁵, and on the other, fathers who exposed a child of theirs were permitted to redeem them.⁶ It seems that the first cited text, from 318, is actually interpolated, the initial purpose of this regulation being to offer help to poor parents, so that they would not need to sell their children. The effective incrimination came about only in 374. It seems as though this tradition was so deeply ingrained that emperors displayed great reluctance in banning it outright (HARRIS, 1994).

Otherwise, the entire phenomenon also had an economic character, as it seems that it was out of the rearing and sale of abandoned children that, at least in some provinces, a real business could thrive, since children constituted one of the important sources for slavery (SCHEIDEL, 2007).

Although it was not permitted, selling one's sons into slavery was practiced at a large scale. From a legal standpoint, such acts produced no effect, as the child continued to be under the power of the *pater familias*, who had the possibility to reclaim him or her, with or without a price. Also, such a sale left no wrinkle upon the child's statute as an ingenuous being (BUCKLAND, 1908).

In this context, it is understandable that the emperors could not ignore the existing demand on the market for new slaves. For this reason, the *collectores*, who gathered abandoned children and tended to their rearing and their sale into slavery, were encouraged (FOURNIER, 1926). If, in the older times, any *pater* could reclaim his abandoned children without any obligation, Constantine, through his legislative measures, initially ordered that this can only happen for a price and, later, in 331, he declared that the person who found an exposed child was the only one who could decide whether that child was free or a slave⁷. The father who abandoned him or her no longer had any right to reclaim his child in the future (HARRIS, 1994).

Through the constitution he elaborated in 313⁸, Emperor Constantine permitted the sale of newborns however (*sangvinolenti*), thus defeating the old principle by which no price could be put on a free individual. By analyzing the rule passed by Constantine on the subject, we notice that it practically has two main effects: one economic and the other moral.

From an economic point of view, the emperor did nothing but bring a pre-existing reality into the legal sphere: as a consequence of the need for slaves on the market and the extreme poverty large swaths of the population lived in, many parents sold their offspring, despite its illegality, while others simply abandoned

⁴ *Th. C.*, 9, 15, 1.

⁵ *Th. C.*, 11, 27, 1.

⁶ *Th. C.*, 5, 10, 1.

⁷ *Th. C.*, 5, 9, 1.

⁸ *Th. C.*, 5, 10, 1.

them to the same end, a life in slavery.

From a moral point of view, the legislative measure was meant to discourage the exposure of children, which, as we have discussed, most of the times lead to the death of the newborn. By allowing the very poor to sell their children, their chances of survival increased (CANTARELLA, 2010).

An absolute interdiction on child exposure was passed much later in 374, by emperors Valentinian, Valens and Gratian, who punished infanticide and, implicitly, child exposure, based on the premise that every person is obligated to feed their descendants. Through the same edict, the right to reclaim the child was taken away from the person who abandoned him or her, practically losing their parental power (MONIER, 1947). Emperor Justinian confirmed these legislative measures, further establishing that an exposed child becomes automatically free, nobody bearing the power to claim any right over him or her.⁹

Conclusion

Under the influence of Christian ideology, the emperors from the Post-Classical Era tried to promote legislative measures meant to support family and, especially, children. Confronted with the centuries-old pagan traditions and the impossible-to-ignore economic state of the time, they initially put forth less imperative measures, some apparently contradictory, which lead, in the end, to a significant amelioration of the situation however.

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⁹ J.C., 8, 51, 3.

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