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THE IMAGE OF A ROMAN FAMILY IN *Noctes Atticae* BY AULUS GELLIUS

Aulus Gellius,[1] who lived in the 2nd century AD, constituted one link of a long chain of Roman authors, extending from Cato the Censor to Isidor of Seville, who focused their interests on the ancient times. Other links of the chain were made up of such authorities like Marcus Terentius Varro, Verrius Flaccus, Valerius Maximus, Plinius Secundus, Valerius Probus, Pompeius Festus, and Nonius Marcellus. Gellius may be located among the supporters of the archaizing trend which was called frontonianism[2] with this reservation however that he read ancient authors not only to enrich his vocabulary but also to learn the content of the literary works. Moreover, of more interesting fragments concerning different branches of the knowledge[3]. Gellius drew up extracts which subsequently were included into his own encyclopaedic work. The book was started already during his study period in Athens - thus its title: *Noctes Atticae*[4]. The book provides an invaluable source, even if therein science is mixed with superstition and history with legend. And it is not because of the text Gellius wrote himself, but because of what he rewrote, paraphrased or summarized, often from the sources which had been irretrievable[5], inclusive of the works on law[6]. That is why *Noctes Atticae* constitute a mine of

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1 Gellius may have been born in Rome where he put on a *toga virilis* (GELL.18,4,1). From Rome he went to Athens to study where he stayed for at least a year (about his journey in summer writes GELL.2,21,1-2, about his work in autumn - GELL.1,2,2 and in winter - GELL. *praef.*4 and 10). Before his departure to Greece he listened to the lectures of a grammarian Sulpicius Apollinaris (GELL.7,6,12; 18,4,1), rhetor Antonius Iulianus (GELL.9,1,2; 9.15; 15,1,1; 18,5,1; 19,9,2) and perhaps of Titius Castricius (GELL.11,13,1; 13,22,1) and some other masters. All his life he was under the influence of M.Cornelius Fronton (Gell.2,26,1; 13,29,2; 19,8,1) and his friend-philosopher Favorinus (GELL.16,3,1). In Greece he used to meet almost all members of the intellectual elite of the world of that time. We have to mention at least a philosopher Calvisius Taurus (Gell.12,5,1), a rhetor Herodes Atticus (GELL.1,2,1), a cynic Peregrinus Proteus (GELL.12,11,1). Cf. M.S. RUXER, *Z ateńskich wspomnień uniwersyteckich Aulusa Gelliusa*, Poznań 1934 p.1 ff.; F. CASAVOLA, *Gellio, Favorino, Sesto Cecilio /in:/ Giuristi Adrianei*, Napoli 1980 p.77 ff.; L. HOLFORD-STREVENS, *Aulus Gellius*, London 1988 p.9 ff.

2 The name of the trend derives from Marcus Cornelius Fronton. Cf. M. SCHANZ, C. HOSIUS, G. KRÜGER, *Geschichte der römischen Literatur bis zum Gesetzgebungswerk des Kaisers Justinian*, III[3], (Nachdruck) München 1959 p.88 ff.

3 Cf. GELL. *praef.*13. On how Gellius used the sources cf. H.E.DIRKSEN, *Die Auszüge aus den Schriften der römischen Rechtsgelehrten, in den Noctes Atticae des A.Gellius* /in:/ *Hinterlassene Schriften*, I, Leipzig 1973 (Nachdruck), p. 30ff..

4 Cf. GELL. *praef.*4. He continued his work in Rome. It was to be a reading for his off-spring (GELL. *praef.*23); it was written in an order reflecting the way he got acquainted with the literature (GELL.9,4) or when he recollected it (GELL. *praef.*11).

5 The sources referred to by Gellius are made up of fragments of writings of 275 Greek and Roman authors. Among them there were several dozens of Roman authors concerned with the law who lived at the end of the Republic and during the times of the Principate. Some of them are mentioned by their names only, in case of others both their names and titles of their pieces are mentioned. A dozen or so are quoted in longer or shorter fragments, extensive abstracts were drawn up from few of them. About the possibility to take advantage of older sources of the kind cf. B. BRAVO, E. WIPSZYCKA, *Vademecum historyka starożytnej Grecji i Rzymu*.I, Warszawa 1979 p.21

information, perhaps not for a doctor, but definitely for a philologist or a lawyer. Gellius conveyed priceless information both on linguistic or grammatic archaisms, and on legal institutions already long forgotten in his times[7].

Information concerning law contained in *Noctes Atticae* refer to its development in different stages and originate from various sources otherwise often unknown. On the basis of those fragmentary pieces of information concerning different periods a image of a Roman family may be drafted. The image in particular will reflect the situation of a Roman family of the archaic period.

A Roman family of the archaic period was not so much a social as a political institution. It was headed by a *pater familias.* He was the head of the home and a symbol of the family durability. *Pater familias* was also an intermediary between the ancestors' spirits and the living members of the family; he was an owner of the property and a superior of all persons subjected to his authority[8].

The authority of *pater familias*, originally uniform in relation to all persons, in the times of the Law of the Twelve Tables was little differentiated and was called *manus*. The word meant "a hand", i.e. a protecting hand, a helping hand but also an avenging hand. In course of time a certain differentiation of the authority of *pater familias* in relation to different members of the family may be observed. Over children the father exercised authority called *patria potestas*. *Patria potestas* was a purely Roman institution and it was vested only in Roman citizens. It lasted as long as lived the father, thus being exercised in relation to both immature and mature children even if they held the highest state offices. To identify the father's rights exercised in relation to his wife a primary term *manus* was maintained.

The volume of the authority of *pater familias* is best described by such expressions as: *ius vitae ac necis,* or *vitae necisque potestas.* They expressed the father's right to decide about his child's fate[9].

The father acquired his authority over his child only if it was born *ex iustis nuptiis*[10] that is *ex uxore*[11] and *intra legitimum tempus*[12]. The problem of the so called conceptional period was regulated,

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6 Gellius, although he was not a lawyer he performed a function of a private judge (GELL.14,2,1) He was interested not only in settling current disputes but also was concerned with the law in force in the past. Cf. L. HOLFORD-STREVENS, *op.cit*., p.218 ff.

7 Cf. C. HOSIUS, s.v. *Gellius*, Nr 2 /in:/ RE, I Reihe, 7,1, Stuttgart 1910 col.994; M. SCHANZ, C. HOSIUS, G. KRÜGER, *op.cit*., III p.176 ff.; D. NÖRR, *Der Jurist im Kreis der Intellektuellen: Mitspieler oder Aussenseiter? (Gellius, Noctes Atticae 16,10) /in:/ Festschrift für Max Kaser zum 70. Geburtstag*, München 1976 p.59 ff.

8 Cf. M. KASER, *Der Inhalt der patria potestas, ZSS* 58,1938 p.62 ff.; C.W. WESTRUP, *Introduction to Early Roman Law. Comparative Sociological Studies. The Patriarchal Joint Family*, I 1, *The House Community*, Copenhagen-London 1944 p.45 ff.; P. DE FRANCISCI, *Primordia civitatis*, Romae 1959 p.151 ff.; P. BONFANTE, *Corso di diritto romano, I. Diritto di famiglia*[2], Milano 1963 p.11 ff.; C. GIOFFREDI, *Funzioni e limiti della "patria potestas", Nuovi studi di diritto greco e romano*, Romae 1980 p.77 ff.; G. FRANCIOSI, *Famiglia e persone in Roma antica. Dall'età arcaica al principato*, Torino 1989 p.49 ff. inclusive of the quoted literature.

9 The term covered either all father's rights to decide about the life of his child, or in a narrower sense a particular right - ability to put to death a child falling under his authority. Cf. CIC. *de dom*.77; DION.2,26-27; G.AUG.1,21; 4.85-86; Coll.4,8,1; C.Th.4,8,6 pr. See also B. ALBANESE, *Note sull'evoluzione storica del ius vitae ac necis* /in:/ *Scritti in onore di Contardo Ferrini*, III, Milano 1948 p.362 ff.: R. YARON, *Vitae necisque potestas, TR* 30,1962 p.243 ff.; B.WIERZBOWSKI, *Treść władzy ojcowskiej w rzymskim prawie poklasycznym*, Toruń 1977. p.23 ff.; W.V. HARRIS, *The Roman Father's Power of Life and Death* /in:/ *Studies in Roman Law in memory of A. Arthur Schiller*, Leiden 1986 p.81 ff.

10 Cf. G.1,55; G. *ep*.1,3,2; ULP.5,1.

11 Cf. D.1,6,6.

12 Cf. D.3,2,11,2; D.38,16,3,12.

as has been unanimously accepted in the literature, by the Law of the Twelve Tables. The relevant provision of the Law has been reconstructed on the basis of *Noctes Atticae* and most probably read as follows: *Si qui ei IN X MENSIBUS PROXIMUS postumus natus escit, ustus esto*[13]. The Antiquarian quoted the provision in the chapter devoted to the discussion carried out by ancient doctors and philosophers on the duration of pregnancy[14]. Since they believed, that a baby is rarely born in the seventh month, it is never born in the eighth, but very often in the ninth month. Though most often it is born in the tenth month of the pregnancy. When he mentioned the tenth month, Gellius explained that he did not mean a complete tenth month, but only the commenced tenth month[15]. Having not paid much attention to the births in the seventh month Gellius further discusses numerous examples of children born after the lapse of the tenth month[16]. However the provision of the Law of the Twelve Tables recognized a child as a posthumous one if it was born in the tenth month of the pregnancy at the latest. Such *postumus* was treated equally to the children born when their father was alive[17].

Gellius also quoted *Hebdomades* by Varron[18], who following the example of the Neopythagoreans ascribed magic power to number seven also in the foetal life of a man. Since seven days after fertilization semen is capable of assuming a form; then after four weeks (four sevens) the sex, a head and a backbone are created; after the lapse of 7 weeks (that is 49 days) a man is fully shaped. His fate though depends on the next seven, that is next seven months; since he cannot be born earlier completely able to live[19]. If pregnancy developed in accordance with the rules of the nature[20] childbirth occurred at the beginning of the fortieth month (that is 273 days since the conception)[21].

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13 In such wording it is quoted by JACOBUS GOTHOFREDUS, *Fontes quattuor iuris civilis*, Genevae 1653 - presently in E. OTTO, *Thesaurus Iuris Romani*, III, Basileae 1744, tab.4,4 and col.94. M. VOIGT, *Die XII Tafeln*, I, Leipzig 1883 p.707 placed the provision under discussion in tab.4,8 in the following wording: *In decem mensibus gigni hominem*; B.W. NIKOLSKY, *XII Tablic*, S.Petersburg 1897 p.6, in tab.4,12 in the following wording: [*Decimo mense iure "gigni" infantem*]. Contemporary palingeneses restrict themselves only to quote GELL.3,16,12 possibly highlighting the phrase: *In decem mensibus gigni hominem.*

14 Cf. GELL.3,16,12: *Praeterea ego de partu humano, praeterquam quae scripta in libris legi, hoc quoque usu venisse Romae comperi: feminam bonis atque honestis moribus, non ambigua pudicitia, in undecimo mense post mariti mortem peperisse factumque esse negotium propter rationem temporis, quasi marito mortuo postea concepisset, quoniam decemviri in decem mensibus gigni hominem, non in undecimo scripsissent; sed divum Hadrianum, causa cognita, decrevisse in undecimo quoque mense partum edi posse; idque ipsum eius rei decretum nos legimus. In eo decreto Hadrianus id statuere se dicit requisitis veterum philosophorum et medicorum sententiis.*

15 Cf. . GELL.3,16,1: *Ed medici et philosophi inlustres de tempore humani partus quaesiverunt. Multa opinio est, eaque iam pro vero recepta, postquam mulieris uterum semen conceperit, gigni hominem septimo rarenter, numquam octavo, saepe nono, saepius numero decimo mense, eumque esse hominum gignendi summum finem: decem menses non inceptos, sed exactos*.

16 Cf. GELL.3,16,2-6; 3,16,13-15; 3,16,23.

17 Cf.. J. ZABŁOCKI, *In decem mensibus gigni hominem*, *Prawo Kanoniczne* 35,1992 nr 3-4 p.197 ff.

18 In this book (known foremost from the Gellius's summary) Varro played with number seven (and so e.g. he stated that entering 12th hebdomade of his life he had already written 70 hebdomades of books - GELL.3,10,17) and then in 14 books he placed portraits, all of them subscribed with two biograms: one in prose and one in verse, 700 famous people of 7 domains of man's creativity. Cf. M. SCHANZ - C. HOSIUS, op.cit., I[4], München 1959 p.561 ff.; K. KUMANIECKI, *Literatura rzymska. Okres cyceroński*, Warszawa 1977, p.485 ff.

19 More on the subject of premature and delayed delivery cf. J. ROUSSIER, *La durée normale de la grossene, Droit de l'antiquité et sociologie juridique /in:/ Mélanges Henri Lévy-Bruhl*, Paris 1959 p.245 ff.

20 The term of delivery referred to by Varro related only to normal pregnancy taking a normal course without any complications. There were pathological pregnancies, premature or delayed ones. On the way to calculate

In Rome numerous progeny was always welcome. In the earliest period number of children had no effect upon the legal situation of a father. This changed only in the times of Augustus. People who could boast of numerous off-spring were granted many privileges, among the others *ius trium liberorum*[22]. The privilege was more important for women than for men, however it brought some advantages to the men too. Thanks to the information conveyed by Gellius it is known that according to *lex Iulia de maritandis ordinibus* the number of children affected the sequence of holding an office by *magistratus*. Since out of two consuls running for *fasces* priority was granted not to the older but to the one who held a greater number of children under *patria potestas.* If both candidates had an equal number of children, the priority was granted to the married one. And only if both of them were married and had an equal number of children *fasces* was taken by the older of the two candidates[23]. Children held under *patria potestas* were taken into consideration, and not only those who were born from the candidate.

Falling under the authority resulted not only from the fact of birth, but also due to admission to a family which nowadays is called adoption and in Rome was executed either in the form of *adrogatio* or in the form of *adoptio*. The former was carried out *per populum*, the latter was executed *per praetorem*[24]. According to Gellius a stranger (*extraneus*) could receive a position of a child in a family both by *adrogatio* and by *adoptio*[25]. The adrogated who was a person *sui iuris* (that is one who was not subjected to anyone's authority in a family) as a result of *adrogatio* in which he himself actively participated became a person *alieni iuris* thus falling under *patria potestas* of the adrogating person.

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the term cf. G. IMPALLOMENI, *In tema di vitalità e forma umana come requisiti essenziali alla personalità*, IURA 22,1971 p.104 ff.

21 Cf. GELL.3,10,7-8: *Ad homines quoque nascendos vim numeri istius (scil.septenarii quem Graece εβδομαδα appellant) porrigi pertinereque ait: (scil.M.Varro in primo librorum qui inscribuntur Hebdomades vel De Imaginibus) "Nam cum in uterum", inquit, "mulieris genitale semen datum est, primis septem diebus conglobatur, coagulaturque fitque ad capiendam figuram idoneum. Post deinde quarta hebdomade, quod eius virile secus futurum est, caput et spina, quae est in dorso, informatur. Septima autem fere hebdomade, id est nono et quadragesimo die, totus", inquit, "homo in utero absolvitur". Illam quoque vim numeri huius observatam refert, quod ante mensem septimum neque mas neque femina salubriter ac secundum naturam nasci potest, et quod hi qui iustissime in utero sunt, post ducentos septuaginta tres dies postquam sunt concepti, quadragesima denique hebdomade inita nascuntur.*

22 Cf. M. ZABŁOCKA, *Il "ius trium liberorum" nel diritto romano*, *BIDR* 91,1988 p.361 ff.

23 GELL.2,15,4-8: *Sicuti kapite VII.legis Iuliae priori ex consulibus fasces sumendi potestas fit, non qui pluris annos natus est, sed qui pluris liberos quam collega aut in sua potestate habet aut bello amisit. Sed si par utrique numerus liberorum est, maritus aut qui in numero maritorum est praefertur; si vero ambo et mariti et patres totidem liberorum sunt, tum ille pristinus honos instauratur et qui maior natu est prior fasces sumit. Super his autem, qui aut caelibes ambo sunt et parem numerum filiorum habent aut mariti sunt et liberos non habent, nihil scriptum in ea lege de aetate est. Solitos tamen audio, qui lege potiores essent fasces primi mensis collegis concedere aut longe aetate prioribus aut nobilioribus multo aut secundum consulatum ineuntibus.*

24 Cf. G.1,97-99. On *adrogatio* and *adoptio* cf. E. VOLTERRA, *La nozione dell'adoptio e dell'arrogatio secondo i giuristi romani del II e del III secolo d.C.*, *BIDR* 69,1966 p.109 ff.; C. CASTELLO, *Il problema evolutivo della "adrogatio"*, *SDHI* 33,1967 p.129 ff.; and, *L'intervento statuale negli atti costitutivi di adozione in diritto romano*, *Annali della Facoltà di Giurisprudenza dell'Università di Genova* 16,1977 fasc.2 p.685 ff.; M. KURYŁOWICZ, *Die Adoptio im klassischen römischen Recht*, Warszawa 1981 p.24 ff. inclusive of the quoted literature.

25 Cf. GELL.5,19,1-4: *Cum in alienam familiam inque liberorum locum extranei sumuntur, aut per praetorem fit aut per populum. Quod per praetorem fit, "adoptatio" dicitur, quod per populum, "arrogatio". Adoptantur autem, cum a parente in cuius potestate sunt tertia mancipatione in iure ceduntur atque ab eo qui adoptat apud eum apud quem legis actio est vindicantur; adrogantur hi qui, cum sui iuris sunt, in alienam sese potestatem tradunt eiusque rei ipsi auctores fiunt.*

However the adopted who was a person *alieni iuris* was a subject of a transaction performed between two *pater familias* and consequently he was transferred from the authority of the hitherto father under the authority of a new father. The term *adrogatio* itself originated from the way the transaction was performed that is from *rogatio* directed during *comitia curiata* by *pater familias* to the gathered *populus*[26].

Describing *adrogatio* Gellius emphasized the fact that since the times of Quintus Mucius the adrogating person made an oath (*iusiurandum*)[27] that his intentions concerning the adrogated person are just and fair[28]. Certainly the oath related not only to property but also to the problems connected with *sacra*. In literature attention is mainly paid to the interest of the adrogating person, in particular to the transfer of *familia* and *sacra* to the relevant successor[29]. It seems to me though, that *pontifex* cared foremost about the interest of the adrogated person's family, which as result of adrogation ceased to exist, since its *sacra* expired and its property fell to the adrogating person.

Thanks to Gellius the words of the formula of *rogatio* delivered on *comitia curiata* by *pater familias* were preserved[30]. Pursuant to the formula the adrogated person became *iure legeque filius* over whom *pater familias* acquired *vitae necisque potestas*. It was a position of a son born not only from a marriage recognized by the law but also from such marriage in which a mother was *mater familias*, that is where she was subjected her husband's authority. In other words the adrogated person became an agnation relative of both the adrogating father and his wife. Thus he acquired the right to intestacy succession from the adrogating person and as the closest agnate he also acquired the right to exercise guardianship over the adrogating person's wife and the right to succession from her.

In the archaic period a wife was also subject to the authority of *pater familias.* Although in Rome there was always only one institution of marriage, the position of a wife could be different. On marrying her husband a woman did not have to enter her husband's agnation family maintaining a position of a person *alieni iuris* in her hitherto family, or if she was a person *sui iuris* she could keep her hitherto status. Otherwise she could enter her husband's agnation family as a result of *convention in manum*. Generally in the earliest period a wife entered her husband's family as a result of the act of *confarreatio* or *coemptio*, but also by *usus*, that is if she stayed in her husband's home for a year[31]. Gellius maintained however, that if a woman did not want to fall under her husband's authority she might take advantage of the so called *trinoctium abesse*: the wife left her husband's home for three successive nights thus interrupting the acquisition of authority over her[32]. At the same time I would

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[26] Cf. GELL.5,19,8: "*Adrogatio" autem dicta, quia genus hoc in alienam familiam transitus per populi rogationem fit.*

[27] Cf. GELL.5,19,5-6: *Sed adrogationes non temere nec inexplorate committuntur; nam comitia arbitris pontificibus praebentur, quae "curiata" appellantur, aetasque eius qui adrogare vult, an liberis potius gignundis idonea sit, bonaque eius qui adrogatur ne insidiose adpetita sint consideratur, iusque iurandum a Q. Mucio pontifice maximo conceptum dicitur, quod in adrogando iuraretur.*

[28] Cf.. A. WATSON, *The Law of Persons in the Later Roman Republic*, Oxford 1967 p. 86; M. BRETONE, *Giuristi e profani tra repubblica e principato. Tecniche e ideologie dei giuristi romani*[2], Napoli 1982 p.110.

[29] Cf. M. KURYŁOWICZ, *op.cit*., p.14 ff.; G. FRANCIOSI, *op.cit*., p.61 ff.

[30] Cf. GELL.5,19,9: *Eius rogationis verba haec sunt: "Velitis, iubeatis, uti L.Valerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eius natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est. Haec ita uti dixi, ita vos, Quirites, rogo*".

[31] Cf. G.1,110-113. See also E. VOLTERRA, *Nuove ricerche sulla "conventio in manum" /in:/ Scritti giuridici*, III, Napoli 1991 p.3 ff.

[32] Cf. GELL. 3,2,12-13. See also H.J. WOLFF, *Trinoctium*, *TR* 16,1939 p.145 ff.; A. WATSON, *Rome of the XII Tables. Persons and Property*, London 1975 p.17 f.; L. PEPPE, *Posizione giuridica e ruolo sociale della donna romana in età repubblicana*, Milano 1984 p.101 f.; I. PIRO, *"Usu" in manum convenire*, Napoli 1994 p.129 ff.

like to emphasize that Romans did not acknowledge different types of marriage as it is hold even by some contemporary historians when they are discussing marriages *cum manu* and marriages *sine manu*[33]. At least there is no evidence in the sources to justify such thesis, unless we take into consideration the change from *due formae uxores* in Cicero's text[34] into *duae formae matrimoniorum* in Quintilianus's text[35]

However the position of a wife in a marriage was related to her affiliation to the agnation family. If a woman entered her husband's family she bore an honourable title of *mater familias*[36]. As it was stressed by Gellius also wives of the sons of *pater familias* were entitled to bear the title if they entered the family by performance of the act of *conventio in manum*[37]. If however a woman was not *in manu* whether or not she bore children she was called *matrona*[38]. Gellius referred here to the authority of ancient writers (*vocum antiquum enarratores).* Gellius also quoted a contrary view expressed by Aelius Melissus who believed that a wife was entitled to the name of *matrona* if she gave birth only once, if however she procreated more than once then she was eligible to the title of *mater familias*[39].

Before a marriage was contracted an engagement was concluded. A ring worn on the middle (ring) finger became a symbol of the engagement. Gellius quoting herein *Aegyptiaca* by Apion explained that from the ring finger of the left hand a delicate nerve was running towards the heart itself[40]. Besides this curious anatomic detail Gellius did not say much about the engagement in Rome. However he described engagement carried out by the inhabitants of that part of Italia which was called Latium[41]. He wrote, after *de dotibus* by Servius Sulpicius Rufus and after *de nuptiis* by Neratius that the engagement until the issuance of *lex Iulia de civitate Latinus et sociis danda* was performed according to the custom and the law in the form of *sponsio* - thus the term *sponsalia*[42]. The ceremony was car-

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33 Cf. P. BONFANTE, op cit., p.262 ff.; E. VOLTERRA, *La conception du mariage d'après les juristes romains*, *Scritti giuridici*, II, p.3 ff.; and *La conventio in manum e il matrimonio romano* /in:/ *Scritti giuridici*, III, p.155 ff.; W. ROZWADOWSKI, *Nowe badania nad istotą małżeństwa rzymskiego*, *Meander* 42,1987 fasc.4-5 p.237 ff.

34 Cf. CIC. *top*.3,14.

35 Cf. QUINT.5,10,62.

36 On different meanings of the phrase *mater familias* cf. W. WOŁODKIEWICZ, *Materfamilias*, *Czasopismo Prawno-Historyczne* 16,1964 fasc.1 p.103 ff.; and *Attorno al significato della nozione di mater familias /in:/ Studi in onore di Cesare Sanfilippo*, III, Milano 1983 p.751 ff.

37 Cf. GELL.18,6,9: ..."*matrem" autem "familias" appellatam esse eam solam quae in mariti manu mancipioque aut in eius in cuius maritus manu mancipioque esset, quoniam non in matrimonium tantum, sed in familiam quoque mariti et in sui heredis locum venisset.*

38 Cf. GELL.18,6,8: *Enimvero illud impendio probabilius est quod idonei vocum antiquarum enarratores tradiderunt, "matronam" dictam esse proprie quae in matrimonium cum viro convenisset, quoad in eo matrimonio maneret, etiamsi liberi nondum nati forent, dictamque ita esse a matris nomine, non adepto iam, sed cum spe et omine mox adipiscendi, unde ipsum quoque "matrimonium" dicitur,...*

39 Cf. GELL.18,6,4: *Ex eo [Aelio Melisso] libro [De loquendi proprietate] verba haec sunt: "'Matrona' est quae semel peperit, quae saepius, 'mater familias'; sicuti sus quae semel peperit, 'porcetra,' quae saepius, 'scrofa'".*

40 Cf. GELL.10,10.

41 Cf. GELL.4,4,1-4.

42 Cf. GELL.4,4,2: *"Qui uxorem", inquit [Servius Sulpicius], "ducturus erat, ab eo unde ducenda erat stipulabatur, eam in matrimonium datum iri. Qui ducturus erat, id itidem spondebat. Is contractus stipulationum sponsionumque dicebatur 'sponsalia'. Tunc, quae promissa erat 'sponsa' appellabatur, qui spoponderat ducturum, 'sponsus'. Sed si post eas stipulationis uxor non dabatur aut non ducebatur, qui stipulabatur aut qui spoponderat ex sponsu agebat. Iudices cognoscebant. Iudex quamobrem data acceptave non esset uxor quaerebat. Si*

was carried out in the following way: the person giving in marriage the girl, called *sponsa* used to ask the future husband, called *sponsus*, whether he wanted to take her as his wife. The future husband used then to ask if the girl would be given to him. If however irrespective of the contracted stipulation *sponsa* was not given in marriage or was not taken as a wife resulted a claim by virtue of the concluded *sponsio.* The judge examined why the girl was not given in marriage or taken as a wife. If he saw no just reason he adjudicated against the one who did not want to give or to take the girl. Although Gellius maintained that Servius described legal regulations concerning Latium it may be believed that in fact those regulations were the same also in Rome where in the form of *sponsio* a promise to give a girl in marriage was also made[43].

The Romans learned about polygamic or polyandric marriages only from anecdotes. Gellius quotes the following anecdote taken from Cato's writings. Papirius Praetextus accompanied his father during the debate of the Senate. Having returned home he was beset by his mother with questions about the subject of the debate. Because he wanted to keep the secrecy of the debate in response to satisfy his mother's curiosity Papirius Praetextus fabricated a story that the subject of the debate was to decide which was better, that a man had two wives or that a woman had two husbands. The next morning a crowd of women gathered in front of the Senate decisively supported the law allowing for possession of two husbands[44]. Although the anecdote was only a joke made up in order to release oneself from the importunate questions but it proved that women were interested both in political life and their own fate.

According to Gellius authors writing *de victu et cultu* of the Roman nation maintained that both in Rome and Latium women led abstemious lives. They were always obligated to abstain from drinking wine (which was called *temetum* in the original language). They were allowed only to drink an unfermented grape juice (*lorea*) and a beverage made from dried berries (*murrina*)[45]. To protect women against that bad habit an otherwise pleasant measure was invented. Namely they were kissed on the mouth to find out whether they were drinking wine[46]. A woman drinking wine could have expected the same consequences as the one who committed adultery. According to Cato's speech *de dotis*, which was summarized by Gellius, for wine drinking women not only could have been *existimatas* but also *multatas* with the same severity like for *probrum* or *adulterium*[47]. After all an adulteress caught *inflagranti* in those times could, without any court proceedings, be with impunity killed by her husband. The wife on the other hand in case of her husband's adultery could not lay her finger on him[48].

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nihil iustae causae videbatur, litem pecunia aestimabat, quantique interfuerat eam uxorem accipi aut dari, eum qui spoponderat aut qui stipulatus erat, condemnabat".

43 On engagement cf. E. VOLTERRA, *Ricerche intorno agli sponsali in diritto romano* /in:/ *Scritti giuridici*, I, p.344 ff.; H. KUPISZEWSKI, *Das Verlöbnis im altrömischen Recht*, *ZSS* 77, 1960 p.125 ff.; R. ASTOLFI, *Il fidanzamento nel diritto romano,* Padova 1987 p.10 ff. inclusive of the quoted literature.

44 Cf. GELL.1,23.

45 On various theories concerning the prohibition of wine for women cf. L. MINIERI, *"Vini usus feminis ignotus"*, *Labeo* 28,1982 p.150 ff.

46 Cf. GELL.10,23,1-2: *Qui de victu atque cultu populi Romani scripserunt mulieres Romae atque in Latio "aetatem abstemias egisse", hoc est vino semper, quod "temetum" prisca lingua appellabatur, abstinuisse dicunt, institutumque ut cognatis osculum ferrent deprehendendi causa, ut odor indicium faceret, si bibissent. Bibere autem solitas ferunt loream, passum, murrinam et quae id genus sapiant potu dulcia.*

47 Cf. GELL.10,23,3: *Atque haec quidem in his quibus dixi libris pervulgata sunt, sed Marcus Cato non solum existimatas, set et multatas quoque a iudice mulieres refert, non minus si vinum in se, quam si probrum et adulterium admisissent.*

48 Cf. GELL.10,23,5: *De iure autem occidendi ita scriptum: "In adulterio uxorem tuam si prehendisses, sine iudicio inpune necares; illa te, si adulterares sive tu adulterarere, digito non auderet contingere, neque ius est".*

Lack of precision of that part of the Cato's utterance which Gellius quoted literally[49] resulted in a controversy whether a wife was adjudicated *with regard to iudicum de moribus* or *iudicum domesticum*[50] and who was the *censor: iudex* or *vir*, and also what it meant that for drinking wine a woman could be sentenced *(condemnatur*), and in case of other offences she was punished (*multitatur*)[51].

A wife, even if she was not *in manu* was obligated, not only to be faithful and deliver children but also it was her duty to bring them up pursuant to her husband's instruction. That fact was emphasized by Gellius when he quoted remarks of his friend philosopher Favorinus on feeding babies. Favorinus when he visited one of his pupils to congratulate him on the birth of his son in presence of the woman lying-in expressed his view that the new born baby would be breast fed by his own mother. The mother of the woman lying-in retorted that one should not add the pain of breast feeding to the pain of child-bearing. Then Favorinus declared that a woman who did not breast-feed was not a complete mother and deserved a reprimand. Since a mother fed her own baby with her own blood when it was in her womb she should also feed her newly born child. Because after the delivery the blood passed to the breasts which were not only decorative growths but serve feeding purposes as well. It was not without significance what food was given to a new born baby. The food affected physical similarity and the baby's character. If then a slave was instructed to feed the baby or another woman of low morale, the baby could take the worst features from her. No wonder then that children of upright and respectable women did not resemble their parents either in their character or their looks[52].

Gellius stated that according to the tradition Roman marriages were durable. First divorce took place (during the consulate of Marcus Atilius and Publius Valerius) only over 500 years after the City was established. Then Servius Carvilius Ruga who descended from a very fine line divorced his infertile wife who he loved and had a very high opinion about her for her moral values. However he divorced her because he respected the oath taken under the influence of censors. And the oath was that he took a wife to deliver children[53]. In another place in his *Noctes Atticae* Gellius stated also that Servius Carvilius Ruga divorced his wife upon the advice given by his friends (*amicorum sententia*)[54].

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[49] GELL.10,23,4: *Verba Marci Catonis adscripsi ex oratione quae inscribitur De Dote, in qua id quoque scriptum est, in adulterio uxores deprehensas ius fuisse maritis necare: "Vir", inquit, "cum divortium fecit, mulieri iudex pro censore est, imperium quod videtur habet, si quid perverse taetreque factum est a muliere; multitatur, si vinum bibit; si cum alieno viro probri quid fecit, condemnatur".*

[50] Cf. H.J. WOLFF, *Das iudicium de moribus und sein Verhältnis zur actio rei uxoriae*, *ZSS* 54,1934 p.319 ff. The existence of *iudicium domesticum* as a legal institution is considered problematic by M. KASER, *op.cit*., p.68 ff. and E. VOLTERRA, *Il preteso tribunale domestico in diritto romano /in:/ Scritti giuridici*, II, p.127 ff. However, the existence of *iudicium domesticum* as a legal institution is recognized by R. DÜLL, *Iudicium domesticum, abdicatio und apoceryxis*, *ZSS* 63,1943 p.59 and W. KUNKEL, *Das Konsilium im Hausgericht*, ZSS 83,1966 p.249 n.66. E. PÒLAY, *Das "regimen morum" des Zensors und sogenannte Hausgerichtsbarkeit* /in:/ *Studi in onore di Edoardo Volterra*, III, Milano 1971 p.317 ff. attempts place *iudicium domesticum* between a legal and a non-legal institution.

[51] Cf. A. SÖLLNER, *Zur Vorgeschichte und Funktion der actio rei uxoriae*, Köln-Wien 1969 p.71 ff.; E. CANTARELLA, *Adulterio, omicidio legittimo e causa d'onore in diritto romano* /in:/ *Studi sull'omicidio in diritto greco e romano*, Milano 1976 p.180 ff.; J. ZABŁOCKI, *Si mulier vinum bibit condemnatur*, *Prawo Kanoniczne* 32,1989 nr 1-2 p.223 ff.

[52] Cf. GELL.12,1.

[53] Cf. GELL.4,3,1-2: *Memoriae traditum est quingentis fere annis post Romam conditam nullas rei uxoriae neque actiones neque cautiones in urbe Roma aut in Latio fuisse, quoniam profecto nihil desiderabantur, nullis etiamtunc matrimoniis divertentibus. Servius quoque Sulpicius in libro, quem composuit De Dotibus, tum primum cautiones rei uxoriae necessarias esse visas scripsit, cum Spurius Carvilius, cui Ruga cognomentum fit, vir nobilis, divortium cum uxore fecit, quia liberi ex ea corporis vitio non gignerentur, anno urbis conditae quingentesimo vicesimo tertio M.Atilio, P. Valerio consulibus. Atque is Carvilius traditur uxorem quam*

A father could not only include a stranger (*extraneus*) into his family, but also in order to punish a member of the family he could exclude an unworthy person (*sacer*) from his family. Although he had over his children *ius vitae ac necis* his decision to exclude a member of the family was subject to control and had to be approved by *populus*. The approval was, in my opinion, *sacrorum detestatio*[55], which was described by Gellius in his writings and thus was made known to future generations. By means of that approval an unworthy person was effectively dismissed not only from *sacra* of the family but also was deprived of the right to acquire property after the death of his/her *pater familias*. It was not, as many would believe, an act preparing or preceding such legal transactions like *adrogatio* or *testamentum calatis comitiis*, but it was an autonomous act, an archetype of disinheritance (*exheredatio*)[56].

Paternal authority was a tie which bonded very tightly members of *familia*. After the death of *pater familias* persons who were under his authority replaced him taking over the property and the duty to administer cult[57]. Originally those persons created a community called *consortium ercto non cito*, largely known from Gellius writings[58]. Gellius did not describe in detail a Roman *consortium*, instead he compared it with Pythagoreans' *societas*[59]. Presentation of those two communities is far from precise and it caused many interpretative problems, that is whether *antiquum consortium* was *inseparabile* or *inseparabilis societas* was like ancient *consortium*. Nevertheless it is beyond any doubt that the community was set up as a result of the death of *pater familias* and *sui heredes* participated in it out of their own will as co-heirs (*coheredes*) until *patrimonium* was divided among them. There were various reasons why *sui heredes* remained in *consortium ercto non cito.* Most often it was so because they lacked life experience or because they ran common house which was quite frequent. If however *coheredes* did not want to remain in *consortium* each of them could cause its division[60].

Should he die *pater familias* could nonetheless dispose of the fate of his *familia*. Due to information included also in Gellius writings it is known that Romans acknowledged three forms of testa-

dimisit egregie dilexisse carissimamque morum eius gratia habuisse, set iurisiurandi religionem animo atque amori praevertisse quod iurare a censoribus coactus erat, uxorem se liberum quaerundum gratia habiturum.

54 Cf. GELL.17,21,44: *Anno deinde post Romam conditam quingentesimo undevicesimo Sp. Carvilius Ruga primus Romae de amicorum sententia divortium cum uxore fecit, quod sterila esset iurassetque apud censores, uxorem se liberum quaerundorum causa habere*. More on Carvilius' case cf. A, Watson, *The Divorce of Carvilius Ruga*, *TR* 33,1965 p.38 ff. See also O. ROBLEDA, *Il divorzio in Roma prima di Costantino*, *ANRW*, Berlin-New York 1982 p.355 ff.

55 Cf. GELL.7,12,1-2; GELL.15,27,3.

56 Cf. J. ZABŁOCKI, *Appunti sulla "sacrorum detestatio"*, *BIDR* 92-93,1989-90 p.525 ff. See also B. ALBANESE, *"Sacer esto"*, *BIDR* 91,1988 p.145 ff.; L. GAROFALO, *Sulla condizione di "homo sacer" in età arcaica*, *SDHI* 56,1990 p.223 ff.

57 Cf. Tabl.5,4-5, and also P. VOCI, *Il diritto ereditario romano dalle origini ai Severi* /in:/ *Studi di diritto romano*, II, Padova 1985 p.20 ff.

58 Cf. also CIC.*de orat*.1,237, FESTUS, s.v. *Erctum citumque*, L.72; SERV. *ad Aen.*8,642-643 from the legal sources a papyrus found in Egypt PSI XI 1182 containing a fragment of Gaius's *Institutions*: G.3,154 a (=FIRA II 196).

59 Cf. GELL.1,9,12: *Sed id quoque non praetereundum est, quod omnes, simul atque a Pythagora in cohortem illam disciplinarum recepti erant, quod quisque familiae, pecuniae habebat in medium dabat et coibatur societas inseparabilis, tamquam illud fuit anticum consortium, quod iure atque verbo Romano appellabatur "ercto non cito".*

60 Cf. J. ZABŁOCKI, *Consortium ercto non cito w Noctes Atticae Aulusa Gelliusa*, *Prawo Kanoniczne* 31,1988 nr 3-4 p.271 ff.

ment[61]: *testamentum calatis comitiis* prepared with approval of *populus* during *comitia calata* that was not a unilateral declaration of will instituting an heir; *testamentum in procinctu* which was a unilateral declaration of the testator's will in front of the closest witnesses standing in battle array and *testamentum per aes et libram*[62].

Although the possibility to draw up a testament is related to the powers of *pater familias*, fragments of writings of earlier authors quoted by Gellius[63] (Anthias, Labeo, Masurius Sabinus) presented information on testaments drawn up by women already in the times of legendary king Romulus. It may be concluded that testament *calatis comitiis* drawn up *in populi contione* was the only admissible adequate form of the last will available for women[64].

On the basis of the above presented material we may beyond doubt state that *pater familias* occupied an exceptional position in the structure of a Roman family. However his decisions concerning political changes, which might destroy the social balance required an approval of *populus.* In such a way activity of *pater familias* was controlled if one family disappeared as a result of *adrogatio* of its *pater familias* and exclusion of a member of family in consequence of *sacrorum detestatio,* or institution of an heir in a testament[65].

To conclude I would like to add that the above presented issues concerning an ancient family are commonly known. Very often however we do not realize that this knowledge is due not infrequently solely to information contained in *Noctes Atticae* of Aulus Gellius.

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61 Cf. GELL.15,27,3: ...*Tria enim genera testamentorum fuisse accepimus: unum, quod calatis comitiis in populi contione fieret, alterum in procinctu, cum viri ad proelium faciendum in aciem vocabantur, tertium per familiae emancipationem, cui aes et libra adhiberetur*.

62 On the earliest forms of testament cf. also G.2,101-103; Ulp.20,2. In the literature of subject it is generally accepted that *testamentum calatis comitiis* and *testamentum in procinctu* were known before the Law of the Twelve Tables, but *testamentum per aes et libram* was developed only because of the interpretation of the Law. See also E. GINTOWT, *Rzymskie prawo prywatne w epoce postępowania legisakcyjnego (Od Decemwiratu do lex Aebutia)*, Warszawa 1960 p.71 ff.; M. AMELOTTI, *Le forme classiche di testamento*, I, Torino 1966 p.28 ff.; P. VOCI, *Diritto ereditario romano*[2], I, Milano 1967 p.14 ff.

63 Cf. GELL.7.7.

64 Cf. E. VOLTERRA, *Sulla capacità delle donne a far testamento*, BIDR 48,1942 p.74 ff.; J. ZABŁOCKI, *Appunti sul "testamentum mulieris" in età arcaica*, BIDR 94-95, 1991-92, p.157 ff.

65 Cf. J. ZABŁOCKI, *Kompetencje patres familias i zgromadzeń ludowych w sprawach rodziny w świetle Noctes Atticae Aulusa Gelliusa*, Warszawa 1990 p.108 ff.