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The Roman family court (*iudicium domesticum*) and its historical development in France and the Netherlands

Emese K.E. VON BÓNÉ[1)]

Abstract

This article is about an important family institution, 'iudicium domesticum', from ancient Roman times up to its reception by the French legislation in the eighteenth century and later on in the Dutch legislation. Looking for traces of the old 'iudicium domesticum' in the Western world, we find its reception in the French legislation. In the 'L'Esprit des Lois' of Montesquieu, we find the 'tribunal de famille' with a reflexion on its Roman origin. In 1804, once again we find the institution of the family council in the French Civil Code, which was also introduced in the Netherlands during the Napoleontic period. The family council goes back to the first French law on the judiciary of 1790 and, as this article will demonstrate, also goes back to the 'iudicium domesticum' of ancient Roman times. In the epilogue also the modern family courts such as in Korea and Japan are evaluated.

Introduction

In Roman times, the power of any father over his children, known as *patria potestas*, was very important[2)]. Within the family, fathers had complete power over their children. This *pater familias*, or head of the family, had the right to punish his children, the *ius castigationis*, as well as the power of life and death over

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2) Kaser, Max, *Das Römische Privatrecht*, I, München 1971, p. 62. Kaser, Max, 'Der Inhalt der patria potestas', in: ZSS, rom. Abt, Band 58, Weimar 1938, p. 62-87. Mommsen, Theodor, *Römisches* Strafrecht, Leipzig, 1899, R. Graz 1955, p. 16-27. Fayer, Carla, *La familia romana, aspetti giuridici antiquari*, Roma 1994, p. p. 130.

them. Did a father have a limited power over his children? Did he have an absolute right to punish? The head of the family rarely pronounced a verdict alone, for he had to consult the family council, which was composed of family members and friends.

The Italian scholar Luigi Capogrossi Colognesi stresses in his article *La famiglia romana, la sua storia e la sua storiografia* the special authority of the *patria potestas* and the private relationship between fathers and sons[3)].

In the last century two Romanists wrote an important article on the theme *iudicium domesticum*: Edoardo Volterra and Wolfgang Kunkel, but both authors have different perceptions on the existence of *iudicium domesticum*. In this article I will not discuss the different opinions of the two Romanists because it is known, neither I will make a choice between the two opinions. Wolfgang Kunkel's opinion is that the Roman *iudicium domesticum* existed during the Roman Republic especially in practice and the customs. Edoardo Volterra shows in his article that *iudicium domesticum* has never existed as a legal phenomenon. Both opinions can be defended. In this lecture I will demonstrate that *iudicium domesticum* had its renaissance in the 18th century in the *l'Esprit des Lois* of Montesquieu and much later in the French Civil code, which was also introduced in 1811 in the Netherlands.

1. *Iudicium domesticum* in Roman classical literature

In Roman classical literature, we see different opinions on the existence of the Roman *iudicium domesticum*. Titus Livius doesn't speak explicitly about it in the times of the Roman kings; he mentions this institution as of the Roman Republic. During the Roman Empire, this institution no longer existed.

Dionysius of Halicarnassus tells us in his 'Roman Antiquities' (2, 25,5), that Romulus had given to the father of the family the right to kill his children and his wife:

> ἁμάρτένουσα δέ τι δικαστὴν τὸν ἀδικούμενον ἑλάμβανε καὶ τοῦ μεγέθους τῆς τιμωρὶας κύριον. 6. Ταῦτα δέ οἱ **συγγενείς** μετὰ τοῦ **ἀνδρὸς ἐδίκαζον**· ἐν οἷς ἦν φθορὰ σώματος καί, ὃ πάντων ἐλάχιστον ἁμαρτημάτων Ἕλλησι δόξειεν ἂν ὑπάρχειν, εἴ τις οἶνον εὑρεθείη πιοῦσα γυνή. Ἀμφότερα γὰρ ταῦτα θανάτῳ ζημιοῦν συνεχώρησεν ὁ

3) Capogrossi Colognese, Luigi, 'La famiglia romana, la sua storia e la sua storiografia', in: *Mefra* 1221/1, 2010. P. 146-174.

> Ῥωμύλος, ὡς ἁμαρτημάτων γυναικείων ἔσχατα, φθορὰν μὲν ἀπονοίας ἀρχὴν νομίσας, μέθην δέ φθορᾶς.

But if she did any wrong, the injured party judged and determined the degree of her punishment. Other offences, however, were judged by her relations together with her husband; among them was adultery, or if it was found she had drunk wine – a thing which the Greeks would look upon as the least of all faults. However, Romulus permitted them to punish both these acts with death, as being the worst offences of which women could be guilty, since he looked upon adultery as the source of reckless folly, and drunkenness as the source of adultery.

In *Collatio* 4,8,1 the jurist Papinianus seems to confirm this idea:

> *Cum patri lex regia dederit in filium vitae necisque potestatem, quod bonum fuit lege comprehendi, ut potestas fieret etiam filiam occidendi, velis mihi scribere; nam scire cupio….*
> As the 'lex regia' gives the father towards his son the right of life and death, what will be the reason of this law that he will have the right to kill also his daughter. Write it to me because I would like to know…

The text doesn't mention a verdict of the parents but according to Bernardo Santalucia the husband was assisted by a 'consilium domesticum'[4]. The text of Dionysius of Halicarnassus, from 7 B.C., is the oldest source which refers to *iudicium domesticum* as the **συγγενείς**, although this expression is not commonly used. Dionysius of Halicarnassus was born in 60 B.C. and came to Rome in the period when Augustus put an end to the civil war around 30 B.C. Between that year and the publication of his first book on the Roman Antiquities in 7 B.C., 22 years had passed. In this period Dionysius received his new education. He learned Latin and worked on his book by asking for the necessary information of important people in Rome and by reading the works of Roman historians. In Rome, he became professor in Greek rhetoric. In Rome he met the 'Aelii Tuberones', a famous Roman aristocratic family. His patron was the historian Quintus Aelius Tubero[5]. He probably helped him with the composition of his

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4) *Leges Regiae* 1,8 (Dion. Halic. 2, 26, 27). See 'leges regiae', in: Santalucia, B., *Diritto e processo penale nell'antica Roma*, 2°. Ed., Milano 1998, p. 5 nota 5. According to Santalucia 'la legge, attribuita a Romolo, che concede al marito, assistito dal *consilium* domestico, di punire con la morte l'adulterio o altra colpa grave della moglie'.

5) About Dionysius of Halicarnassus, see Fornaro, Sotera, in: *Der Neue Pauly Enzyklopädie* der

book *Roman Antiquities*. It is possible that Dionysius discussed his work with Tubero and that he received from him legal advice[6]. In his book, Dionysius mentions the family court with the words συγγενείς. In his text, he mentions that a husband decides together with family members to give a judgment and punishment in cases of *adulterium* of his wife.

Another interesting text in which the father is the judge of his wife's behavior, is Aulus Gellius's[7] *Noctes Atticae*:

> *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 diuortium fecit, mulieri iudex pro censore est, imperium quod videtur habet; si quid peruerse taetreque factum est a muliere, multatur; si vinum bibit, si cum alieno viro probri quid fecit, condemnatur.*

The text is about *De Dote* of Marcus Cato, in which he also mentions that husbands have the right to kill their wives in case of having committed *adulterium*. The husband can punish his wife also when she drank wine or committed an dishonorable act. He has absolute power in such a case. The text by Aulus Gellius was probably written under Emperor Antonius Pius (138-161 AD) between 146 and 158 A.D. The text is taken from Marcus Cato (253-149 BC), who lived during the Roman Republic. Marcus Cato mentions the *censor* in his *De Dote: mulieri iudex pro censore est* but doesn't mention the husband.

Why does the text refer to '*iudex pro censore est*'? Why can't a husband, who wants to get divorced, kill his own wife immediately in case of *adulterium*? Is it possible that with the words *mulieri iudex est pro censore* the husband is the judge of his wife, and that the wife will be interrogated by her husband, and perhaps with the assistance of the parents? The text doesn't mention a family council but in the *Roman Antiquities* of Dionysius of Halicarnassus we find a text with a similar case in which the συγγενείς, the relatives, are mentioned. Is it possible that in this case the wife's husband is the judge of his wife in case of *adulterium*

Antike, Band 3, Weimar 1997, p. 635. About Quintus Aelius Tubero, see Kunkel, Wolfgang, *Herkunft und Soziale Stellung der römischen Juristen*, Graz-Wien-Köln 1967, p. 37.

6) See the introduction of Valérie Fromentin, *Denys D'Halicarnasse, Antiquités Romaines*, tome I, Livre I, Collection Budé, Paris, 1998, p. XV.

7) Aulus Gellius, *Les Nuits Attiques*, Liber X, XXIII, 4, texte établi et traduit par René Marache, tome II, Paris 1978, édition Budé, p. 182.

or when she drunk wine? In this case, the husband has the right to punish his wife. Is it possible that in such a case the husband in his role of a judge doesn't determine alone the punishment without *iudicium domesticum* or family council? In his article 'Das Konsilium im Hausgericht', Wolfgang Kunkel mentions the work of Marcus Cato. According to Kunkel Cato compares the authority of the husband towards his wife with a magistrate towards his citizens[8]. According to Voci the *iudex* in the text of Aulius Gellius acts like a *censor*[9]. Kunkel also mentions the text of Dionysius of Halicarnassus and according to him this text is an example of 'private justice' because a woman was judged by her husband with the συγγενείς, the relatives. The relatives were not only the relatives of the husband, but also of the wife. Kunkel says that women committed such crimes at home and not in public. The relatives of the women didn't want to judge these kinds of crimes in public and often the members of the family couldn't find a prosecutor who would bring the case before a public tribunal[10]. According to Kunkel, this is one of the reasons that the State supported the family court and that the State demanded such a tribunal[11]. According to Kunkel, the text of Dionysius mentions the συγγενείς and other sources such as Gaius Suetonius Tranquillus (in Tiberius, 35) mention *propinqui more maiorum* and Valerius Maximus in his *Facta et Dicta Memorabilia* (6, 3,8) mentions *propinquorum decreto*. In another text of Valerius Maximus (5,9,1) we read about Lucius Gellius, a man who had held all public offices up through that of censor, possessed near certainty that his son was guilty of various serious offenses, namely committing adultery with his stepmother and plotting the murder of his father. Still, he did not

8) Kunkel, Wolfgang 'Das Konsilium im Hausgericht', in: *Kleine Schriften*, Weimar 1974, p. 134, note 32. This article was also published in ZSS, Romanistische Abteilung, Band 83, Weimar 1966, p. 219-251.

9) See also Voci, Pasquale, 'Storia della patria potestas da Augusto a Diocleziano', in: *Studi di diritto Romano*, Padova 1985, p. 417-418, nota 96.

10) Ib, p. 417. See also Wesener, Günther, *iudicium domesticum*, in: *PW IX A*, Stuttgart 1962, p. 373-376. See also Robinson, Olivia, *The criminal law of ancient Rome*, Baltimore, Maryland, 1995, p. 15. See also Fayer, *La familia Romana*, Roma, 1994, p. 130. See also Numa Denis Fustel de Coulanges, *La cité antique*, Paris, réimprimé 1948, p. 92-95 (*The ancient city*, New York, 1873, p.87). See alsoThomas, Yan, 'Remarques sur la jurisdiction domestique à Rome', in: *Parenté et stratégies familiales dans l'Antiquité romaine*, 1990, p. 449-474. See also Friedrich Vittinghoff, Friedrich, *Europäische Wirtschafs- und Sozialgeschichte in der Römischen Kaiserzeit*, Stuttgart 1990, p. 175. Amunátegui Perelló, Carlo, *Origen de los poderes del pater familias. El pater familias y la patria potestas*, thèse de doctorat, Madrid, 2009, p. 114

11) Kunkel, p. 137.

rush at once to vengeance but instead summoned almost the entire Senate to his *consilium*, set forth his suspicions, and offered the young man the chance to defend himself. And when he had very carefully examined the case, he acquitted him not only by the verdict of the *consilium* but also by his own[12]. Livius mentions in his *Ab Urbe Condita*, book 39,18,6 that women were condemned by their relatives,the *cognate*:[13] *mulieres damnatas cognatis, aut in quorum manu essent, tradebant, ut ipsi in privato animadverterent in eas*. Convicted women were turned over to their relatives or to those who had authority over them, that they might be punished in private.

Kunkel says that in the Roman Republic, and in the beginning of the Roman Empire sources mention that women were judged by *propinqui and cognati* in criminal and public cases. The Italian scholar Volterra has a different opinion. In his article 'Il preteso tribunale domestico in diritto romano', he says that *iudicium domesticum* has never existed[14]. A recent article of Nunzia Donadio confirms that there are different opinions about the legal existence of *consilium domesticum*[15]. Sources don't mention the term *iudicium domesticum*. Other sources mention the term συγγενείς such as Dionysius of Halicarnassus, Livius mentions the term *cognati*, and Seneca mentions the term *consilium*. Volterra's opinion is that *iudicium domesticum* never existed as a public tribunal. Kunkel sustains that it did exist in Roman times, as a private tribunal and he proves it.

In a text of Seneca, we find the term *consilium*. In book I, 15, sub 3 of the *De Clementia* of Seneca we find an interesting text to study: *Cogniturus de filio Tarius avocavi in consilium Caesarem Augustum; venit in privatos penates, adsedit, pars alieni consilii fuit, non dixit: "Immo in meam domum veniat"; quod si factum esset, Caesaris futura erat cognitio, non patris.*

Seneca was the counselor of Emperor Nero (54-68 A.D.). He probably wrote *De Clementia*[16] after the murder on Britannicus, the son of Emperor Claudius in

12) Frier, Bruce, and McGinn, Thomas, *A casebook on Roman family law*, Oxford 2004, p. 193.

13) *Ab Urbe Condita*, édition Loeb, Cambridge, p. 271.

14) Volterra, Edoardo, 'Il. preteso tribunale domestico in diritto Romano', in: *Scritti Giuridici, II Famiglia e Successioni [Antiqua 58]*, Napoli 1991, p. 127-177. This article was earlier published in RISG. 85 (1948), p. 103-153.

15) Donadio, Nuzia, *Iudicium domesticum, riprovazione sociale e persecuzione pubblica di atti commessi da sottoposti alle 'patria potestas'*, in: Index, 40, Napoli 2012, p. 175-195.

16) About the *De Clementia* see: Mortureux, Bernard, 'Les idéaux stoïciens et les premières responsabilités politiques: le 'De Clementia', in: *Aufstieg und Niedergang der Römischen Welt*/Rise and Decline of the Roman World, Band 36.3, herausgegeben von/edited by Wolfgang Haase and Hildegard Temporini, New York 1989, 1639-1685,

55 A.D. This text is about Tarius who condemned his son after a legal interrogation. In this text, Tarius asks Augustus to appear in the *consilium*. He did so and the meeting took place near the judge, and in this way he was member of the family council. This text shows that a father couldn't accuse his son without a familycouncil. The *consilium* indicates perhaps a family court. The Italian scholar Pasquale Voci mentions in his article *patria potestas da Augusto a Diocleziano* the text of Seneca, and argues that the Emperor was also a *giudice domestico*, a family judge[17]. According to Voci, Seneca refers in this text to a *consilium domesticum* in which the Emperor himself participated. So we have some proof that in the dynasty of the Julian-Claudian house the *consilium domesticum* existed.

2. *Iudicium domesticum* in the *Corpus Iuris Civilis*?

Also in *Digest* 48,8,2 of the *Corpus Iuris Civilis*, we find an interesting text of the great lawyer Ulpian on *adulterium*. How can the words of this text be interpreted: '*Inauditum filium pater occidere non potest sed accusare eum apud praefectum praesidemve provinciae debet*'?

In this text we don't find the term *iudicium domesticum*. Yet this text is remarkable because a father can't kill his son without interrogation, but has to accuse him before the *praefectus* or the governor of the province.

Does the father have to interrogate his son before the family council? It is not clear from the text. Wolfgang Kunkel argues that there are some traces of a family council in this text. According to Kunkel, a father is not authorized to kill his son in case of *adulterium* without 'Gehör' which could be *iudicium domesticum*. The son has to have the opportunity to defend himself before a family council. According to Kunkel, the makers of the Digests might have deleted the words *sed cognoscere de eo cum amicis* before *accusare eum*[18]? We don't know, because the text doesn't mention it. Elemér Pólay mentions it in his article 'dass der Vater sein Kind ohne Anhörung des Familienrates nicht töten durfte'[19]. Pólay refers to Bonfante who mentions in his *Corso di diritto romano* that the text was altered in

17) Voci, p. 427.

18) Kunkel, p. 147.

19) Pólay, Elemér, 'Das 'Regimen Morum'des Zensors und die sogenannte Hausgerichtsbarkeit, dans: *Studi in onore di Volterra di Edoardo Volterra*, volume terzo, Milano 1971, 263-317, see page 293. [This article was also published in hungarian 'A censori regimen morum és az un. házi biráskodás', in: *Acta Universitatis Szegediensis de Attila József Nominatae. Acta juridica et politica*, 1965, t. 12, fasc. 4.

the postclassical period[20].

The question remains that if a father wants to interrogate his son in case of *adulterium*, does he need a *consilium* in that case? Is it possible to speak about a real interrogation without a *consilium*? We also have to determine the *iusta causa* for killing a son. A fragmentary late Roman commentary on Gaius (*Gaius Augustodunensis* 86) appears to indicate that a son could not be killed 'without just cause' (*sine iusta causa*), a rule ascribed to the Twelve Tables of 449 B.C.[21] A text in the Digests of Marcianus D. 48, 9, 5 confirms my hypothesis because in this text is written that a father cannot kill his son during hunting, even if the son has committed adultery with his stepmother.

According to the divine Emperor Hadrian, the father in this case was exiled because he killed his son as if he was a burglar and the father didn't kill him under the right conditions.

Unfortunately I couldn't find any literature on this text. In the articles by Hans Ankum *La sponsa adultera: problèmes concernant l'accusatio adulterii en droit romain classique*[22] *and La captiva adultera, problèmes concernant l'accusatio adulterii en droit romain classique*[23], Ankum doesn't mention the text of Ulpian although he does mention in his article the term *iudicium domesticum*. According to Ankum the wife and her lover, who were caught by the husband or the father, could be punished by *iudicium domesticum*. The father and the husband could even kill the wife and her lover immediately when they were caught at once in the house.

In the first century B.C. most marriages were *matrimonia sine manu* and the family relations were less tight. The repression of the family members was considered insufficient in this period[24]. Perhaps there is a reason for not mentioning these texts because the articles of Ankum concern the *Lex Iulia de adulteriis coercendis* of 18 B.C.. However the texte of Ulpian in *Digest* 48, 8, 2 concerns the *Lex Cornelia de sicariis et veneficiis* of 81 B.C. Perhaps this is the reason why Ankum doesn't give a solution for the interpretation of the text of

20) Bonfante, Pietro, *Corso di diritto roman, I: Diritto di famiglia*, Milano 1963, 111.

21) Frier, Bruce, and Thomas McGinn, Thomas, *A casebook on Roman family law*, Oxford 2004, p. 193. See also, Gaius Institutionum Augustodunensia [IV, 86]

22) Ankum, Hans, 'La sponsa adultera: Problèmes concernant l'accusatio adulterii en droit romain classique', in: *Estudios de Derecho Romano en honor d'Alvaro d' Ors*, I, Pamplona, 1987, 161-198.

23) Ankum, Hans, 'La captiva adultera. Problèmes concernant l'accusatio adulterii en droit romain classique', in: Rida, (1985), T. XXXII, p. 153-205.

24) Ankum, Hans, *La captiva adutera*, p. 154.

Ulpian, *Digest* 48, 8, 2. According to me Ankum follows the opinion of Kunkel because he uses the expression *iudicium domesticum* in case of adultery in the Roman republic. During the Roman republic under the rule of Sulla the *lex Cornelia de sicariis et veneficiis* gave the possibility of an interrogation by the father of his son with a consilium before bringing the plaint of *adulterium* before the censor. In the Roman republic the censor keep an eye on women and on the rest of the republic[25]. The *Lex Iulia de adulteriis coercendis* doesn't mention the possibility of an interrogation of a father of his son as in the text of Ulpian, *Digest* 48, 8, 2 (*Inauditum filium*) before bringing the plaint of *adulterium* before a public court (*publico iudicio*). In 18 B.C. Augustus promulgated the *Lex Iulia de adulteriis coercendis* in order to forbid sexual relationships exterior marriage. According to Ankum the *Lex Iulia de adulteriis coercendis* had a tendency of being moralistic. *Stuprum and adulterium* became *crimina publica* and *quaestiones perpetuae*. The purpose of the *quaestio de adulteriis* was created to give a judgement.

Ankum seems to give the impression of having the same opinion as Wolfgang Kunkel. Most Romanists use the term *iudicium domesticum* and give the impression *iudicium domesticum* has existed. Moreover we find this phenomenon in *L'Esprit des Lois* of Montesquieu. Montesquieu is referring to the Roman times and mentions the text of Dionysius of Halicarnassus and the text of Ulpian VI, paragraphs 9, 12 and 13. What can be the reason for Montesquieu to refer to these texts in a juridical work when the phenomenon has never existed? In the 18th century this phenomenon was even codified in the first law of the judiciary of 16-24 August 1790 and later in Napoleon's Civil Code.

3. The *tribunal de famille* in l'Esprit des Lois of Montesquieu

In *L'Esprit des Lois* of Montesquieu, book 7, chapitre X *Du tribunal domestique chez les Romains*, we can read about the *tribunal de famille* with its reference to Roman origin:

> *Du tribunal domestique chez les Romains. Les Romains n'avaient pas, comme les Grecs, des magistrats particuliers qui eussent inspection sur la conduite des femmes. Les censeurs n'avaient l'œil sur elles que comme sur le reste de la république. L'institution du tribunal domestique*[26] *suppléa la*

25) Montesquieu, *L'Esprit des lois*, livre 7, chapitre 10.

26) Romulus institua ce tribunal, comme le mentionne Denys d'Halicarnasse, liv. II, p. 96.

magistrature établie chez les Grecs.

Le mari assemblait les parents de la femme, et la jugeait devant eux[27]*. Ce tribunal maintenait les mœurs dans la république. Mais ces mêmes mœurs maintenaient ce tribunal. Il devait juger non seulement de la violation des lois, mais aussi de la violation des mœurs. Or, pour juger de la violation des mœurs, il faut en avoir.*

Les peines de ce tribunal devaient être arbitraires, et l'étaient en effet; car, tout ce qui regarde les mœurs, tout ce qui regarde les règles de la modestie, ne peut guère être compris sous un code de lois. Il est aisé de régler par des lois ce qu'on doit aux autres; il est difficile d'y comprendre tout ce que qu'on se doit à soi-même.

Le tribunal domestique regardait la conduite générale des femmes. Mais il y avait un crime qui, outre l'animadversion de ce tribunal, était encore soumis à une accusation publique; c'était l'adultère; soit que, dans une république, une si grande violation de mœurs intéressât le gouvernement; soit que le dérèglement de la femme pût faire soupçonner celui du mari; soit enfin que l'on craignît que les honnêtes gens mêmes n'aimassent mieux cacher le crime que le punir, l'ignorer que le venger.

Montesquieu was a 'culture humanist'. He had studied Roman law. In this period Roman law was very important. In a big part of France Roman law was 'le droit écrit'[28]. In la Brède Montesquieu had in his library the *Opera* of Cujacius and *l'Histoire du droit romain* of 1718 of Ferrière[29]. He had several other important law books as he was 'conseiller' and later president of the Parlement of Bordeaux. Montesquieu also studied the work of Giovanni Vincenzo Gravina, an italian lawyer (1664-1718). In 1699 Gravina became professor of Roman law in Rome and in 1703 in canon law. In 1713 he published in Naples *Originum iuris*

27) Il paraît par Denys d'Halicarnasse, livre II, que par l'institution de Romulus, le mari, dans les cas ordinaires, jugeait seul devant les parents de la femme; et que, dans les grands crimes, il la jugeait seul devant les parents de la femme; et que, dans les grands crimes, il la jugeait avec cinq d'entre eux. Aussi Ulpien, au titre VI, par. 9, 12 et 13, distingue-t-il, dans les jugements des moeurs, celles qu' il appelle graves, d'avec celles qui l'étaient moins: *mores graviores, mores leviores*. Montesquieu, *De l'Esprit des Lois*, tome I, Introduction par Robert Derathé, Garnier 1973, p. 115.

28) *Oeuvres complètes de Montesquieu, t. 11, Collectio juris*, Oxford 2005, p. XXXVIII. Volpilhac-Auger, Catherine, *Collectio juris, Dictionnaire électronique Montesquieu (http:// dictionnaire-montesquieu.ens-lyon*.

29) Cox, Iris, *Montesquieu and the history of French laws*, Oxford, 1983, p. 75.

civilis libri tres, (later translated from latin in *Esprit des loix romaines*, by Jean-Baptiste Requier, edited in Paris 1766). In this book Gravina mentions that in the Roman customs *adulterium* was severely punished. He also refers in his *Originum iuris civilis libri tres* to *adulterium* according to the laws of Romulus, the lex Cornelia and the lex Iulia. Perhaps the title of his book *Originum iuris civilis*, inspired Montesquieu to entitle his book *L'Esprit des lois*?

When we study carefully the text of Montesquieu on *le tribunal de famille chez les* Romain, we discover the Roman institute of *iudicium domesticum*. Montesquieu mentions in this text that the Romans unlike the Greeks, didn't have special magistrates who controlled the behavior of women. According to Montesquieu the censors watched them as they also did in the rest of the Roman Republic. According to Montesquieu the husband assembled the relatives of his wife in a case of adultery. The husband had to judge his wife along with the relatives. Montesquieu refers to the text of Dionysius of Halicarnassus and Ulpian when he mentions crimes such as adultery by women. According to Montesquieu the *tribunal domestique* maintained the customs in the Republic and these customs maintained the *tribunal domestique*. Montesquieu mentions in his text that the *tribunal domestique* was supervising the behavior of women. Can we speak here about an invented tradition because in the 16th and 17th century it was à la mode to refer to Antiquity? An example is *Calvin's commentary on Seneca's de Clementia*[30]. Moreover the Antiquities of Dionysius were translated in French by François Bellanger in 1723. He wrote in his préface (p. IX and XIV): *Plusieurs autres écrivains modernes qui ont examiné les Antiquités avec attention y reconnaissent beaucoup d'exactitude, de fidélité, de recherches, d'éloquence et d'amour pour la vérité. Personne, selon eux, n'a mieux connu ni mieux observé toutes les règles de l'histoire. Denys d'Halicarnasse est un des premiers maîtres dans l'art d'écrire. Il avait un génie sublime, une critique solide, un discernement exquis, une profonde érudition*[31].

In *l'Esprit des lois* of Montesquieu we also find the *tribunal de famille*. What's the reason for this Roman nostalgia? Vanessa Seraclens stresses the importance of Rome in the 18th century: 'Au XVIIIe siècle, Rome demeure 'l'horizon le plus familier de la culture française', et le spectacle romain n'a rien perdu de ses

30) *Calvin' s commentary on Seneca's de Clementia (1532)* with introduction, translation, and notes by Ford Lewis Battles and André Malan Hugo, published for the Renaissance society of America, Leiden, Brill, 1969.

31) See the introduction by Valérie Fromentin, livre 1, collection Budé 1998, p. IX.

attraits[32].

In her book, *Le XVIIIe siècle et l'Antiquité en France 1680-1789*, the historian Chantal Grell mentions the importance of antiquity. She consecrates a part of her studies to the extensive and profound acquaintance of antiquity and the important position of Rome in classical education[33]. Grell concludes that Roman history and Roman literature have an important place in the traditional humanist education. In the XVIII century students were educated in the sources of Roman law and literature. Latin and philology were mandatory in the education of the students.

Humanists, such as Montesquieu had a great admiration for the Roman republic. This is perhaps one of the reasons why Montesquieu mentions in his *L'Esprit des Lois* the Roman institution of the *tribunal de famille*.

4. The *tribunal de famille* in the French legislation

Some years after the *L'Esprit des Lois* of Montesquieu count Mirabeau mentions this Roman institute in the French Parliament. The 7th February 1790 the project of the *tribunal de famille* is discussed in the French Parliament and Mirabeau, depute of the 'Tièrs-Etat d'Aix en Provence[34], pleads with the words: *Hâtons nous, messieurs d'établir un tribunal de famille*[35].

Mirabeau was a victim of the *patria potestas* and he was incarcerated a few times by a *lettre de cachet*. In 1772 his father asked the French King 'par ordre du roi' to incarcerate his son. The same practice was used in the Netherlands[36].

32) De Senarclens, Vanessa, *Montesquieu historien de Rome, un tournant pour la réflexion sur le statut de l'histoire au XVIIIe siècle*, Bibliothèque des Lumières anciennement 'Travaux d'histoire éthico-politique', Vol. LXII, Genève 2003, p. 31.

33) Grell, Chantal, *Le XVIIIe siècle et l'Antiquité en France, 1680-1789, 2* vol., Oxford, Voltaire Foundation, 1995.

34) Mirabeau, *Discours*, édition établie, présentée et annotée par François Furet, Gallimard 1973, p. 415.

35) *Archives Parlementaires*, Paris 1884, t. 11, p. 488 séance du 7 février 1790.

36) In 1508 there was a student from Den Bosch, in Brabant, the 22- year- old Melchior, whose father has sent him to Wallonia to learn French. But Melchior preferred to gamble and frequent courtesans, so his father applied for and obtained from the Court of Brabant permission to have him confined to a monastery, where he was locked up. See: Sirks, Boudewijn, 'Prodigal Son', in: *The Journal of Legal History*, Vol. 25, no. 2, August 2004, p. 151-160. Another typical case in Holland described in *Observationes Tumultuariae Novae* in 1743 was that of a girl, Anna Divera, of patrician descent, who married Paulus Benelle, likewise from the highest circles, but could not keep matrimonial continence. He applied for a divorce. Even after the divorce her ex-husband locked her up in the special ward of the workhouse. There she met another dissolute, got pregnant and, after having been released when the divorce had gone through, she married him.

Mirabeau wrote about his imprisonment in his *Essai sur le despotisme*. The book was published in Holland in 1776.

In 1774 Mirabeau was again imprisoned by a *lettre de cachet* on the orders of his father. He was incarcerated at Château d'If. He was transferred in 1775 to 'Fort de Joux', near to Pontalier. Mirabeau managed to escape from 'Fort de Joux', where he spent his time half-free. He had an affair with Sophie de Ruffey, the young wife of the Marquis de Monnier, who was the ex-president of de 'Chambre des comptes de Dôle'. They escaped together to Holland. After having settled the dispute in court and with the old Marquis de Monnier, he could return to Provence. In 1789 Mirabeau was elected depute of the 'Tiers État d'Aix en Provence'. He became editor in Paris of *Le Courrier de Provence*.

During the first French Republic, the *tribunal de famille* appears as a legal phenomenon in the first law of the judicial organization of 16-24 August 1790[37]. Mirabeau introduced the *tribunal de famille* into the first French Law on the Judiciary of 16-24 August 1790 . Article 15 contains the following text:

> *Si un père, ou une mère, ou un aieul, ou un tuteur a des sujets de mécontentement très graves sur la conduite d'un enfant ou d'un pupille dont il ne puisse plus réprimer les écarts, il pourra porter sa plainte au tribunal domestique de la famille assemblée au nombre de huit parents les plus proches ou de six au moins, s'il n'est pas possible d'en réunir un plus grand nombre; et à défaut de parents il y sera supplée par des amis ou voisins.*
>
> *Article 16: Le tribunal de famille, après avoir vérifié les sujets de plainte pourra arrêter que l'enfant, s'il est âgé de moins de 21 ans accomplis, sera renfermé pendant un temps qui ne pourra excéder celui d'une année, dans les cas les plus graves.*

The *tribunal de famille* was a typical institution of the French Revolution because it was forbidden that the state could interfere in family matters.

Family members could perform their own justice without interference of the state or a judge. In gratitude to Mirabeau the *tribunaux de famille* was introduced in France. As Jean-Jacques Rousseau, Mirabeau had been victim of the patria potestas.

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37) *Archives Parlementaires*, Paris 1884, t. 18, p. 104-109, Loi du 16-24 août 1790 sur l'organisation judiciaire française, article 15 et 16.

In the *Ancien Regime*, the *patria* potestas was absolute: a father had the right to incarcerate his son when he behaved badly. The reaction on the *patria potestas* was the creation of a *tribunal de famille*. Mirabeau was one of the defenders to introduce the *tribunal de famille*. In 1792 another revolutionary law was accepted in Parliament, *la loi du 20-25 septembre 1792 sur le divorce*, and created *l'assemblée de famille*. The *Législative* introduced divorce in 1792[38]. The divorce law enabled husband and wife to ask for divorce before an *assemblée d'au moins six parents les plus proches, ou d'amis à défaut des parents*. The *assemblée de famille* could try to conciliate the spouses. If the spouses persisted in their intention the *tribunal de famille* had to pronounce the decision.

Conciliation which was used in divorces according to the French revolutionary law, which can be compared with mediation in a Japanese family court (chotei rikon), is still used in Japan in divorce cases. In France and the Netherlands the court doesn't mediate in divorces and there are no family courts anymore. In the French revolutionary period the family court pronounced the decision if the spouses persisted in their intention to divorce. Couples could divorce because of 'incompatibilité d'humeur'. Divorce with mutual consent was possible as it is also possible in Japan (kyogi rikon)[39] but also in case of requirement by one of the parties. In this case the causes of divorce were according to the French revolutionary law of 1792: mental illness, sentenced to a dishonorable punishment, maltreatment of the spouses, immoral behaviour, abandonment, emigration. In Japan, divorce is granted in case of divorce by civil decision if the civil court determines that there is a special ground for divorce. The grounds of divorce according to the Japanese civil code (art. 770 par. 1) are adultery, desertion, absence for over three years, incurable mental illness and other grave reasons for which continuation of marriage is deemed difficult[40]. Some of these grounds remind on the first French divorce law of 1792. Perhaps the grounds of divorce in the Japanese civil code are influenced by the French law as Japanese law has been influenced by various foreign legal systems such as the Roman law system[41].

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38) Duvergier Jean-Baptiste, *Collection complète des lois, décrets, ordonnances, réglements, avis du Conseil d' Etat 1788 à 1883*, Paris 1825, T. 4, p. 478.

39) De Cruz, Peter, *Family law, sex and society, a comparative study of family law*, London/New York 201, p. 228.

40) Shimazu, Ichiro, *Procedural aspects of marriage dissolution in Japan*, in: The Resolution of Family Conflict, ed. by J.M. Eekelaar and S.N. Katz, Toronto, 1984, p. 116-123.

41) De Cruz, Peter, *Family law, sex and society, a comparative study of family law*, London/New York 201, p. 223.

The first French law on divorce had a great impact in France. In Paris there were more registration of divorces than marriages! The first divorce law had a broad variety of causes of divorce and that was the reason that people could easily divorce. There were no high costs to get a divorce because the divorces cases were handled by the family court. The interference of the family members was not succesful because they were not totally independent and couldn't reach easily a settlement between the spouses. In fact it was only a formality to appear before the family court[42]. In 1796, the *tribunal de famille* was already abolished. In the *Courrier de Provence*, we read a letter of Mirabeau: *En copiant les institutions des peuples anciens, on ne calcule pas assez les différences qui existent entre eux et nous, soit pour les habitudes, soit pour les circonstances politique et morales*[43].

In the period of the French revolution the *Convention* replaced the era of Christianity by the era of the revolution. The period of the French revolution resembled the era of the Roman republic with the Roman family courts (*iudicium domesticum*). There was a 'nostalgia' for the Roman republic and a revolutionary calendar was introduced as well as Roman numerals. The French *tribunal de famille* didn't last long and not all the competences were maintained. The Decree of 28 February 1796, *loi du 9 ventôse an IV*, abolished arbitration of the *tribunaux de famille*. In 1796 the *tribunaux de famille* could only judge correctional matters, *le droit de correction*, and divorces by mutual consent or *incompatibilité d'humeur ou de caractère*.

In the French Civil Code of 1804 we see in art 468 traces of the family court of the first law on the judiciary of 1790[44]: *Un tuteur qui a des sujets de mécontentement graves sur la conduite du mineur, peut porter sa plainte auprès du conseil de famille et avec autorisation de ce dernier, il peut provoquer la réclusion du mineur convoqué. Article 407 of the French Civil Code of 1804*

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42) After the French Revolution we see a complete different reaction on family life in the new reform bill of Jacqueminot (1799): family as such was restorded and divorces were to be diminished, there was a strong tendency towards the *patria potestas*. In the French civil code we find again the *patria potestas* of the father.

43) *Le Courrier de Provence*, no. CLXXIII, t. 9, Paris 1791, p. 437.

44) Code civil français 1804, art. 407 & 468

Art. 407. Le conseil de famille sera composé, non compris le juge de paix, de six parents ou alliés pris, tant dans la commune ou la tutelle sera ouverte, que dans la distance de deux myriamètre, moitié du coté paternel, moitié du coté maternel. Art. 468. Un tuteur qui a des sujets de mécontentement graves sur la conduite du mineur, peut porter sa plainte auprès du conseil de famille et avec autorisation de ce dernier, il peut provoquer la réclusion du mineur convoquer.

mentions the composition of the family council: Le conseil de famille sera composé, non compris le juge de paix, de six parents ou alliés pris, tant dans la commune ou la tutelle sera ouverte, que dans la distance de deux myriamètre, moitié du coté paternel, moitié du coté maternel.

5. Concluding remarks and Epilogue

The family court had its origin in ancient Rome. Dionysisus of Halicarnassus mentions the laws of Romulus concerning adultery. In *Collatio* 4,8,1 there is a reference to the *lex regia* concerning adultery. It is possible that *iudicium domesticum* was never constituted in a law in antiquity but that it only appeared in customs as it did in ancient Rome or other places influenced by the Romans.

Titus Livius doesn't mention *iudicium domesticum* during the Roman kingdom but he mentions it in the Roman republic. In the Roman Empire *iudicium domesticum* was not in existence anymore. In Roman classical literature we see different opinions on the existence of *iudicium domesticum*. Different Romanists wrote on *iudicium domesticum*, the family court of the Romans. According not just to Kunkel but also De Fresquet, and Pólay the Roman family courts limited the power of the head of the family (*pater familias*)[45]. Only Volterra has a different opinion. According to him the Roman family court never existed as a legal phenomenon. Wolfgang Kunkel and Pólay try in their articles 'Das Konsilium im Hausgericht' and 'Das regimen morum des Zensors und die sogenannte Hausgerichtsbarkeit' to prove the existence of the Roman family court.

In *L'Esprit des Lois* of Montesquieu we find the renaissance of the Roman family court as well as in the *cahiers des doléances*. In the Roman republic customs and habits of people created the family court. The family court was not based on a legal document. The same development we see in the first French Republic. The *cahiers de doléances*, written by the French people, in which different habits and customs of villages were collected, we find a plea to install the family court. It is finally due to Mirabeau, who introduces the family court into the first French law of the judiciary of 16-24 August 1790. In the first French republic there was a great admiration for the Roman republic. The Consul was installed during this period as the executive power. The same executive power was used in the Roman Republic.

Finally in 1804 the 'family court' was introduced in the French Civil Code of

45) De Fresquet, R, 'Le tribunal de famille chez les Romains', in: *Revue Historique* du droit français et étranger, I, 1855, p. 125-147. Mommsen, Theodor, *Römisches Strafrecht*, 'Die Hauszucht', p. 25-26.

Napoleon. Napoleon Bonaparte had a great admiration for the Roman Empire. The *tribunal de famille* was replaced by a *conseil de famille*.

The *conseil de famille* was in practice in France until 1958 and in Belgium until 2001. In the Netherlands the *conseil de famille* was maintained until 1838[46].

By abolishing the *conseil de famille*, the Roman influence has disappeared in the French legislation and also in the Dutch.

In the Netherlands specialized family courts don't exist but there is discussion to create specialized family courts. I visited different family courts in the world such as in Seoul, Tokyo, New York, and Istanbul which are good examples how family courts could be established in the Netherlands. The family court[47] in Seoul was founded by the first female lawyer Mrs. Lee Tai -Young[48]. In Seoul I met her daughter, Dr. Chyung Misook, who told me about the foundation of the family court in Korea on October 1, 1963, her mother's contribution but also of her father, Dr. Chyung Il-Hyung. He was a Member of Parliament and campaigned with his wife for the foundation of the family court and the Korea Legal Aid Center for Family Relations[49]. In Seoul the family court is very well organized. There is a special parental educational plan for couples who want to divorce. In this way couples who want to divorce get the right information about divorce, the advantages and the disadvantages of divorcing and how to deal with their children after divorce. In the family court there are also special mediation rooms, where the judge can talk to the parents. In the family court there is a daycare for baby's and there is also a special room with a playground and toys for children. In this room the parent who is not in charge with the daily care of the children can spend some time with his or her children. In this way the parent can see his or her children in

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46) Von Bóné, Emese, *De familieraad in Nederland 1811-1838*, Ph.D. thesis, Rotterdam 1992.

47) Song Sang-Hyun, 'Family Court in Korea', in: *Nakamura, Family Law Litigation*, the comparative civil law institute, Waseda University, Japan 1984, p. 205-215.

48) Reid Strawn, Sonia, *Where there is no path, Lee Tai Young, her story*, Korea Legal Aid Center for Family relations, Seoul, Korea 1988. See also Finkelstein, David, *Korea's 'Quiet" Revolutionary, a profile of Lee Tai-Young*, www.rmaf.org.ph

49) Korea Legal Aid Center for Family Relations, One Hundred Women's building, 11-13 Yoido-Deong, Young Deung Po-Ku, Seoul, Korea was founded in 1956. In 1976 the Center moved into its new 6-story brick building on Yoi island in Seoul. The One Hundred Women's building was made possible through substantial contributions of two groups of one hundrred Korean women in Korea and overseas, joined to the gifts of many other women. The building was completed in 1977 and dedicated to the One Hundred Women. See Lee Tai-Young, *What can I do?*, translated by Soun-Sook Chyung, Korea Legal Aid Center for Family Relations, Seoul 1981.

case the other parent doesn't allow it. In such difficult cases the court can order to bring the child to the family court. Also in Tokyo, where the family court was founded in 1949, I visited the family court. In Tokyo the family court doesn't provide a parental educational plan for the couples who want to divorce. The good thing of the family court in Seoul and Tokyo but also in New York and Istanbul is that the court is not only equipped with specialized family judges but also with psychologists and other social workers. Not only divorces are handled in the family courts but also the juvenile delinquency cases. A mediation system is employed by the family courts and it is obligatory to go through the conciliation procedure in the family court.

It would be good to create family courts in the Netherlands as the divorce rate is very high. Children are involved and can suffer because of the divorce of their parents. In the Netherlands one in every two marriages breaks down. We have a very modern family law in the Netherlands, a man and a woman can divorce very easily. Adultery is not the reason for a divorce and there is no punishment in case of adultery as there is in Korea[50] and Japan. The only ground for divorce according to the Dutch civil code is that the marriage irretrievably has broken down (art. 154). After divorce both parents keep parental authority so mothers and fathers have equal rights. Before 1998 in most cases the mother had guardianship over her children and the father was only co-guardian. Fathers complained about their restricted role in the education of their children. That is why in 1998 the Bill of parental authority after divorce was accepted. In the Netherlands also homosexuals can marry and adopt children[51]. In the civil code of the Netherlands there is no difference between marriage and registered partnership. In this perspective the Dutch family law is one of the most modern codifications in the world. Comparing the very modern Dutch family law to the still existing '*jong-joong*' organization in Korea it seems that Korean family law is still very traditional and patriarchal although changes have been made like abolishing the 'Hoju' system[52]. The '*jong-joong*' organization, which is governed by customary

50) Kwon, Youngjoon, 'Bridging the gap between Korean substance and Western form', in: *Law and Legal Institutions of Asia, traditions, adaptions and innovations*, ed. by E. Ann Black and Gary F. Bell, Cambridge University Press, Chapter 5, 2011, p. 159.

51) Von Bóné, Emese, 'Une comparaison de l'adoption dans le code civil français et le code civil néerlandais', in: *Les démarches de codification du moyen-âge à nos jours*, éd. Georges Marcours et Renée Martinage, Iuris Scripta Historica XXI, Brussel 2006, p. 199-212.

52) See about *Hoju* (the Master of Family) the article of Jinsu, Yune, 'Tradition and the Constitution in the context of the Korean Family law', in: *Journal of Korean Law*, vol. 1, no. 1, 2005, p. 194-212.

law, still exists and resembles the Roman family law tradition with the 'paterfamilias'. In the '*jong-joong*'[53] organization woman were not allowed until the Supreme Court of Korea recently declared that married females are entitled to equal membership and property rights associated with 'jong-joong'. Such a tradition we had also in the Netherlands where until 1956 the husband was head of the family[54]. In 1956 woman became independent from the authority of their husbands[55]. One might think Holland is a modern country but in this aspect the development for the independency of women came late into existence in the Netherlands, later than in Japan[56] but earlier than in Korea[57].

53) Kwon Youngjoon, 'Bridging the gap between Korean substance and Western form', in: *Law and Legal Institutions* in Asia, Oxford University Press, Chapter 5, 2010, p. 161.

54) von Bóné, Emese, 'De receptiegeschiedenis van de *patria potestas*, en de maritale macht in het Nederlands Burgerlijk Wetboek van 1838', in: *Libellus ad Thomasium, Essays in Roman law, Roman- Dutch law and Legal history in Honour of Philip J. Thomas*, Fundamina, Editio Specialis 2010, p. 539-550.

55) *Handelingen der Staten-Generaal 1948-1950, 1430, 1-2* (Lex Oven).

56) De Cruz, Peter, *Family law, sex and society, a comparative study of family law*, London/New York 201, p. 226. The revised Japanese civil code of 1947 abolished the wife's legal incapacity so that she had equal rights with her husband to hold assets and manage them.

57) Lee, Mijeong, *Women's education, work and marriage in Korea, Women's lives under institutional conflicts*, Seoul National University Press, 1998, p, 28.