Historical development of the minor's custody in the Roman Law

PhD (C.) Entela Filo

Abstract

The children, as the most fragile category in the society, have always been in need of special care and protection, which is usually exercised by parents, who take care of their well-being and development.
But at all times, there have been numerous cases of minors who, for various reasons, were left out of parents' custody and could not therefore provide the necessary protection of their rights and interests.
Under these conditions, the need of the Minors' Custody Institute was created as a form of society's response to the protection of this category of subjects, an institute that, for its own legal and social significance, has been treated since the early stages of human society's development, by evolving in its most perfect form to nowadays.

Keywords: History, Roman Law, Minor, Custody.

Historical development of custody on minors in the Roman Law

According to the Roman Law, the custody institute, developed under the designation of the tutoring institute, included two subdivisions: tutorship and guardianship.
Historical data show that tutorship and guardianship were institutes that carried out the protection of the property interests of the subjects that were under the authority of the tutor or guardian (as their legal representative), in legal relations of property character. Legal rules on tutorship and guardianship under Roman law do not enter into family law matters. These institutes belonged to the personal right, *ius personarum*, which in itself included all the Roman law institutes that influenced the legal status of persons inside and outside the family (Olldashi, 73).
They are legal institutions, closely related to the issues of person's ability to act. While in the Roman family the power of *paterfamilia* was eternal, there was no problem of ability to act for other persons (Mandro, 1998, 135).
The problem of the ability to act, was created only in those persons who did not live under the power of the head of the family, who were known the status *sui iuris*, but that were in such circumstances that they could not reasonably use the known rights. These needs also arise for people who could not exercise the ability to act because of the age and gender, as well as those who could not exercise the ability to act because of their personal inadequacies.
Thus, some law subjects who, while free and *sui iuris*, needed legal protection, while they were possessors of a certain property, which they could not manage by themselves (Ivo, 1989, 190).
A summary of the rules regulating the legal relations on the exercising or fulfillment of the impossibility of acting of persons, led to the creation of a tutorship and guardianship institute.

According to the definition given by Gaius on the tutorship institute, it can be interpreted as following: "Tutorship was the institute with which it was filled the lack of ability to act for that category for persons who, due to their age or sex, were unable to show out personally in the legal communication".
So, the tutorship, was the potentiality and the power on a free subject, for the purpose of its protection and representation in the legal communication, because of the inability to be represented himself.
The Roman juridical order provided the non-imposition or the restriction of the ability to act, for free citizens, or for a part of *sui iuris* persons, because of the lack of their fulfillment of the constitutive conditions and criteria, established in the law.
The persons who were in such circumstances were (Olldashi, 74-75):
-*Impuberis*, those who, because of the age, did not have the ability to act. There were considered as such, the minors *(infantes)* and the women who, although they might have reached their puberty age (12 years), were still considered *impuberis*.
-*Furiosi* and *mentecapi*, were those persons who, because of a mental illness or a psychological deficiency, were considered as unconsciously.
-*Prodighi*, were classified those who were considered immoral for various legal reasons, as e.g. embezzlement of family property.
-*Minores*, were considered all those people who did not reach the age of 25, which was considered as the major age beyond which there were no restrictions for performing legal actions.
Because of their inadequate legal status to be directly subjects of legal relationship with property character, it was necessary that the legal entity, attributed to a third the right to be substituted or represented through its status and actions. The legal representative was obliged to act on behalf of these persons with the aim of the protection of the economic interests in the legal relations, in which they would appear as a party.
According to the legal regulation of the Roman Law, the tutorship on minors, the way of setting or appointing tutors on minors, was created in several ways (Olldashi, 74-75): Testamentary Tutorship, Legal Tutorship, Dativa Tutorship, In-Trust Tutorship.
The Testamentary Tutorship was decided when the *paterfamilias* defined in the testament the tutor of the *impubere* person until he reached his seniority age. When the testament was declared invalid, there emerged the need to determine the tutor from the magistrate. By testament, the testamentary tutor, could be assigned either by the mother, by the relatives or even by a foreigner, when confirmation from the magistrate was given. In the Justinian period, another type of testamentary tutorship was defined, the case of defining a tutor from the biological father (when he was not *patria potestas* on the minor) if he had foreseen in the testament a wealth benefit in his favor.
While Legal Tutorship in the absence of a testamentary tutorship, could be exercised by family relatives who were non-family heirs of *paterfamilias* after his death.
Legal Tutorship was the oldest form of tutorship. In the case of the legal tutor, an interesting fact was that he could pass the tutelage to another person, even though he continued to be considered the real owner, because if the new tutor died or became invalid, the tutorship would return again to the first. If the latter died, the tutorship

was passed to the one who succeeded him in heritage, and the tutor to whom it was left the tutorship would lose that. The legal tutor could not give up from tutorship. At the end, against him, a lawsuit could be filed for twice the amount of damage he has brought to his *pupil* property. By *Lex Claudia* it was decided that among the relatives, the first tutorship was won by the mother (Mandro, 1998, 137).

In the absence of the testamentary tutorship and the legal one, it is decided the Dativa Tutorship upon the decision of the competent authorities. As authorized authorities there were considered *pretors*, *tribunes*, and in their provinces their leaders. Justinian delegate the right to appoint a tutor to the *urban pretor* and from that time the tutorship was called a public institute which could not be refused without justified reasons.

While In-Trust Tutorship it was considered the one, that under the purpose to emancipate the *filifamilias impubere* or *filifamilias mancipated*, became a tutor *ipso iure* (Ivo, 1989, 200).

According to the Roman Law, women, even after reaching the age of puberty, continued to be under tutorship (unlike men who after having reached the age of puberty, ceased to be under tutorship), even though in the position of *sui iuris* persons. This kind of tutorship corresponded to the primitive character of family arrangements. The woman, exempted from the power in the family, in the patriarchal regime was always subject to *potestas*, *manus*, or tutorship.

Classical jurists in Roman Law distinguished several ways of tutorship appointing, such as testamentary tutors, legal tutors, tutors appointed by magistrates, or in-trust tutors (as in the case of minors). But, besides these methods of tutorship appointing, there existed also a special kind of tutor, the *optivus* tutor, who was elected by the woman herself who was under the *manus* of the consort who knew the right of appointing a tutor (Olldashi, 76).

The woman had the right to choose a tutor and to change it whenever she wanted.

As the tutorial on women lasted throughout their lives (Mandro, 2006, 217), the right of the tutor replacement was recognized, for reasons that were presented by the tutor himself or the woman herself. In the case of tutor's change (legal tutor), the transfer of this right was required to another tutor, by means of a solemn act performed before the magistrate. If the new tutor died or was in the state of loss of his or her liberty and legal capacity, the tutorship was passed on to another tutor and if he had the ability to be a tutor again, the tutorship would fall on that person foreseen by the list of legal tutors. The absence of the tutor gave the woman the right to ask the magistrate to appoint a new tutor, who replaced the previous tutor. In case a court hearing between a tutor and a pupil started, the city praetor appointed another temporary tutor, called the *praetoris* tutor, to perform the tutor's function until the trial was completed (Olldashi, 77).

The tutorship institute on women in the classical period, as it did not respond to the social-legal conditions, as it was noticed that the legal tutors prevented that the wealth of the *pupil* may pass to non-family members, by refusing to use their authority in legal relations to third parties, it was considered necessary to change. In this way, women gained some rights, mainly in the field of private law in the II-III century, to run out independent, but in some special cases the authority of the tutor was necessary.

If the tutor unjustly refused to give the authorization, the woman under tutorship could ask the praetor to force him. An important factor influencing in the dissolution of the tutorship on women, was the possibility of the woman *pubere* to choose a tutor herself.

The rights and duties of the tutor consisted in the protection of the interests of the person under tutorship. His main task was to protect the *pupil*. Because of the performance of this task, there were also recognized to him some rights on the property and on the *pupil* himself. The tutor's rights in exercising this duty depended on the age of the *pupil*. At the time of Emperor Justinian, for the persons under the age of 7, the tutor enjoyed a full administration power, while in the case of tutorship on women, who were considered as persons with limited abilities to act, the tutorship was placed only to fill this inability.

Meanwhile, the minor over the age of 7, could perform valid actions, which resulted in the acquisition of rights, but in no case could he take any action that could aggravate his condition, or from which obligations arise on his own account (Olldashi, 78).

The tutor administered all the benefits, the titular of which was the (minor) person under tutelage. His duties consisted in running the affairs of the person under tutorship and assistance in the actions of the minors through the presentation of his authority. The first consists in running the *pupil*'s work performed by the tutor on his own behalf and includes the administration of his property. Since the owner is the *pupil*, the tutor was its possessor. The job guidance is noticed more in the case of minors under the age of 7, who lack the ability to act. If there are many tutors of a single *pupil*, the guidance may be divided between them or it can be entrusted to one of them for the execution of deadlines. All tutors are solicitously responsible for administration the *pupil*'s property (Mandro, 1998, 141).

At the same time, as mentioned above, the tutor performed also complementary actions to give effect to the act committed by the minor himself over the age of seven years. Through his authority, the tutor became judicially legal provided the *pupil*'s action.

The Roman Law provided legal remedies for the protection of the interests of the minor in case of misuse of the tutor's duties with regard to the administration of his property. As such we can mention the lawsuit that any person might arise if he suspected on the tutor's activity, as well as the claim that the minor had the right to raise himself, after interruption of the tutorship when he doubted on the accounts for administration of his property (Melo, 2005, 8).

The Roman law also provided cases of extinction or termination of custody which were: the death of the *pupil*, the passage of the *pupil* from the status of the minor to the status of the adult, the natural death or the *capitis deminutio* state of the tutor (Olldashi, 82), the verification of an exclusionary circumstance for the tutor, such as the use of the *pupil's* wealth in his favor. When the tutorship was canceled for any personal cause of the tutor, a new tutor had to be appointed.

While the above cases were briefly dealt with cases of guardianship, the guardianship institution, on the other hand, was placed on those persons who were limited to being able to act because of personal (psychological, physical or moral) shortcomings or that had been removed with a special judicial decision, while tutorship was exercised

over those persons who had never before been able to act.
The custody was first placed on persons who did not have the capacity to act because of mental and physical illness. The mentally ill persons, were considered to have limited ability to act and if they did not have a guardian, they were placed under the care of their relatives.
A distinction had to be made between the foolish, who at times had a moment of openness, and those with complete mental disabilities, who did not have a caste of sobriety at all.
Justinian decided that the guardianship during the period of mental reticence would be suspended and reset *ipso iure* at the first moment that the disease would appear again (Olldashi, 82). The duty of the guardian for these persons was exercised by their relatives or by the authorized person with the decision of the competent state authorities.
The custodian's obligations were wider than the tutor ones, since, besides the administration of the wealth, they should also take care of the medical part (regarding the expenses). The custodian's functions to administer the wealth of mentally ill persons were created through *negatorium gestio* agreement,[1] and against this action it could be a presented a sue of *action negotiorum gestio.*
Unlike what was suggested by the tutorship institute, the *paterfamilias* right was not recognized in the guardianship institute, to prescribe in the will the guardian for the mentally ill person, but in practice, the magistrate always designated as the guardian, the person who was previously favored by the *paterfamilias* (Talamanca, 162).
Refusal from the legal guardians not to reinstate the functions was condemned by the loss of property rights and this right was known to him who voluntarily admitted being a guardian.
Regarding the rights and duties, the guardian of the mentally ill person had the right to freely administer all the property of the person under guardianship. This right of the guardians was subject to almost all the limitations that were in power as the minors' property was administered.
When the arrangements under the guardianship were related at the time the person showed signs of calmness, the guardianship authority should not be required. The custody ended with the full recovery of the psychic patient, who regained the ability to act.
Meanwhile, besides the mentally handicapped persons, the guardianship was placed even on the persons with physical disabilities. In the case of the latter, the guardian was appointed only for those actions related to their own defect and as such, could not be carried out by themselves.
The other category of persons on whom custody was placed were the plunderers. As such there were considered, the persons *sui iuris,* that had lost or had been restricted the ability to act through an act preventing the person from administering his property because of their immoral actions. In classical law, this act was fulfilled by a decree of the praetor, which prohibited the plundering person from administering his property and carrying out actions of economic and trade character. The plunder

[1] Negatorium gestio-one of the most important quasi-contracts that consisted in performing/management of someone's affairs without the consent or consensus of the latter.

was considered to be the one who misused his property, to the detriment of the future of his heirs. It could not be considered as such, the one who would be a testamentary heir, assuming that, since he knew that the *paterfamilias* knew him as an heir, and would consider him as capable to properly administering his wealth (Olldashi, 85).
The right to appoint a guardian to this category of persons was known to the *paterfamilias*, but always upon the confirmation of the praetor. The plunderer was not considered completely unable to act. He could freely take actions to improve his financial conditions, such as accepting gifts, but in no case could he take actions to aggravate it.
As in the case of guardianship on the mentally ill person, the custody of the plunderer became a contractual relationship *negatorium gestio,* and against the actions of the guardian it could be raised a sue of *actio negatorium gestio*. Custody ended with the death of the person under guardianship or when the latter regained the ability to act by a Praetorian decree, which annulled the previous decree that had removed the person's ability to act.
In Roman law, some types of temporary guardianship were recognized for certain cases such as guardianship on unborn children, guardianship of the various masses of wealth for which the owners could not care, the wealth of prisoners of war, the wealth of missing persons or persons with unknown residence or the guardianship over persons who, due to physical and psychological defects, were not able, in specific cases, to defend their interests, as well as the custody of minors in case of conflict with the interests of tutors and guardians (Olldashi, 85).
Until the second century BC, Roman masculine citizens *sui iuris* and *pubere* had full capacity to act, while female citizens *sui iuris* and *pubere* were under permanent guardianship.
During this period, it was decided that against persons who knowingly had committed harmful acts or benefited assets from minors up to 25 years old, profiting from their ignorance, could be raised special lawsuits, by which the minor under 25 years old, within one year from the occurrence of the legal action, might oppose the harmful acts and might request the return to the previous state due to age. In this way, if a major person over 25 years contracted with a minor under the age of 25, only the first was obliged to comply with the obligation, while the minor could cancel the contract or seek reinstatement through *restuitio in integrum*.[2]
Under these conditions, these legal remedies on the one hand favored the minors and on the other hand hindered all adult persons from entering in legal relationship with the firsts because of the uncertainty that existed. To avoid this disagreeable situation for both parties, it was foreseen that the minors would be assisted during legal relationship by their legal representative. The assisted person would play the role of the appointed guardian case by case for every action. Minors under the age of 25 may choose their own guardian, but they should always receive the magistrate's confirmation. In the absence of a free choice, the magistrate automatically appointed the guardian. Minors under guardianship could undertake valuable legal actions, but

[2] Restituito in integrum - a praetorian legal mean used in certain circumstances, for example, when the presence of violence, force, deception, sometimes affected or threatened a bond relationship. When the praetor found that such circumstances were present, he provided a solution that extinguished the effects of this impact on the performance of the bond relationship.

the appearance of their will should be guaranteed by the consensus of the guardian.
For all the above-mentioned, it can be said that the Roman law deals with a special treatment of the various tutelage cases, foreseeing two special institutes that aimed in protection of the interests of free persons and out of the power of the *paterfamilias* and that were not able to protect themselves, by distinguishing between them only with regard to the subjects they advocated. However, considering the content of these two institutes, we can say that there was no substantial difference between them, except for the fact that while tutoring always required the *pupil's* existence, the guardianship could also be placed on an estate without a titular subject.
For these reasons, the two institutes on passage of time, especially in the Justinian period, became dim and both were counted in a single institute, that of guardianship.
The importance of studying the institutes under Roman law lies in the role played by the latter as a basis for contemporary legal systems of continental Europe.
The study of its concepts, institutes and principles is the study of the path to the perfection of the law.
Even the norms of the institute of custody on minors under this right continue to constitute the basic concepts and have found their coverage today, naturally in a more advanced form, in the modern legislation of different European countries.

References

• Dr. Enkeleda Olldashi "The Roman Law".
• Dr. Arta Mandro "The Roman Law", Tirana 1998.
• Puhan Ivo "The Roman Law", Gjilan 1989.
• Ilda Melo - Doctorate Program "Guardianship for the Minors", Tirana 2010.
• Mario Talamanca "Institutions of Roman Law" Dott. A. Giuffre Editore, Milan.