

# MATER FAMILIAS

## SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

A CURA DI

**ZUZANNA BENINCASA  
JAKUB URBANIK**

CON LA COLLABORAZIONE DI

**PIOTR NICZYPORUK  
MARIA NOWAK**

VARSAVIA 2016



# **MATER FAMILIAS**

## **SCRITTI ROMANISTICI PER MARIA ZABŁOCKA**

A CURA DI

**ZUZANNA BENINCASA  
JAKUB URBANIK**

CON LA COLLABORAZIONE DI

**PIOTR NICZYPORUK  
MARIA NOWAK**

VARSAVIA 2016

*Supplements to The Journal of Juristic Papyrology* are jointly published by the Faculty of Law and Administration of the University of Warsaw, the Institute of Archaeology of the University of Warsaw, and Fundacja im. Rafała Taubenschlaga, Krakowskie Przedmieście 26/28, 00-927 Warszawa 64 tel. (+48 22) 55 22 815 and (+48 22) 55 20 384, fax: (+48 22) 55 24 319 e-mails: g.ochala@uw.edu.pl, t.derda@uw.edu.pl, kuba@adm.uw.edu.pl web-page: <<http://www.taubenschlagfoundation.pl>>

Cover design by Maryna Wiśniewska  
Computer design and DTP by Jakub Urbanik

© for the book by Zuzanna Benincasa & Jakub Urbanik  
and Fundacja im. Rafała Taubenschlaga

© for the constituting papers by the Authors

Warszawa 2016

ISBN 978-83-938425-9-9

Wydanie I.  
Druk i oprawa: Sowa Sp. z o.o., Piaseczno



*Mater Familias*  
*Scritti per Maria Zabłocka*

**INDICE**

Zuzanna BENINCASA & Jakub URBANIK	
<i>Prefazione</i> .....	XIII
<i>Elenco delle opere di Maria Zabłocka</i> .....	XXIII
José Luis ALONSO	
<i>The Emperor, the ex-prostitute, and the adulteress.</i>	
<i>Suet. Cal. 40 revisited</i> .....	3
Krzysztof AMIELAŃCZYK	
<i>In search for the origins of the Roman public law offences (crimina)</i>	
<i>in the Archaic period</i> .....	23
Zuzanna BENINCASA	
<i>Alcune riflessioni sulla libertà di caccia nel diritto romano.</i>	
<i>vivai e riserve di caccia</i> .....	39
Witold BORYSIK	
<i>Roman principle</i>	
<i>Nemo pro parte testatus pro parte intestatus decedere potest</i>	
<i>and the reasons of its modern rejection</i> .....	63
Luigi CAPOGROSSI COLOGNESI	
<i>Un ordinamento giuridico e le sue trasformazioni</i> .....	85
Cosimo CASCIONE	
<i>Celso lettore di San Paolo?</i>	
<i>Una nota minima in tema di interpretazione</i> .....	101

Alessandro CORBINO	
<i>Personae in causa mancipii</i> .....	107
Božena Anna CZECH-JEZIERSKA	
<i>Roman law in Polish People's Republic: Stages of transformation</i> .....	119
Tomasz DERDA & Maria NOWAK	
<i>Will of [---]is daughter of Pachois from Oxyrhynchos.</i>	
<i>P. Oxy. II 379 descr.</i> .....	135
Marzena DYJAKOWSKA	
<i>Verba impia et maledicta.</i>	
<i>The influence of Roman law upon the western European doctrine</i>	
<i>of verbal insult of the ruler in the 16–17th centuries</i> .....	145
András FÖLDI	
<i>Appunti sugli elementi romanistici nel nuovo Codice civile ungherese</i> ..	161
Ewa GAJDA	
<i>Elements of theology in Roman law.</i>	
<i>On Zenon's Henoticon and Justinian's letter (Cf. I.I.8)</i> .....	191
Luigi GAROFALO	
<i>Roma e i suoi giuristi nel pensiero di Nicolás Gómez Dávila</i> .....	207
Tomasz GIARO	
<i>L'expérience de l'absurde chez les juristes romains</i> .....	243
Sławomir GODEK	
<i>Ignacy Daniłowicz on the impact of Roman law</i>	
<i>on the law of the pre-partition Commonwealth</i>	
<i>in the light of his letters to Joachim Lelewel</i> .....	269
Ireneusz JAKUBOWSKI	
<i>Some remarks about Roman law</i>	
<i>in Tadeusz Czacki's opus magnum</i> .....	285
Maciej JOŃCA	
<i>Per aspera ad astra.</i>	
<i>Johann Bayer, römisches Recht</i>	
<i>und das Ausbildungsprogramm der jungen Radziwiłłs</i> .....	295

Aldona Rita JUREWICZ	
<i>TPSulp. 48 und actio quod iussu.</i>	
<i>Konnte Prudens adjektivisch belangt werden?</i> . . . . .	307
Agnieszka KACPRZAK	
<i>Obbligo del lutto e il controllo sociale sulla sessualità di vedove</i> . . . . .	323
Leszek KAZANA	
<i>Il delitto Matteotti: qualche dubbio sul colpevole</i> . . . . .	351
Piotr KOŁODKO	
<i>Some comments on the role of the quaestor as a prosecutor</i>	
<i>in criminal proceedings in the times of the Roman Republic</i> . . . . .	375
Przemysław KUBIAK	
<i>Between emotions and rationality</i>	
<i>Remorse as mitigating circumstance in Roman military law</i> . . . . .	397
Sławomir KURSA	
<i>Capacity of women to make testamentum parentis inter liberos</i> . . . . .	415
Marek KURYŁOWICZ	
<i>Ancarenus Nothus und Gaius von Hierapolis</i>	
<i>Miscellanea epigraphica: CIL VI 7193a &amp; IGR IV 743</i> . . . . .	425
Luigi LABRUNA	
<i>«Necessaria quanto la giustizia ...»</i>	
<i>Etica e tradizione dell'avvocatura</i> . . . . .	445
Paola LAMBRINI	
<i>Ipotesi in tema di rescissione per lesione enorme</i> . . . . .	453
Elżbieta LOSKA	
<i>Testamenti factio passiva of actresses in ancient Rome</i> . . . . .	465
Adam ŁUKASZEWICZ	
<i>Remarks on Mars Ultor, Augustus, and Egypt</i> . . . . .	487
Rafał MAŃKO	
<i>Roman roots at Plateau du Kirchberg</i>	
<i>Recent examples of explicit references to Roman law</i>	
<i>in the case-law of the Court of Justice of the EU</i> . . . . .	501

Carla MASI DORIA	
<i>Una questione di «stile»?</i>	
<i>A proposito di una critica di Beseler a Mommsen</i> .....	527
Rosa MENTXAKA	
<i>Sobre la actividad comercial del clero hispano en los inicios del siglo IV</i>	
<i>a la luz de dos cánones del Concilio de Elvira</i> .....	535
Joanna MISZTAL-KONECKA	
<i>The non-litigious proceedings in Polish Law</i>	
<i>and Roman iurisdictio voluntaria</i> .....	569
Józef MÉLÈZE MODRZEJEWSKI	
<i>Modèles classiques des lois ptolémaïques</i> .....	579
Piotr NICZYPORUK	
<i>La capacità giuridica e la tutela del nascituro nella Roma antica</i> .....	597
Dobromiła NOWICKA	
<i>Family relations in cases concerning iniuria</i> .....	619
Tomasz PALMIRSKI	
<i>Some remarks on legal protection of commodans</i>	
<i>prior to the introduction of the praetorian actio commodati</i> .....	639
Anna PIKULSKA-RADOMSKA	
<i>Über einige Aspekte der Steuerpolitik und Propaganda</i>	
<i>der öffentlichen Macht im römischen Prinzipat</i> .....	653
Manex RALLA ARREGI	
<i>Sobre una posible relación causal entre regulación canónica</i>	
<i>y legislación imperial en los primeros siglos del monacato</i> .....	677
Francesca REDUZZI MEROLA	
<i>Schiavitù e dipendenza nel pensiero di Francesco De Martino</i> .....	693
Władysław ROZWADOWSKI	
<i>Sul trasferimento del credito in diritto romano</i> .....	705
Francesca SCOTTI	
<i>Actio aquae pluviae arcendae e «piccola bonifica agraria»:</i>	
<i>Un esempio dalle fonti giustinianee</i> .....	725



Michał SKŘEJPEK	
<i>La pena di morte nel diritto romano: necessità o no?</i> .....	785
Marek SOBCZYK	
<i>Recovery of performance rendered dotis nomine</i> <i>on account of a future marriage that did not take place</i> .....	797
Andrzej SOKALA	
<i>Władysław Bojarski Paterfamilias</i> .....	819
Janusz SONDEL	
<i>Alcune considerazioni sulla storia e sull'insegnamento</i> <i>del diritto romano in Polonia</i> .....	849
Agnieszka STĘPKOWSKA	
<i>Il ruolo del consenso muliebre</i> <i>nell'amministrazione dei fondi dotali in diritto romano</i> .....	889
Dorota STOLAREK	
<i>Lenocinium in the Lex Iulia de adulteriis</i> .....	909
Paulina ŚWIECICKA & Łukasz MARZEC	
<i>From Roman oratores to modern advocates</i> <i>Some remarks on the formative of lawyer's ethics in Antiquity</i> .....	935
Adam ŚWIEŃTOŃ	
<i>Superexactiones in the Late Roman Law</i> <i>A short review of the imperial constitutions in the Theodosian Code</i> ..	965
Renata ŚWIRGOŃ-SKOK	
<i>Family law in the private law systematics</i> <i>from the Roman law until the present day</i> .....	979
Sebastiano TAFARO	
<i>Il diritto per l'oggi</i> .....	993
Anna TARWACKA	
<i>Manomissioni di schiavi nelle commedie di Plauto</i> .....	1025
Jakub URBANIK	
<i>Dissolubility and indissolubility of marriage</i> <i>in the Greek and Roman tradition</i> .....	1039

Andreas WACKE

- Führte die Unveräußerlichkeit des Mitgiftgrundstücks  
im römischen Recht zu relativer Nichtigkeit?  
Grenzen vom Verbot des venire contra factum proprium* ..... 1069

Jacek WIEWIOROWSKI

- Deformed child in the Twelve Tables* ..... 1157

Witold WOŁODKIEWICZ

- Apices iuris non sunt iura* ..... 1177

Karolina WYRWIŃSKA

- Functionality of New Institutional Economics  
in research on Roman law* ..... 1187

Jan ZABŁOCKI

- Il concetto di mater familias in caso di arrogazione* ..... 1199

*Mater Familias*  
*Scritti per Maria Zabłocka*  
pp. 1039–1068

Jakub Urbanik

**DISSOLUBILITY AND INDISSOLUBILITY  
OF MARRIAGE IN THE GREEK AND ROMAN  
TRADITION\***

FOR A THOROUGH TREATMENT of the problem of the (in)dissolubility of marriage in the Graeco-Roman Mediterranean, a voluminous book would not suffice. Generations of scholars have devoted learned pages to the study of marriage and marriage-like unions in Antiquity, dealing

\* My interest for Roman law in general and for marriage and family law in particular, was sparked by Maria ZABŁOCKA, who directed me towards the areas she had herself explored (*cf.* the list of her publications at the beginning of this volume), and who also greatly influenced my leaning towards juristic papyrology. I trust therefore she would benevolently accept a piece which combines these two, and for which the first considerations, hopefully now much mature, date back to the doctoral thesis I wrote on divorce under her supervision almost two decades ago.

This article, based on a paper I delivered at the conference *Aspects of Family Law in the Ancient World – a Cross-cultural Perspective* (London, 22–24 April 2015) organised by the UCL Department of Classical Studies, and on an earlier lecture at the Departement Altertumswissenschaften of the University of Basel, is intended in terms of an essay, and thus the bibliographical references are limited to the essentials. The preparation of the final version has been conducted within the Grant of the Ministry of Economy and Competitiveness of the Kingdom of Spain: FFI2015–65511–C2–2–P: *Interpretación y análisis de los textos en papiro de las colecciones españolas: sociedad, religión y derecho*. The translations, unless otherwise indicated, are mine. I would like to cordially thank Agnieszka KACPRZAK for the discussion on the subject, and Derek SCALLY for having proof-read my English.

specifically with Roman law and society<sup>1</sup> as well as with various Greek nuptial arrangements.<sup>2</sup> Since my goal is much more modest – I intend to present a very general overview of the issue – I wish to devote most of the following pages but to one test case which, I hope, will help to show the decision of whether or not (and how) a marriage may be dissolved is directly linked the protection of the goods identified by the law-maker. Before I do so, however, let me start with a brief introduction, which will mainly consist of rather naming the problems then studying them in details.



<sup>1</sup> For the former aspect, cf. above all numerous works of E. VOLTERRA, commencing from the ground-breaking, *La conception du mariage d'après les juristes romains*, Padova 1940 [= *Scritti giuridici* II, Napoli 1991, pp. 3–68], or the later, more concise *vox* 'matrimonio (diritto romano)', *Enciclopedia del diritto* xxv [= *Scritti giuridici* III, Napoli, pp. 223–303], as well as his handbook of the Roman law of marriage, *Lezioni di diritto romano. Il matrimonio romano*, Roma 1961–1962, all with a thorough critique of the earlier scholarship and review of the relevant sources; more recently, in some aspects reassessing the doctrine of Volterra, e.g., R. ASTOLFI, *Il matrimonio nel diritto romano classico*, Padova 2004 and Patrizia GIUNTI, *Consors vitae: matrimonio e ripudio in Roma antica*, Milano 2004. For the latter, for the latter, from among recent numerous studies, cf. e.g., Susan TREGGIARI, *Roman Marriage: iusti coniuges from the Time of Cicero to the Time of Ulpian*, Oxford 1991. I contrasted both of them and reviewed the scholarly debate of the last decades in my recent contribution 'Husband and wife', to P. J. DU PLESSIS, C. ANDO & K. TUORI (eds), *The Oxford Handbook of Roman law and Society*, Oxford 2016, pp. 473–486.

<sup>2</sup> From the more recent works cf. A.-M. VÉRILHAC & C. VIAL, *Le mariage grec: du VI<sup>e</sup> siècle av. J.-C. à l'époque d'Auguste* [BCH Suppl. 32], Athènes 1998, but above all the overview by J. MÉLÈZE MODRZEJEWSKI, 'La structure juridique du mariage grec', *Symposion* 1979, pp. 37–72 [reprinted in *Statut personnel et liens de famille*, Aldershot 1993, n° v; also published in *Scritti in onore di Orsolina Montevicchi*, Bologna 1981, pp. 231–268]. For the Hellenistic developments cf. Julie VELISSAROPOULOS-KARAKOSTAS, *Droit grec d'Alexandre à Auguste (323 avant J.-C. - 14 après J.-C.)*, Athènes 2011, esp. chap. 4, as well as, J. MÉLÈZE MODRZEJEWSKI, 'Greek law in the Hellenistic period: Family and marriage', [in:] M. GAGARIN & D. COHEN (ed.), *The Cambridge Companion to Ancient Greek Law*, Cambridge – New York 2005, pp. 343–354. Cf. also another study of the same eminent scholar, 'Un divorce à l'alexandrine', [in:] *Un peuple de philosophes*, Paris 2011, pp. 251–282 (originally published as 'Les Juifs et le droit hellénistique: divorce et égalité des époux (CPJud. 144)', *Iura* 12 [1961], pp. 162–193), for a thorough analysis of the encounter between the Jewish and Hellenistic tradition in regards to divorce and the implications thereof, which also tackle the main proposition of this paper, i.e. the aim of (in)dissolubility of marriage.

# I. PROLEGOMENA INDISSOLUBILITY VS. DISSOLUBILITY

In each given society, the admissibility of divorce or its exclusion will result from the socially recognized function of marriage and its socially adopted form. It may thus be delimited by the procreation function of marriage, its binding and relation-creating character for the society, accepted religious role or its (public) moral aspect. This we know thanks to modern anthropological research;<sup>3</sup> yet rarely does the ancient law-giver, unlike their modern counterparts, directly justify the adopted measures. A singular exception thereof is provided by the chiefly later Antique imperial constitutions limiting the traditional freedom of divorce. And so they are promulgated in order to tame *prava cupiditas* of women (cf. Constantine ban on unilateral divorces: *CTb.* 3.16.1),<sup>4</sup> for the benefit of children (as the introduction of compulsory written letter of divorce by Theodosius II was justified: *NovTh.* 12),<sup>5</sup> or because of religious motives (in the case of Justinian who aimed at an absolute prohibition of

<sup>3</sup> Cf. e.g., an extremely interesting transcript of a scholarly debate between the founding fathers of the modern anthropology, *Marriage, past and present: a debate between Robert BRUFFAULT and Bronisław MALINOWSKI*, ed. with introduction by M. F. ASHLEY MONTAGU, Boston 1956.

<sup>4</sup> *CTb.* 3.16.1 (= *Brev.* 3.16.1): Imp. Constantinus A. ad Ablavium p(rae)fectum p(raetorio) 'Placet, mulieri non licere propter suas pravas cupiditates marito repudium mittere exquisita causa...' – It is pleasing that a woman shall not be allowed to send repudial to her husband because of her depraved cupidity and some invented pretext...'. On the subject there is a vast scholarly literature, which I analyse, taking a somewhat different position in: 'La repressione constantiniana dei divorzi: La libertà dei matrimoni trafitta con una forcina', [in:] *Fides. Humanitas. Ius. Studii in onore di Luigi Labruna* VIII, Napoli 2007, pp. 5705–5726, esp. § and the overview of the literature in n. 35.

<sup>5</sup> *NovTh.* 12: Impp. Theod(osius) et Valent(inianus) AA. Florentio P(raefecto) P(raetorio). 'Consensu licita matrimonia posse contrahi, contracta nisi misso repudio dissolvi praecepimus. Solutionem etenim matrimonii difficiliorem debere esse favor imperat liberorum.' (10 July 439) – Licit marriages could be contracted by consent, but we order that once contracted than cannot be dissolved unless (a written) letter of repudial is sent. The benefit of children commands that dissolution of marriage should be more difficult.', on the point, cf. G. BARONE-ADESI, 'Favor liberorum e veterum legum moderamen', *AARC* VII (1988), pp. 433–457.

any type divorce, cf. *Nov.* 117.10 of 542).<sup>6</sup> In many other cases the motives behind structuring marriage as dissoluble (or not) may only be reasoned from the circumstantial evidence.

To briefly illustrate this point let us turn to two texts giving witness to the extreme solutions, also in the chronological sense. Their confrontation represents the tremendous change that the Roman law of marriage may have undergone since the legendary times until the so-called classical period, passing from the apparent indissolubility of marriage to the complete liberty of divorce. I am not going to discuss here the authenticity of Plutarch's vision of the primordial Roman times which, though indeed a vexed question, is secondary for this essay. Even if I lean to the assumption that the passage from the *Life of Romulus* echoes the actual construct of marriage in the most archaic times, it is more significant for us here that it reflects the common concept of the Plutarch's contemporaries of how distinct marriage was in the times long-forgotten.<sup>7</sup>

Plut. *Rom.* 22.3: Ἐθηκε δὲ καὶ νόμους τινάς, ὧν σφοδρὸς μὲν ἔστιν ὁ γυναικὶ μὴ διδοῦς ἀπολείπειν ἄνδρα, γυναῖκα δὲ διδοῦς ἐκβάλλειν ἐπὶ φαρμακείᾳ + τέκνων ἢ κλειδῶν + ὑποβολῇ καὶ μοιχευθεῖσαν· εἰ δ' ἄλλως τις ἀποπέμψαιτο, τῆς οὐσίας αὐτοῦ τὸ μὲν τῆς γυναικὸς εἶναι, τὸ δὲ τῆς Δήμητρος ἱερὸν κελεύων· τὸν δ' ἀποδόμενον γυναῖκα θύεσθαι χθονίοις θεοῖς. – He also enacted certain laws, among them one of severity, which forbids a wife to leave her husband, but permits a husband to put away his wife for using poisons, for substituting + children or keys +, and for adultery; but if a man for any other reason sends his wife away, the law prescribes that half his fortune? shall belong to his wife, and the other half be consecrate to Ceres; and whosoever puts away (?) his wife, shall make a sacrifice to the gods of the netherworld (Bernadette Perrin, modified).

<sup>6</sup> Cf. e.g., F. DE MARTINO, 'Chiesa e stato di fronte al divorzio nell'età romana', [in:] *Festschrift für Werner Flume zum 70. Geburtstag* 1, Köln 1978, pp. 137–157 [= *Scritti di diritto romano* III, Roma 1982, p. 9–28], skeptical however, doubtlessly rightly on the actual influence of the church on the prohibition, and pointing rather to the personal convictions of the emperor.

<sup>7</sup> The visible oddness of this measure ('the [law] of extreme severity') for Plutarch may speak for the veracity of the tradition.

If we read carefully through this fragment,<sup>8</sup> we immediately understand that a matrimonial rupture shall only be permitted if provoked by female transgression of her role in procreation of the legitimate offspring, her social role of the mother, and at the same time, the gravest breach of the parental rights of the Roman father (this triple female crime will resound later in Constantine's cases of permitted unilateral divorce).<sup>9</sup> Any other case is to be severely punished. The punishment for the husband is quite telling (interestingly, Plutarch would not even contemplate a punishment of the wife, as a divorce or desertion initiated by her were beyond any imagination): one-half of his estate is sacrificed, the other half will belong to the deserted woman. Any divorce, it seems,<sup>10</sup> entails the need for sacramental purification to avert the divine wrath that could befall on the community. This aspect of the sanction reveals that it was the wife who had been protected by the 'Romulean' norm; indeed, in the world where girls passed from their father's power to that of the husband's (or his agnatic superior's), with no duty to restore the dowry, the fate of divorcée was not to be envied.

<sup>8</sup> The text is spurious here, cf. Cl. LINDSKOG & K. ZIEGLER (ed.), *Plutarchi Vitae Parallelae* 1 1, Lipsiae 1969 (4 ed.), *apparatus a.b.l.* (p. 65). Both textual traditions may be reasonably justified. The self-explanatory substitution of children mentioned alongside abortion (or/and contraception) and adultery is replaced in some manuscripts by the substitution of keys. This variant is usually linked with the well known account of Dionysius Halicarnassensis about the death-penalty inflicted on women for drinking wine (D.H. 11 25.6, cf. also Val. Max. VI 3.9. In the minds of the Roman men inebriation would necessarily lead to the two other breaches as we are reminded by the Gellius' version of the speech of M. Cato (Gellius x 23.1); on wine-drinking, among others, G. MACCORMACK, 'Wine drinking and the Roman law of divorce', *The Irish Jurist* n.s. 10 (1975), pp. 170-174; J. ZABŁOCKI, 'Illeciti delle donne romane', *Ius Antiquum — Древнее Право* 1 (8) (2000), pp. 75-80 with literature.

<sup>9</sup> *CTh.* 3.16.1: 'In masculis etiam, si repudium mittant, haec tria crimina inquiri conveniet, si moecham vel medicamentariam vel conciliatricem repudiare voluerit.' – And also in the case of men, if they initiate divorce, one ought to investigate these three crimes: if he wants to divorce an adulteress, a poison-maker or a procuress. Cf. further, URBANIK, 'La libertà dei matrimoni' (cit. n. 4), p. 5724 and n. 46 and the important work of Antonella DI MAURO TODINI, 'Medicamentarius: una denominazione insolita. Brevi considerazioni a proposito di *CTh.* 3.16.1', *AARC* VII (1988), pp. 343-382, analyzing the semantics of medicamentarius (in part. pp. 373-375. and n. 113-117 for the long standing archaic tradition).

<sup>10</sup> At least if we follow this way of understanding the verb ἀποδίδωμι. This is also a disputed problem: some of the modern interpretations prefer 'whoever sells his wife', cf. e.g. S. RICCOBONO, *FIRA* 1, *lex Romuli* 9.

Now if we turn to a snapshot of the other end of the history of the Roman marriage, we will see a completely opposite picture (and this is only one of many sources that confirm this assumption).<sup>11</sup> The Emperor Alexander Sever recalls a principle existing, from his point of view, since time immemorial.

*Cf.* 8.38.2 – Alexander A. Menophilo: Libera matrimonia esse antiquitus placuit. Ideoque pacta, ne liceret divertere, non valere et stipulationes, quibus poenae inrogarentur ei qui divortium fecisset, ratas non haberi constat. PP. 111 non. Febr. Maximo 11 et Aeliano cons. – Alexander Augustus to Menophilus. It has been accepted since time immemorial that marriages are free. Therefore it is obvious that any pact excluding divorce or a stipulation imposing a pecuniary penalty on the party that has divorced shall not be ratified. (2 February 223).

Marriage is free and this freedom cannot be limited even by what appears an autonomous decision of one of the parties.<sup>12</sup> Exclusion of divorce and imposition of any penalty on the divorcing party is considered to be against the Roman public order and therefore it cannot be ratified. This freedom of marriage expresses also the fact that a marriage created and sustained merely by the will to remain married: *affectio maritalis*. As Paul recalls in his commentary to the Edict:<sup>13</sup>

<sup>11</sup> For a cursory discussion, *cf. infra*, pp. 1061–1062 with n. 41–42, as well as, p. 1057, nn. 30–31, and literature therein cited.

<sup>12</sup> As J. L. ALONSO, ‘The *Constitutio Antoniniana* and the private legal practice in Egypt’, [in:] Kim CZAJKOWSKI, B. ECKHARDT & Meret STROTHMANN (eds.), *Law in the Roman Provinces* (forthcoming), rightly points out it is probably not accidental that this constitution was addressed to (if we are not misled by the onomastic), to someone from the Eastern part of the empire, possibly not only Greek speaking but also used to the Greek tradition of the clauses penalising divorce included in marriage contracts (*cf. e.g.*, BGU IV 1050, 12–11 BC Alexandria; P. Oxy II 281 [= MChr. 66, AD 20–50, Oxyrhynchos], and most notably, post-dating *Constitutio Antoniniana*, P. Ross. Georg. III 28, AD 343 or 358, Arsinoites), flagrantly incompatible with the Roman *ordre public*.

<sup>13</sup> There is a vast literature on the text, for an extensive treatment and the critique of the former positions, *cf.* VOLTERRA, *s.v.* ‘matrimonium’ (cit. n. 2), pp. 235–244, esp. p. 239, n. 34.



*D. 23.2.2 (Paul. 35 ed.):* Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt – A marriage cannot exist unless all agree, that is these who enter it as well as those whose power they are.

The classical Roman view on divorce would underline that each component of the union is free not only to form it but also to withdraw from it even without informing his/her partner. Why such unprecedented (and then never repeated) complete and informal dissolubility of marriage? To that a tentative (even in his words very certain) answer was given over a half a century ago by Fritz Schulz. In his *Classical Roman Law* he firmly stated that such a construction clearly favoured the wife, positioning her at the same level as that of the husband:

The classical law of marriage is an imposing, perhaps the most imposing, achievement of the Roman legal genius. For the first time in the history of civilization there appeared a purely humanistic law of marriage, viz. a law founded on a purely humanistic idea of marriage as being a free and freely dissoluble union of two equal partners for life.<sup>14</sup>

No lengthy explanation is needed in regards to happened between this version of marriage and its 'Romulean' antecedent. The Roman women would gain, little by little, legal, social and economic independence. *Actio rei uxoriae* secured their right to the dowry and hence to economic and social standing of a divorced woman (even, *nota bene*, if she was the party to be blamed for the divorce). *Conventio in manu* was less and less practiced until it became forsaken, guardianship, in Gaius' words, was but a name (*cf.* Gai I.190–191).<sup>15</sup> Nor more did women need male protectors or intermediaries being practically able to contract any transaction they

<sup>14</sup> F. SCHULZ, *Classical Roman Law*, Oxford 1951 (reprint Aalen 1992), p. 103, § 180, as well as IDEM, *Principles of Roman Law*, Oxford 1936, ch. 'Humanity', pp. 189–222, at 195–197.

<sup>15</sup> *Cf.* Maria ZABŁOCKA, 'Zanikanie instytucji tutela mulierum w prawie rzymskim» [Disappearance of *tutela mulierum* in Roman law], *Prawo Kanoniczne* 30. 3–4 (1987), pp. 239–252; and the important study of L. PEPPE, *Posizione giuridica e ruolo sociale della donna romana in età repubblicana*, Milano 1984, pp. 50–52.

wished. In the ancient world, in which a woman was quite limited in her power to divorce (if she could do it at all), the Roman solution clearly seemed beneficial to the wives.

I shall now pass to my test-case, dealing with just one aspect of the issue of dissolubility, viz. the admissibility of divorce imposed by a third party, most notably the father, exercising his paternal power. I will first scrutinize the sources attesting the paternal *aphaeresis* in Athens, then address the problem of existence of the corresponding right in case of the Roman father, and finally re-propose the case of Dionysia, which in fact may be seen as sort of synthesis of these two.<sup>16</sup>



## II. A TEST-CASE: DIVORCE IMPOSED BY THE FATHER

### 1) *The Greek (?) Father*

Let us first turn to the situation of the Greek father. A question mark in the heading of this section should keep us aware that in most of the cases whenever we speak of ‘Greek law’, what we actually examine is the legal order of the classical Athens, reconstructed mostly from legal oratory, and thus leaving us with a certain degree of uncertainty. The case of paternal *aphairesis* is to a certain extent even worse. Among five sources usually studied in this context (most extensively and notably in the recent scholarship by Naphtali Lewis)<sup>17</sup> only one could be termed as legal. It is a speech ascribed to Demosthenes, *Against Spudias*.

<sup>16</sup> What follows draws, among others, from my article dealing in detail with the disputable right of the father to break his child’s marriage: ‘D. 24.2.4: ... Pater tamen eius nuntium mittere posse: l’influsso della volontà del padre sul divorzio dei sottoposti’, [in:] T. DERDA, J. URBANIK & M. WĘCOWSKI, *Ἐπεργεσίας χάριν. Studies Presented to Benedetto Bravo and Ewa Wiśniewska by Their Disciples* [*JfJP Suppl.* 1], Warsaw 2002, pp. 293–336, cf. there for the detailed literature.

<sup>17</sup> N. LEWIS, ‘*Ἀφαίρεσις* in Athenian law and custom’, *Symposion* 1977, pp. 161–178.

Dem. 41 (c. *Spud.*), 3-4: Πολύευκτος γὰρ ἦν τις Θριάσιος, ὃν ἴσως οὐδ' ὑμῶν τινες ἀγνοοῦσιν. οὗτος ὁ Πολύευκτος, ἐπειδὴ οὐκ ἦσαν αὐτῷ παῖδες ἄρρενες, ποιεῖται Λεωκράτη τὸν ἀδελφὸν τῆς ἑαυτοῦ γυναικὸς. οὐσῶν δ' αὐτῷ δύο θυγατέρων ἐκ τῆς τοῦ Λεωκράτους ἀδελφῆς, τὴν μὲν πρεσβυτέραν ἐμοὶ δίδωσιν καὶ τετταράκοντα μνᾶς προῖκα, τὴν δὲ νεωτέραν τῷ Λεωκράτει. 4. τούτων δ' οὕτως ἐχόντων, διαφορὰς γενομένης τῷ Πολυεύκτῳ πρὸς τὸν Λεωκράτη, περὶ ἧς οὐκ οἶδ' ὅ τι δεῖ λέγειν, ἀφελόμενος ὁ Πολύευκτος τὴν θυγατέρα δίδωσι Σπουδίᾳ τουτῷ. μετὰ δὲ ταῦτ' ἡγανάκει θ' ὁ Λεωκράτης, καὶ δίκας ἐλάγχανε Πολυεύκτῳ καὶ τουτῷ Σπουδίᾳ, καὶ περὶ πάντων ἡναγκάζοντ' εἰς λόγον καθίστασθαι. καὶ τὸ τελευταῖον διελύθησαν, ἐφ' ᾧ τε κομισάμενον τὸν Λεωκράτην ἅπερ ἦν εἰς τὴν οὐσίαν εἰσηνεγμένος, μήτε κακόνουν εἶναι τῷ Πολυεύκτῳ, τῶν τε πρὸς ἀλλήλους ἐγκλημάτων ἀπηλλάχθαι πάντων. – Polyeuctus was a man of Teithras, not unknown, it may well be, to some of you. This Polyeuctus, since he had no male children, adopted Leocrates, the brother of his own wife; but since he had two daughters by the sister of Leocrates, he gave the elder to me in marriage with a portion of forty minae, and the younger to Leocrates. 4. So matters stood, when a quarrel came about between Polyeuctus and Leocrates, as to the nature of which I know of nothing which it is incumbent upon me to relate, and Polyeuctus took away his daughter and gave her in marriage to this man Spoudias. After this Leocrates, being greatly incensed, brought suit against Polyeuctus and Spoudias here, and they were forced to render an accounting in regard to all the matters at issue, and in the end a settlement was reached on the terms that Leocrates, on receiving back all that he had brought into the estate, should be reconciled with Polyeuctus, and that final releases should be given from all demands made by each upon the other. (A. T. Murray)

The plaintiff sues his brother-in-law, Spudias, for a share of the estate of Polyeuctus, the late father-in-law of both, deceased with no male issue. Polyeuctus married out his elder daughter to the speaker and the younger to the brother of his wife, Leocrates, whom he also adopted. Leocrates apparently quarrelled with his father-in-law. This caused the latter to take away the girl. Later he gave her in marriage again, this time to the defendant (*ἀφελόμενος ὁ Πολύευκτος τὴν θυγατέρα δίδωσι Σπουδίᾳ τουτῷ*). Seemingly this would constitute a direct proof of the paternal power to take the married daughter away from her husband. Yet, as already noticed by Harrison and Lewis, this problem is only marginal for the speaker, he merely uses to provide the audience with the background of

the inheritance matter.<sup>18</sup> We are not informed of the content of the *dikai* Leocrates brought against Spudias and his ex-father-in-law. Were they merely patrimonial, or did they also regard the matter of legality of the divorce and challenged the father's right to take away his wife? Let us also notice that the verb ἀφαιρέω, which is used to form the term *aphairesis*, adopted in the modern scholarship, may be totally devoid of any legal value, simply expressing what actually happened ('away-take'). Finally, the matter was eventually settled by private arbitration, which may suggest that not everything that happened followed the law to the letter.

The other four sources apparently proving the right of *aphairesis* are even more problematic, as their context is not legal at all. Possibly the most telling of them the Menander's *Men at Arbitration*,<sup>19</sup> where the removal of the daughter from the marital home forms one of the central issues of the plot.<sup>20</sup> It is worth recalling here the narrative, because it sets *aphairesis* in the very interesting interpretive perspective.

The play evolves around the travails of Pamphilia, who, soon after being raped by a stranger at the festival of Tauropolia, is given into marriage by her father Smicrines to a young Athenian, Charisius. She gives birth to a boy during her husband's absence and, terrified that she may be accused of infidelity, orders her faithful slave to expose the infant. Upon his return to Athens, Charisius, having found out about the baby, decides to abandon the wife (rather than to repudiate the apparent adulteress), and seeks consolation with the courtesan Harbotronon, spending vast sums on entertainment. The bride's father becomes concerned about his son-in-law's spendthriftiness (after all he had provided a very handsome

<sup>18</sup> A. R. W. HARRISON, *The Law of Athens* 1, Oxford 1968, pp. 31–32; LEWIS, 'Ἀφαίρεσις', (cit. n. 17), p. 162.

<sup>19</sup> For a thorough discussion and earlier literature, cf. LEWIS, 'Ἀφαίρεσις', (cit. n. 17), pp. 163–165.

<sup>20</sup> For some of the tentative reconstructions of the plot, cf. C. WELLER, 'Menander's Arbitrants', *Classical Journal* 8.9 (1913), pp. 275–278 and E. CAPPS, 'The plot of Menander's *Epitrepontes*', *The American Journal of Philology* 29.4 (1908), pp. 410–431 and much more updated with new textual suggestions, C. AUSTIN, "My daughter and her dowry": Smicrines in Menander's *Epitrepontes*, [in:] D. OBBINK & R. RUTHERFORD (eds.), *Culture in Pieces. Essays on Ancient Texts in Honour of Peter Parsons*, Oxford 2011, pp. 160–173.

dowry to Pamphilia), and possibly a little less about his daughter's well-being, ponders a termination of the marriage.

Men. *Epitrep.* 655–660 (Sandbach)

ΣΜΙΚΡΙΝΗΣ· τοῦτο[ ]ν, ἀλλ' ἴσως ἐγὼ  
πολυπραγμ[ονώ πλεί]ω τε πράττω τῶν ἐμῶν,  
κατὰ λόγον ἐξὸν [ἀπιέν]αι τὴν θυγατέρα  
λαβόντα. τοῦτο μὲν ποιήσω καὶ σχεδὸν  
δεδογμένον μ[οι τυγχ]άνει. μαρτύρομαι  
ὕμᾱς δ' ὅμο[λογεῖν] (?)

SMICRINES But perhaps I am a busybody and exceed my rights, although it were permissible, according to reason, for me to take my daughter and go off. This, indeed, I will do and, as it happens, it is all but decided on by me. I call you to witness. (G. Allison)

Men. *Epitrep.* 1102–1105 (Sandbach)

ΟΝΕΣ· ἀλλ' ἀπαγεῖν παρ' ἀνδρὸς αὐτοῦ θυγατέρα  
ἀγαθὸν σὺ κρίνεις, Σμικρίνη;  
ΣΜΙΚΡ· λέγει δὲ τίς  
τοῦτ' ἀγαθόν; ἀλλὰ νὺν ἀναγκαῖον.

ONESIMUS Well do you call it 'good' from husband to divorce one's daughter, Smicrines?

SMICRINES Who says it's good? 'Tis now necessity (G. Allison)

The considerations about the difficulties in interpretation of *Against Spudias* could be accordingly reapplied here. Let us put them aside for a time-being and assume, as it has been done, that Smicrines indeed had a right to divorce his daughter. We cannot but observe that even the caricatured narration of Menander hints to the possible purpose of such a prerogative. The father would exercise it for the benefit of the daughter – her husband is wasting the dowry and has deserted the poor girl for a common courtesan – by no means is it presented as coercive measure aimed against the girl herself (λέγει δὲ τίς | τοῦτ' ἀγαθόν; ἀλλὰ νὺν ἀναγκαῖον!).<sup>21</sup> The happy

<sup>21</sup> Cf. also the new reconstruction of the beginning of the Act IV, portraying conversation between Smicrines and his daughter and their reasons: AUSTIN, “My daughter and

ending – the unknown festival-rapist turns out to be Charisius himself, the child thus legitimate, and marital bliss restored – is quite unfortunate for a law-historian. It prevents any further considerations on the reality of *aphairesis*, whether there was any legal procedure to be applied, if it was executed via official authority, and, last but not least, whether it actually existed at all...

Motivations similar to those of Smicrines seem to lie under the father's idea to divorce his daughter in a fragment of a play preserved in *P. Didot* 1:<sup>22</sup>

*Tragicorum Graecorum fragmenta* 953 (Nauck = *Sel. Pap.* III 34 = *P. Didot* 1)

- ὦ πάτερ, ἐχρῆν μὲν οὖς ἐγὼ λόγους λέγω,  
τούτους λέγειν σε· καὶ γὰρ ἀρμόζει φρονεῖν  
σὲ μᾶλλον ἢ ἐμὲ καὶ λέγειν ὅπου τι δεῖ·  
14 ἐπεὶ δ' ἀφῆκας, λοιπὸν ἐστ' ἴσως ἐμὲ  
ἐκ τῆς ἀνάγκης τά γε δίκαι' αὐτὴν λέγειν.  
ἐκεῖνος εἰ μὲν μεῖζον ἡδίκηκέ τι,  
οὐκ ἐμὲ προσήκει λαμβάνειν τούτων δίκην·  
18 ἂ δ' εἰς ἐμ' ἡμάρτηκεν αἰσθέσθαι με δεῖ.  
ἀλλ' ἀγνοῶ δὴ τυχὸν ἴσως ἄφρων ἐγὼ  
οἶσ', οὐκ ἂν ἀντείοιμι· καίτοι γ', ὦ πάτερ,  
εἰ τᾶλλα κρίνειν ἐστὶν ἀνόητον γυνή,  
12 περὶ τῶν γ' ἐαυτῆς πραγμάτων ἴσως φρονεῖ ....  
ἔστω δ' ὃ βούλει· τοῦτο τί μ' ἀδικεῖ, λέγε.  
ἔστ' ἀνδρὶ καὶ γυναικὶ κείμενος νόμος,  
τῷ μὲν διὰ τέλους ἦν ἔχει στέργειν αἰεί,  
16 τῇ δ' ὅσ' ἂν ἀρέσκει τάνδρ' αὐτὴν ποεῖν.  
γέγονεν ἐκεῖνος εἰς ἐμ' οἶον ἡξίου,  
ἐμοὶ τ' ἀρέσκει πάνθ' ἂ κακείνῳ, πάτερ.  
ἀλλ' ἔστ' ἐμοὶ μὲν χρηστός, ἡπόρηκε δέ.  
20 σὺ δ' ἀνδρὶ μ', ὥς φῆς, ἐκδίδως νῦν πλουσίῳ,  
ἵνα μὴ καταζῷ τὸν βίον λυπουμένη.  
καὶ ποῦ τοσαῦτα χρήματ' ἐστίν, ὦ πάτερ,  
ἂ μᾶλλον ἀνδρὸς εὐφρανεῖ παρόντα με;  
24 ἢ πῶς δίκαιόν ἐστιν ἢ καλῶς ἔχον

her dowry" (cit. n. 19), pp. 170–173. AUSTIN unfortunately does not discuss at all the legal aspects of the play.

<sup>22</sup> Cf. LEWIS, 'Αφαίρεσις', (cit. n. 17), pp. 166–170 for a detailed treatment and reassessment of the scholarship.

- τῶν μὲν ἀγαθῶν με τὸ μέρος ὧν εἶχεν λαβεῖν,  
 τοῦ συναπορηθῆναι δὲ μὴ λαβεῖν μέρος;  
 φέρ' ἦν ὁ νῦν <δὴ> λαμβάνειν μέλλων μ' ἀνὴρ,  
 28 ὃ μὴ γένοιτο, Ζεῦ φίλ', οὐδ' ἔσται ποτέ,  
 οὐκ οὖν θελούσης οὐδὲ δυναμένης ἐμοῦ,  
 ἦν οὗτος αὖθις ἀποβάλλῃ τὴν οὐσίαν,  
 ἐτέρῳ με δώσεις ἀνδρὶ; καὶ τ' ἐὰν πάλιν  
 32 ἐκεῖνος, ἐτέρῳ; μέχρι πόσου τὴν τῆς τύχης,  
 πάτερ, σὺ λήψῃ πείραν ἐν τῷ μῶ βίῳ;  
 ὅτ' ἦν ἐγὼ παῖς, τότε σε χρὴν ζητεῖν ἐμοὶ  
 ἄνδρ' ᾧ με δώσεις· σὴ γὰρ ἦν τόθ' αἵρεσις·  
 36 ἐπεὶ δ' ἅπαξ δέδωκας, ἤδη ἐστίν, πάτερ,  
 ἐμὸν σκοπεῖν τοῦτ', εἰκότως· μὴ γὰρ καλῶς  
 κρίνας' ἐμαυτῆς τὸν ἴδιον βλάψω βίον.  
 ταῦτ' ἔστιν· ὥστε μὴ με, πρὸς τῆς ἐστίας,  
 40 ἀποστερήσῃς ἀνδρὸς ᾧ συνώκισας·  
 χάριν δικαίαν καὶ φιλάνθρωπον, πάτερ,  
 αἰτῶ σε ταύτην. εἰ δὲ μὴ, σὺ μὲν βία  
 πράξεις ἃ βούλει· τὴν δ' ἐμὴν ἐγὼ τύχην  
 πειράσομ' ὥς δεῖ μὴ μετ' αἰσχύνῃς φέρειν

The words I speak, father, you should be speaking: it is fitting that you should be wiser than I, and speak what the time demands. Now, in your default, it remains for me, I think, perforce to plead myself the cause of justice. If my husband has done me a great injury, is it not for me to exact a penalty therefor? And if he has wronged me, must I not perceive it? Perhaps I am a fool and know it not. – I will not answer no: and yet a woman, father, though a fool in judgment of all else, may perhaps have good sense about her own affairs. But only tell me this, wherein he wrongs me? For wife and husband there is a law laid down: – for him, to love his woman for ever till the end; for her, to do whatever gives her husband pleasure. All I demanded, my husband has been to me; and all that pleases him, father, pleases me. You say he is good to me but he is poor – so now (you tell me) you give me in marriage to a man of wealth, that I may not live all my life in distress. Where in the world is all that money, father, which – if I have it will cheer me more than the man I love? How is it just or honourable, that I should take my share of the good things he had, but in his poverty take no share at all? Say, if the man who is now about to take me (which dear God forbid, nor shall it ever be! – at least not of my will, nor while I can prevent it). If he should lose his substance hereafter, will you give me to another man? And then to another, if he too loses all? How

long will you use my life, father, for your experiments with fortune? When I was a child, that was the time for you to find a husband to give me to, for then the choice was yours. But when you had once given me, father, at once it was for me to look to my own fate. And justly so, for if I judge not well, it is my life that I shall injure. There is the truth. So by the Goddess of our Home, do not rob me of the man to whom you wedded me. This favour I ask you — a just one, father, and full of loving kindness. If you refuse, you shall do your pleasure by force: and I shall try to endure my fortune as I ought, without disgrace (D. L. Page).

It is true that in her monologue the girl passionately protests against the rupture, she truly loves her husband. Yet the father has obviously decided to take her away for what he sees as her own good: he has found her a wealthier, better partner (*nota bene* nothing in the text presents such power in terms of a legal prerogative: the daughter opposes not the law, but brute force (σὺ μὲν βίᾳ πράξεις ἂ βούλῃ).<sup>23</sup>

Analogous thoughts are prompted by reading Plautus' *Stichus*. The play reproduces the plot of Menander's *Adelphoi A* and could thus be used to reconstruct the Athenian legal environment.<sup>24</sup> Again we are confronted

<sup>23</sup> Differently, HARRISON, *Law* (cit. n. 18), p. 31, n. 5, followed by LEWIS, 'Ἀφαίρεσις', (cit. n. 17), p. 170 and n. 31, who see in the final lines 42–44 and obvious allusion to legal prerogative granting the use of force. Yet this reading may be obscured by the quest for such power in the sources, and thus results in a vicious circle of argumentation.

<sup>24</sup> Cf. LEWIS, 'Ἀφαίρεσις', (cit. n. 17), p. 171, following U. E. PAOLI, 'Lo *Stichus* di Plauto e l'afèresi paterna in diritto attico', [in:] *Studi in onore di Pietro de Francisci* 1, Milano 1956, pp. 231–247, at p. 244 [= *Altri studi di diritto greco e romano*, Milano 1976, pp. 161–173, at 162–164 with references to literature in the notes). We have to admit, however, that to a sceptical critique the arguments for the 'Greekness' of the legal situation and against its belonging to the Roman world may seem unsatisfactory. One of the chief points is the proposition of inadmissibility of an imposed divorce (or at least important limitation thereof) in Rome already in the times of Plautus: hence the deeds of Antipho cannot have been set there – I, however accept this argumentation, cf. my 'D. 24.2.4' (cit. n. 16), *passim*; *contra*, O. ROBLEDA, 'Il divorzio a Roma prima di Costantino', *ANRW* II 14 (1982), pp. 347–390, § III C (which is justified by his belief on the nature of the Roman marriage, cf. further, *infra*, n. 31). On women and divorce in *Stichus*, cf. L. PEPPE, 'Le forti donne di Plauto', [in:] L. AGOSTINIANI & P. DESIDERI, *Plauto testimone della società del suo tempo*, Napoli 2002, pp. 67–91. Elisabeth SCHUMANN, 'Ehescheidungen in den Komödien des Plautus', *ZRG RA* 93 (1977), pp. 45–65, surprisingly, does not discuss *Stichus*.



with daughters to be separated by their father from the husbands. Pane-gyris and her sister (traditionally referred to as Pamphila) are married to the brothers Epignomus and Pamphilippus. The men have gone missing for almost three years. The father, Antipho, concerned with the fate of his girls, insists that they should forsake their spouses and be married again to someone who would really take care of them. Even if firm in decision to remain faithful to their husbands, the younger sister cannot help noticing that the father might have a point:

Plaut. *Stich.* 27–29

Sor. tamen si faciat, minime irasci  
decet, neque id immerito eveniet.  
nam viri nostri domo ut abierunt,

Still, if he does do it, it befits you by no means to be angry; nor will it happen without some reason. For this is the third year since our husbands have been away from home. (H. Th. Riley)

In fact, the conversation between Antipho and his daughters in the second scene of the first act confirms this reading of his initiative. Instead of harshly exercising *potestas*, to which the girls see themselves obliged to obey,<sup>25</sup> Antipho chooses persuasion by putting forward the benefit of the new marriages.<sup>26</sup>

<sup>25</sup> Cf. Plaut. *Stich.* 53–54: ‘SOR. verum postremo in patris potestate est situm | faciendum id nobis quod parentes imperant’. – ‘tis placed in our father’s power; that must be done by us which our fathers enjoin (modified); 68–70: SOR. Quid agimus, soror, si affirmabit pater adversum nos? PAN. Pati | nos oportet quod ille faciat, cuius potestas plus potest. | exorando, haud adversando sumendam operam censeo: | gratiam per si petimus, spero ab eo imetrassere; | adversari sine dedecore et scelere summo haud possumus, | neque equidem id factura neque tu ut facias consilium dabo, | verum ut exoremus. novi ego nostros: exorabilest’. – [PAM.] What are we to do, sister, if our father shall resolve against us? PAN. It befits us to submit to what he does whose power is the stronger. By entreating, not by opposing, I think we must use our endeavours. If with mildness we ask for favour, I trust to obtain it of him. Oppose him we cannot, without disgrace and extreme criminality; I will neither do that myself, nor will I give you the advice to do it, but rather that we should entreat him. I know our family; he will yield to entreaty. (H. Th. RILEY)

<sup>26</sup> This strategy is presented in his soliloquy at the beginning of the scene: Plaut. *Stich.* 75–87: ‘ANT. Principium ego quo pacto cum illis occipiam, id ratiocinor: lego perplexim laccessam oratione ad hunc modum, | quasi numquam quicquam in eas similem, quasi nil

Within the context of persuasion (and not legal measures), comes the last of the sources in the section: a passage from *Rhetorica ad Herennium* discussing the figure of *confirmatio rationis*, explained with the employment of a fragment from the tragedy *Chresphontes* by Eurypides (with the possible intermediation of a homonymous piece by Ennius).<sup>27</sup>

Her. II 24.38.2–5. Utuntur igitur studiosi in confirmanda ratione duplici conclusione hoc modo:

Iniuria abs te adficio indigna, pater;  
Nam si inprobum esse Chrespontem existimas,  
Cur me huic locabas nuptiis? Sin est probus,  
Cur talem invitam invitum cogis linquere?

3. Quae hoc modo concludentur, aut ex contrario convertentur aut ex simplici parte reprehenduntur. Ex contrario hoc modo:

4. Nulla te indigna, nata, adficio iniuria.  
Si probus est, te locavi; sin est inprobus,  
Divortio te liberabo incommodis.

indaudiverim leas in se meruisse culpam, an potius temptem saeviter, [[an minaciter. scio litis fore, ego meas novi optume.] | si manere hic sese malint potius quam alio nubere. | non faciam. quid mi opust decurso aetatis spatio cum meis | gerere bellum, quom nil, quam ob rem id faciam, meruisse arbitror? | minime, nolo turbas, sed hoc mihi optimum factu arbitror: | [sic faciam: adsimulabo quasi quam culpam in sese admiserint.] | perplexabiliter earum hodie perpavefaciam pectora; | post id [agam] igitur deinde, ut animus meus erit, faciam palam. | multa scio faciunda verba. ibo intro. sed apertast foris'. –In the first place, in what manner I should make a beginning with them, about that I am in doubt; whether I should accost them in language couched in ambiguous terms, after this fashion, as though I had never pretended anything at all against them, or whether as though I had heard that they were deserving of some censure against them; whether I should rather try them gently or with threats. I know that there will be opposition; I know my daughters right well. If they should prefer to remain here rather than to marry afresh, why, let them do so. What need is there for me, the term of my life run out, to be waging war with my children, when I think that they don't at all deserve that I should do so? By no means; I'll have no disturbances. But I think that this is the best thing to be done by me; I'll do thus; I'll pretend as though they had themselves been guilty of some fault; I'll terribly terrify their minds this day by some ambiguous expressions; and then, after that, as I shall feel disposed, I'll disclose myself. I know that many words will be spoken; I'll go in. (H. Th. RILEY)

<sup>27</sup> Cf. LEWIS, 'Αφαίρεσις', (cit. n. 17), pp. 173–174 and n. 41 for the references.

5. Ex simplici parte reprehendetur, sei ex duplici conclusione alterutra pars diluitur, hoc modo:

Nam si inprobum esse Chrespontem existimas,  
Cur me huic locabas nuptiis? Duxi probum,  
Erravi. Post cognovi, et fugio cognitum.

Students in the rhetorical schools, therefore, in Proving the Reason, use a Dilemma, as follows: 'You treat me, father, with undeserved wrong. For if you think Cresphontes wicked, why did you give me to him for wife? But if he is honourable, why do you force me to leave such a one against his will and mine?' Such a dilemma will either be reversed against the user, or be rebutted in a single term. Reversed, as follows: 'My daughter, I do not treat you with any undeserved wrong. If he is honourable, I have given him you in marriage; but if he is wicked, I shall by divorce free you from your ills.' It will be a rebuttal in a single term if one or the other alternative is confuted, as follows: 'You say: "For if you think Cresphontes wicked, why did you give me to him for wife?" I thought him honourable. I erred. Too late I came to know him, and knowing him, I fly from him.' (H. Caplan)

Leaving aside the legal aspect of the father's prerogative, to which the author does not refer at all,<sup>28</sup> let us again notice that the reason for which the father would want to disrupt his daughter's marriage is her protection from a husband, who, even if once might seem honourable, now proves to be wicked.

The fact that in none of the above texts the daughters resort to juristic arguments to oppose their fathers (notice that the *nomos* laid down for the husband and wife in *P. Didot* 1 has purely figurative value), using only emotional persuasion (once more vehemently, once more meekly) has let the students of the issue to confirm the legal nature of the father's right of *aphairesis*. I guess what has been said so far could raise some doubts as this assumption. The reading of these sources seems to have been strongly influenced by our vision of the formation of the Greek (Athenian) marriage, constituted by giving away of the bride by the double act of *engye*

<sup>28</sup> Again differently, LEWIS, 'Ἀφαίρεσις', (cit. n. 17), pp. 173, following PAOLI, same objections may be applied here as in the note 23 *supra*.

and *ekdosis*. If the natural actor of these would be the bride's father,<sup>29</sup> we assume that he would also have right to take the bride away. Now, even if we admit such a right actually existed in the Athenian law, the literary tradition seems somehow to justify its execution to the benefit of the daughter. In other words: the Greek (Athenian) marriage could be disrupted by the father of the bride, as long as is it done to safe-guard the interests of the girl.

Having asserted as much let us now turn to the Roman model.

## 2) *The Roman Father*

The evidence for the standing of the Roman father is fortunately much more satisfactory than in the Greek case: a number sources, juristic *par excellence*, provide information on this instance. Still there is no agreement in the scholarship as to whether or not the Roman father had a faculty to divorce his child. This is chiefly because this, seemingly minor question, intersects with the interpretation of the Roman concept of marriage at large, viz. whether its only foundation was the marital affection of the spouses or not. The assumption of the *affectio maritalis* theory in its total version, as advocated by Volterra, would necessarily lead to the exclusion of any possible external influence on the will of the couple

<sup>29</sup> Cf. Ps.-Dem. 46 (c. *Steph.* 11) 18: σκέψασθε τοίνυν καὶ τοὺς νόμους, παρ' ὧν κελεύουσι τὰς ἐγγύας ποιεῖσθαι, ἵν' εἰδῇτε καὶ ἐκ τούτων ὡς κατεσκευασμένης διαθήκης ψευδῆς μάρτυς γέγονε Στέφανος οὕτοσί. "Νόμος. ἢν ἂν ἐγγνήσῃ ἐπὶ δικαίοις δάμαρτα εἶναι ἢ πατὴρ ἢ ἀδελφὸς ὁμοπάτωρ ἢ πάππος ὁ πρὸς πατρός, ἐκ ταύτης εἶναι παῖδας γνησίους. ἐὰν δὲ μηδεὶς ᾖ τούτων, ἐὰν μὲν ἐπικληρὸς τις ᾖ, τὸν κύριον ἔχειν, ἐὰν δὲ μὴ ᾖ, ὅτῳ ἂν <ὁ πατήρ> ἐπιτρέψῃ, τοῦτον κύριον εἶναι. – Now, then, consider the laws, and see from whom they ordain that marriages should be made, that you may come to know from them also, that this fellow Stephanus has proved himself to be a false witness to a forged will. 'Law: If a woman be entrusted for lawful marriage by her father or by a brother begotten of the same father or by her grandfather on her father's side, her children shall be legitimate. In case there be none of these relatives, if the woman be an epikleros, her guardian shall take her to wife, and if she be not, that man to whom she be committed <by her father?> <herself?>, be her guardian (and marry her?).' (A. T. MURRAY, modified).

(which would include divorce imposed by the *pater*);<sup>30</sup> on the contrary, a more nuanced position in that matter, or preference for the initial consent as the marriage fundament, would in turn allow such interference.<sup>31</sup> Some time ago I adhered to the former theory, following Volterra with some new arguments.<sup>32</sup> It would be still my stance today, even if I would allow more subtlety as far as the social aspect of marriage is concerned, to which question I shall return in the conclusions of this essay.

The two first texts we should discuss first report the imperial decisions triggered by matrimonial ruptures by the fathers.

*PSent.* 5.6.15. Bene concordans matrimonium separari a patre divus Pius prohibuit, itemque a patrono libertum, a parentibus filium filiamque: nisi forte quaeratur, ubi utilius morari debeat – Divine Pius forbade that a well-concordant marriage should be separated by the father, likewise by the patron in the case of a freedman and by the parents in the case of a son or a daughter, unless perhaps it is doubted where s(he) should more usefully remain (?).

*Cf.* 5.17.5, Diocletianus et Maximianus AA. et CC. Scyrioni: Dissentientis patris, qui initio consensit matrimonio, cum marito concordante uxore filia familias ratam non haberi voluntatem divus Marcus pater noster religiosissimus imperator constituit, nisi magna et iusta causa interveniente hoc pater fecerit. 1. Invitam autem ad maritum redire nulla iuris praecepit constitutio. 2. Emancipatae vero filiae pater divortium in arbitrio suo non habet. (d. v k. Sept. Nicomediae CC. cons.) – Our father, divine Marcus, the most religious emperor stated that the will of the dissenting father,

<sup>30</sup> E. VOLTERRA, 'Quelques observations sur le mariage des *filiifamilias*', *RIDA* 1 (1948), pp. 213–242 [= IDEM, *Scritti giuridici* II, Napoli 1991, pp. 97–126 in contrast to, *i.a.*, S. SOLAZZI, 'Studi sul divorzio I: il divorzio della filia familias', *BIDR* 34 (1925), pp. 1–25 [= IDEM, *Scritti di diritto romano* III, Napoli 1969, pp. 1–21]. *Cf.* further in my 'D. 24.2.4' (cit. n. 15), pp. 294–295 and references to lit. in n. 2.

<sup>31</sup> The most recent fierce opposition to VOLTERRA is present in the works of O. ROBLEDA, *El matrimonio en derecho romano*, Roma 1970, esp. pp. 252–254; IDEM, 'Il consenso matrimoniale presso i Romani. Il mio punto di vista alla luce delle fonti', *Conferenze storico-giuridiche* 1980, pp. 101–151; and IDEM, 'Il divorzio' (cit. n. 34); as well as of his student, J. HUBER, *Der Ehekonsens im römischen Recht. Studien zu seinem Begriffsgehalt in der Klassik und zur Frage seines Wandels in der Nachklassik*, Rom 1977, *passim*.

<sup>32</sup> URBANIK, 'D. 24.2.4' (cit. n. 16), *passim*. I have lately presented the problem in 'Husband and wife' (cit. n. 1), pp. 483–484, esp. n. 32.

who initially granted his consent to marriage would not be ratified in case daughter-in-power harmoniously living with her husband unless the father has done it because of some just and important reason. 1. No constitution commands an unwilling woman to return to her husband. 2. A father has no decision over divorce of an emancipated daughter (28 August 294).

By interpretation of these texts some scholars argue that the decision of Antonius Pius, later confirmed by Marcus Aurelius and eventually by Diocletian, was a novelty;<sup>33</sup> in consequence they admit that a father had right to dissolve the marriage of his unwilling child until the high-classical era. In my earlier study I submitted that this view cannot be accepted, pointing out, *i.a.*, the context of the other sources stating the principle of *affectio maritalis*, but also showing that the imperial decisions were directed against an unacceptable social practice (is evidenced by a number of literary sources and papyri),<sup>34</sup> and not abolishing a pre-existing legal prerogative. It may be further proven by reading the § 2 of *Cf.* 5.17.5 which forestalls divorce of an emancipated daughter executed by the father, in conjunction with *Cf.* 5.17.4 recording that a mother had no power over her daughter's divorce.<sup>35</sup> In neither of these two texts may we speak of a 'right' of the parent. The emperors did nothing else than

<sup>33</sup> *Cf.* e.g. ROBLEDA, 'Il divorzio' (cit. n. 31), pp. 369–372; *contra*, naturally, VOLTERRA, 'Quelques observations' (cit. n. 30), p. 232.

<sup>34</sup> Most notably *P. Oxy.* 11 237, on which, *infra*, § 11 3; other examples: *P. Sakaon* 38 (= *P. Flor.* 1 36 = *M. Chr.* 64, AD 312, Theadelphia); *Ps.-Quint. Decl.* 257, *Greg. Naz. Epist.* 144–145; all discussed in detail in URBANIK, 'D. 24.2.4' (cit. n. 16), pp. 316–333.

<sup>35</sup> *Impp. Diocletianus et Maximianus AA. et CC. Pisoni. 'Filiae divortium in potestate matris non est'. (d. 111 k. Ian. Sirmi CC. cons.)*. – The mother has no power over the divorce of her daughter (30 December 294). Sources like this one and the papyrological evidence (for our case here the most important piece is *P. Cair. Preis.* 2–3, AD 362, Hermoupolis, a petition against mother-in-law who broke the claimant's marriage) led R. TAUBENSCHLAG, 'Die *materna potestas* im gräko-ägyptischen Recht', *ZRG RA* 49 (1929) 115–28 [= *IDEM, Opera Minora* 11, Warschau 1959, pp. 323–337, esp. p. 330 and n. 37], to somewhat hasty admission of sort of a legal power of a mother in the law of the papyri. It would be, however much more prudent, to see merely the force of the social convention and not of the law here, *cf.* further my commentary to *P. Cair. Preis.* 2–3, [in:] J. KEENAN, J. MANNING & U. YIFTACH-FIRANKO, *Law and Legal Practice in Egypt from Alexander to the Arab Conquest. A Selection of Papyrological Sources in Translation, with Introductions and Commentary*, Cambridge 2014, pp. 154–174, at 171–172.

upheld the principle of indissolubility of marriage by a third party. If so, then the same may be assumed about the pr. and § 1 of *Cf.* 5.17.5, and further on the passage of *Pauli Sententiae*. We may then see that Antonius Pius, Marcus Aurelius and finally Diocletian definitely reaffirm that a father cannot disturb his child's marriage, once he conceded its creation. The imperial decisions do not bring about any new principle, they merely restate what had 'pleased for the time immemorial' (cf. *Cf.* 8.38.2 cited on p. 1043)

An analogous conclusion may be drawn from a passage of Ulpian's commentary to the Edict contemplating the grant of *interdictum de liberis ducendis/exhibendis* to the father willing to take away his daughter from her marital house.

*D.* 43.30.1.5 (Ulp. 71 *ed.*): Si quis filiam suam, quae mihi nupta sit, velit abducere vel exhiberi sibi desideret, an adversus interdictum exceptio danda sit, si forte pater concordans matrimonium, forte et liberis subnixum, velit dissolvere? Et certo iure utimur, ne bene concordantia matrimonia iure patriae potestatis turbentur. quod tamen sic erit adhibendum, ut patri persuadeatur, ne acerbe patriam potestatem exerceat. – Will a defence be granted against an interdict, if anyone should want to take away his daughter who has been married to me (or that she should be produced), if, perchance, a father should want to dissolve a agreeable marriage, perhaps even strengthened by children? We use a well-established rule that harmonious marriages should not be disturbed by the right of paternal power. And it should be understood in this way that the father should be persuaded not to exercise his paternal power too harshly.

This part of the explanation of the Edict is probably based on the jurist's answer to an enquiry of a troubled husband.<sup>36</sup> Confronted with a father-in-law, he asked if a defence forestalling the interdict used by *pater familias* to regain control over the children-in-power would be available to him. Ulpian states firmly that such remedy shall be granted. He adds emphatically that it is a well-established rule that harmonious marriage should not be disturbed by the father's power.<sup>37</sup>

<sup>36</sup> As pointed by VOLTERRA, 'Quelques remarques' (cit. n. 30), pp. 235–240.

<sup>37</sup> It is an open question how this remedy actually functioned, for discussion of the scholarship (SOLAZZI, 'Studi sul divorzio' 1 [cit. n. 30], pp. 1–4; 18; G. LONGO, 'Sullo sciogli-

Reading now all three texts again, let us notice the recurring classification of marriage endangered by the parental will as well-concordant. Volterra thought that the epithet *bene concordans* referred to every marriage, but this view seems rather far-fetched.<sup>38</sup> On the contrary, the law-maker seems rather to admit ruptures only of the discordant unions, and only if there was a just reason of great importance therefor ('nisi magna et iusta causa interveniente hoc pater fecerit'). Does it not mean that the father exercising his prerogative must have in view the benefit of his child? Read in this way we understand now the interdict de *liberis ducendis/exhibendis* not only as an expression of the absolute will of the father, exercised to please his unlimited power, but rather as a protective measure used to shield the child (especially daughters married out in a very early age).<sup>39</sup>

Now, how was the marital rupture effectuated? In no other way than obliging the child to divorce her (but also his!) spouse. Until a certain time, no one expected that a child would have a different opinion that its pater (as the two sisters in *Stichus* who know they cannot disobey their father, not because of any legal norm, but bound by the social convention). And so the initial determination of the father would be converted in his child's decision, and as such would be legally in order; we have in fact a very telling source which demonstrates that such a legal trick was possible in the case of marriage making, hence it is plausible that a learned jurist would not have any issues with applying the same reasoning to marriage dissolution.<sup>40</sup>

mento del matrimonio per volontà di *pater familias*', *BIDR* 40 [1932], pp. 201–224, at p. 214 and VOLTERRA, 'Quelques remarques' [cit. n. 30], pp. 236–237) and the critical approach to possible interpolations (especially the postclassical character of the last clause as postulated by VOLTERRA, who saw there obvious Christian influence), cf. my 'D. 24.2.4' (cit. n. 16), pp. 304–305 with *Bas.* 31.2.12.

<sup>38</sup> VOLTERRA, 'Quelques remarques' (cit. n. 30), pp. pp. 233–245; my criticism, 'D. 24.2.4' (cit. n. 16), pp. 306–307.

<sup>39</sup> Cf. B. D. SHAW, 'The age of Roman girls at marriage: Some reconsiderations', *JRS* 77 (1987), pp. 30–46; for Egypt, R. S. BAGNALL & B. W. FRIER, *The Demography of Roman Egypt*, Cambridge 1994, pp. 112–113, who estimate that the Egyptian girls would start marrying at the age of 12.

<sup>40</sup> And so is confirmed by the case of the daughter who fulfilling her mother's will divorced the husband: *Cf.* 6.25.5 *Impp.* Valerianus et Galienus AA. Maximae: 'Reprehen-



D. 23.2.21–22 (Terent. Clem. 3 *Iul. Pap.*). Non cogitur filius familias uxorem ducere. 22. (Cels. 15 *dig.*) Si patre cogente ducit uxorem, quam non duceret, si sui arbitrii esset, contraxit tamen matrimonium, quod inter invitos non contrahitur: maluisse hoc videtur. – Terentius Clemens: A son under paternal control ought not to be compelled to marry. 22. Celsus: If, under pressure from his father, (a son) takes a wife, whom he would not have married if it had been his decision, still, though there is no marriage without consent, he contracted a marriage: he is regarded to have wanted to marry.

This *catena* concocted by the Justinianic compilers shows how Roman jurists rather candidly surrendered the legal theory of marriage to the social practice, in a somewhat desperate move to upkeep the principle of *affectio maritalis*. The son, marrying according to his father wish, actually expresses his own will: an ingenious step which proves once again how practical the Roman jurisprudence could be at times.

As practical as it may be, and as comprehensive of the social ties, it could not completely forsake, once it had invented it, *affectio maritalis* as the foundation of Roman marriage, especially as was enshrined in the stern affirmations, of which the best known is probably the principle ‘marriage is made indeed not by bedding but by consent’ – D. 35.1.15.<sup>41</sup> Now such doctrine must have contributed to the erosion of the social

denda tu magis es quam mater tua. illa enim si heredem te sibi esse vellet, id quod est inutile, matrimonium te dirimere cum viro non iuberet. Tu porro voluntatem eius divortio comprobasti: oportuerat autem, etsi condicio huiusmodi admitteretur, praeferre lucro concordiam maritalem. Enim vero cum boni mores haec observari vetent, sine ullo damno coniunctionem retinere potuisti. Redi igitur ad maritum sciens hereditatem matris, etiamsi redieris, retenturam, quippe quam retineres, licet prorsus ab eo non recessisses’ (XII k. dec. Valeriano IIII et Gallieno III AA. cons.). – Your behaviour is more reproachable than your mother’s. If she wanted you to be her heiress, she would have not commanded that you break your marriage up with your husband, what is of not effect. And yet you have approved her will by divorce. It would have been better, however, even if such a condition were to be admitted, to prefer marital harmony over a profit. And since good morals forbid to respect this condition, you could have stayed in your union without any harm. Return therefore to your husband, knowing that you will keep estate of your mother, even if you return, just as you would have obtained even if you had not left him. (AD 257).

<sup>41</sup> D. 35.1.15 (Ulp. 35 *Sab.*): ‘Cui fuerit sub hac condicione legatum “si in familia nupsisset”, videtur impleta condicio statim atque ducta est uxor, quamvis nondum in cubiculum mar-

dimension of paternal authority, or vice versa, that the on-going emancipation of Roman children (and of women as Schulz observed – *cf. supra.*, p. 1045), furthered the principle of *affectio maritalis* (but most probably the influence was contemporary and mutual).

Such is the context of the imperial decisions and the Ulpianic reply cited above: restating and reaffirming the indissolubility of marriage by the father, directed against attempts to disrupt one's child's marriage. These were probably not infrequent: considering that pater's consent was still necessary to allow a child-in-power of whatever sex to contract marriage,<sup>42</sup> we may safely imagine that the capacity of this Roman father enticed an idea that initial consent could be withdrawn at any given time. It is not surprising therefore that a postclassical collection of jurisprudential rules ascribed to Paul firmly draws a line between these two.

*PSent.* 2.19.2: Eorum qui in potestate patris sunt sine voluntate eius iure matrimonia non contrahuntur, sed contracta non solvuntur: contemplatio enim publicae utilitatis privatorum commodis praefertur – Persons in power of their father do not legally contract marriage without his will; yet once the marriages are contracted they cannot be dissolved by the will of *pater*. Public utility is thus preferred to the commodity of private people.

iti venerit. Nuptias enim non concubitus, sed consensus facit' (= *D.* 50.17.30, Ulp. 36? *Sab.*) – If a bequest was made under a condition 'should she marry', the condition is met as soon as the wife is led, even if she still has not entered into the bedroom of the husband. *Cf.* for all, VOLTERRA, *La conception du mariage d'après les juristes romains*, Padue 1940, pp. 46–49 [= *Scritti giuridici* 11, Napoli 1991, pp. 48–51] and IDEM, *s.v.* 'matrimonio' (cit. n. 1), p. 239, n. 34.

<sup>42</sup> *Cf. TULP.* 5.2: 'Iustum matrimonium est, si inter eos, qui nuptias contrahunt, conubium sit, et tam masculus pubes quam femina potens sit, et utrique consentiant, si sui iuris sunt, aut etiam parentes eorum, si in potestate sunt' – A legitimate marriage is made, when there is *conubium* between the contracting parties, and if the man is adult and the woman is able to procreate, and if both of them agree – if they are autonomous or also their fathers, if they are still in their power – *cf.* as well *D.* 23.2.2 (Paul. 35 *ed.*): 'Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt.' – Marriage cannot exist unless everyone agrees: that is these who enter it and also those in whose power they are. – This general principle is socially still relevant even if *lex Iulia de maritandis ordinibus* foresaw that the governor may compel the unwilling father to grant his consent to marriage (*D.* 23.2.19, *Marc 16 inst.*).

3) *Rome Meets Greece in Egypt:*  
*The Petition of Dionysia*

Time to turn to the lawsuit in which these two models (which, as I hope to have shown, are not automatically antagonistic), meet: the famous case of Dionysia.<sup>43</sup> It is very well known, and the basic facts are probably best outlined by the original claim of Dionysia's father Chairemon:

*P. Oxy. II 237, col. VI, ll. 12–20: Χαίρημων Φανίου γυμνασιαρχήσας τῆς Ὀξυρρυγχειτῶν πόλεως· τῆς θυγατρὸς μου Διονυσίας, ἡγεμῶν κύριε<sup>13</sup> πολλὰ εἰς ἐμὲ ἀσεβῶς καὶ παρανόμως πραξάσης κατὰ γνώμην Ὠρίωνος Ἀπίωνος ἀνδρὸς αὐτῆς, ἀνέδωκα ἐπιστολὴν<sup>14</sup> Ἀλφειῶν Ῥούφῳ τῷ λαμπροτάτῳ, ἀξιῶν τότε ἂ προσήνεγκα αὐτῇ ἀνακομίσασθαι κατὰ τοὺς νόμους, οἰόμενος<sup>15</sup> ἐκ τοῦ παύσασθαι αὐτὴν τῶν εἰς ἐμὲ ὕβρεων· καὶ ἔγραψεν τῷ τοῦ νομοῦ στρατηγῷ (ἔτους) κε, Παχῶν κζ, ὑπο<sup>16</sup>τάξας τῶν ὑπ' ἐμοῦ γραφέντων τὰ ἀντίγραφα ὅπως ἐντυχὼν οἱ παρεθέμην φροντίσει τὰ ἀκόλουθα πράξαι. ἐπεὶ οὖν,<sup>17</sup> κύριε, ἐπιμένει τῇ αὐτῇ ἀπονοίᾳ ἐνυβρίζων μοι, ἀξιῶ τοῦ νόμου διδόντος μοι ἐξουσίαν οὐδὲ τὸ μέρος ὑπέταξα ἡ' εἰδῆς<sup>18</sup> ἀπάγοντι αὐτὴν ἄκουσαν ἐκ τῆς τοῦ ἀνδρὸς οἰκίας μηδεμίαν μοι βίαν γείνεσθαι ὕφ' οὐτινος τῶν τοῦ Ὠρίωνος ἢ αὐ<sup>19</sup> τοῦ τοῦ Ὠρίωνος συνεχῶς ἐπαγγελλομένου. ἀπὸ δὲ πλειόνων τῶ[ν] περὶ το[ύ]των πραχθέντων ὀλίγα σοι ὑπέταξα ἡ' εἰδῆς<sup>20</sup> δῆς. (ἔτους) κς, Παχῶν. – From Chairemon, son of Phantias, former gymnasiarch of Oxyrhynchos. Since my daughter Dionysia, my lord prefect, has committed many impious and illegal acts against me – instigated by her husband Horion, son of Apion – I submitted a letter to his Excellency Longaeus Rufus, asking to recover what I conveyed to her in accordance with the laws, believing that she would thereby cease to insult me. ... Since now, lord, she continues to insult me with the same madness, I ask, since the law – part of which I attach below for your information – gives me the*

<sup>43</sup> There is abundant scholarly literature on this papyrus, for the recent resume cf. the paper Claudia KREUZSALER & J. URBANIK, 'Humanity and inhumanity of law: The case of Dionysia', *JfJ* 38 (2008), pp. 119–155; as well as J. PLATSCHEK, 'Nochmals zur Petition der Dionysia (P. Oxy. II 237)', *JfJ* 45 (2015), in print; for the earlier legal treatment of the issue, cf., now for all, U. YIFTACH, *Marriage and Marital Arrangements. A History of the Greek Marriage Document in Egypt. 4th century BCE–4th century CE* [*Münchener Beiträge zur Papyrusforschung und Antiken Rechtsgeschichte* 93], München 2003, esp. chapter 3 and 5. For the role of the precedents in the courts in Roman Egypt, R. KATZOFF, 'Precedents in the courts of Roman Egypt', *ZRG RA* 89 (1972), pp. 256–292, § 41 on Dionysia's case.

authority to take her unwillingly away from her husband's house, that I shall not be exposed to any violence by any of Horion's people or by Horion himself, who continuously threatens me with it. From the multitude of cases about these things I have attached only a few for your information. Year 26, Pachon. (Claudia Kreuzsaler & J. Urbanik)

Unlike the somewhat speculative nature of *aphairesis*, and seemingly strongly conditioned, at best, character of the Roman prerogative, here we are left in no doubt. There definitely existed a norm permitting a father to divorce his daughter against her will: Chairemon is able to append the *nomos* in its material form and some case-law in which it was successfully applied (sadly, but not to much surprise, Dionysia did not recite either). It is also evident that Chairemon's execution of this right has not the protection of his daughter as a goal (due to the mal-preservation of the first four columns of the papyrus the exact details of the affair are not known, but it is certain that Chairemon resorted to this legal action because he had failed to resolve financial and property matters with his daughter to his liking). The woman opposed her father's claim to the right to take her away by citing two precedents decided by the prefect and the epistrategus and a legal opinion of a *nomikos* Ulpius Dionysiodorus. Thanks to them we may circumscribe better the apparent right, termed conventionally as *apospasis* (the documents only use the verb ἀποσπάω). It will be enough to report here extensively only the judgement of the epistrategus as it includes the previous decision of the prefect:

*P. Oxy.* II 237, Col. VII, ll. 29–39 (14 October 133 AD): ἐξ ὑπομ[νηματισ]μῶν  
<sup>30</sup> Πακωνίου Φήλικος ἐπιστρατήγου. (ἔτους) ιη θεοῦ Ἀδριανοῦ, Φαῶφι ιζ,  
 ἐν τῇ παρὰ ἄνω Σεβεννύτου, ἐπὶ τῶν κατὰ Φλαυήσιος <sup>31</sup> Ἀμμούνιος ἐπὶ  
 παρούσῃ Ταειχίκει θυγατρὶ αὐτοῦ πρὸς Ἡρώνα Πεταήσιος. Ἰσίδωρος  
 ῥήτωρ ὑπὲρ Φλαυήσιος εἶπεν, τὸν οὖν αἰτιώμενον <sup>32</sup> ἀποσπάσαι βουλόμενον  
 τ[ῇ]ν θυγατέρα αὐτοῦ συνοικοῦσαν τῷ ἀντιδίκῳ δεδικάσθαι ὑπογύως πρὸς  
 αὐτὸν ἐπὶ τοῦ ἐ[πι]στρατήγου <sup>33</sup> καὶ ὑπερτεθεῖσθαι τὴν δίκην ὑμεῖν ἵνα  
 ἀναγνωσθῇ ὁ τῶν Αἰγυπτίων νόμος. Σεουήρου καὶ Ἡλιοδώρου ῥητόρων  
 ἀποκρευναμένων <sup>34</sup> Τειτιανὸν τὸν ἡγεμονεύσαντα ὁμοίας ὑποθέσεως ἀκού-  
 σαντα [ἐξ] Αἰγυπτιακῶν προσώπων μὴ ἡκολουθηκέναι τῇ τοῦ νόμου <sup>35</sup>  
 ἀπανθρωπία ἀλλὰ τ[ῇ] ἐπι[νο]ία τῆς παιδός, εἰ βούλεται παρὰ τ[ῷ] ἀνδρὶ  
 μένειν, Πακῶνιος Φήλιξ· ἀναγνωσθητο ὁ νόμος. ἀνα[γ]νωσθέντος Πα-  
 κῶνιος [Φή]λιξ· ἀνάγνωται καὶ τὸν Τειτιανοῦ ὑπομ[νη]ματισμόν.

Σεουήρου ῥήτορος ἀναγν[όντος], ἐπὶ τοῦ ιβ (ἔτους) Ἀ[δρια]νοῦ<sup>37</sup> Καίσαρος τοῦ κυρίου, Παῦν[ι] η, Πακώνιος Φήλιξ· καθὼς ὁ κράτιστος Τ[ε]ιτ[ι]ανὸς[ς] ἔκρινεν, πεύσονται τῆς γυναικός· καὶ ἐκέλευ[σε]ν δι' [ἐρ]μῆ<sup>38</sup> νέως αὐτὴν ἐνεχθῆν[α]ι, τὴ βούλεται· εἰπούσης, παρὰ τῷ ἀνδρὶ μένειν, Π[α]κώνιος Φήλιξ ἐκέλευσεν ὑπομνηματι[σ]θῆναι. – From the minutes of the epistrategus Paconius Felix. In the 18th year of the deified Hadrian, Phaophi 17, at the court for the upper Sebennytyos; case of Phlauesis, son of Ammounis, in the presence of his daughter Taeichakis, against Heron, son of Petaësis. Isidoros, advocate for Phlauesis, said that the plaintiff wanted to take his daughter away, who was living with the opposing party and recently brought in an action against him before the epistrategus and that the case has been adjourned by you in order that the law of the Egyptians should be read. Severus and Heliodoros, advocates, replied that the former prefect Titianus heard a similar case from Egyptians and that he did not follow the inhumanity of the law but the choice of the girl, whether she wished to remain with her husband. Paconius Felix: 'Let the law be read.' After it had been read, Paconius Felix: 'Read also the minutes of Titianus.' Severus the advocate read: 'In the 12th year of Hadrian Caesar the lord, on the 8th of Payni ...' Paconius Felix: 'Just as his Highness Titianus decided, they shall inquire from the woman.' And he ordered that she should be questioned through an interpreter as to what she wanted. On her replying 'To remain with my husband' Paconius Felix ordered it to be recorded in the minute. (Claudia Kreuzsaler & J. Urbanik)

The matter at stake is exactly the one we are dealing with in the present article. The father wants, against the wish of his daughter, to seize her from the house of her husband. He claims he has a right to do so, a right which apparently arises from the law of the Egyptians (again we may see that the *nomos* in question actually exists: the earlier session of the court was adjourned so the law may be found and read). Who these Egyptians were and where they took the norm from, is a question that has puzzled generations of scholars;<sup>44</sup> but for us here it is of no important consequence.

<sup>44</sup> Cf. J. MÉLÈZE MODRZEJEWSKI, *Loi et coutume dans l'Égypte grecque et romaine: les facteurs de formation du droit en Égypte d'Alexandre le Grand à la conquête arabe*. [JfP. Suppl. 21], Varsovie 2014, § 21 – «Loi des Égyptiens», pp. 259–271; H. J. WOLFF, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemaeer und des Prinzipats* 1 (ed. H.-A. RUPPRECHT), München 2002, § 5. The modern debate on the subject: U. YIFTACH-FIRANKO, 'Law in

Suffice it to observe that the norm can neither be Roman, nor, as claimed by Méléze Modrzejewski, a direct import from the ‘Athenian law and custom’.<sup>45</sup> This is not only because the traces of such legal power in classical Athens as I have tried showing in 11 1) are meagre, but chiefly as it is indiscriminately evoked by native Egyptians (not only onomastics point to their ethnicity, but also the fact the epistrategus has to use an interpreter to understand what the will of the wife may be!), and by both by the Greek-Egyptians: Chairemon the proud ex-gymnasiarch.

What counts much more is that the Roman judges, epistrategus Paconius Felix following the prefect Flavius Titianius, decides to ignore this norm, practically abolishing it – and that notwithstanding the rightful expectation of the parties that it should be applicable according to what we nowadays term as the principle of personality of law. In the earlier case of 128 ad, decided by the prefect and cited in this protocol, both sides must have been surprised: the father that his right was not executable, but also the lawyers of the defence, who, hoping to forestall the execution of *apospasis*, put forward a firm legal argument: the bride’s father lost power to separate her marriage once he had performed the act of *ekdosis*<sup>46</sup> (a plau-

Graeco-Roman Egypt: Hellenization, fusion, romanization», [in:] R. S. BAGNALL (ed.), *The Oxford Handbook of Papyrology*, Oxford 2009, pp. 541–560, and the new approach of J. L. ALONSO, ‘The status of peregrine law in Egypt. ‘Customary law’ and legal pluralism in the Roman Empire’, *JfJrP* 43 (2013), pp. 351–404.

For a useful overview of the relevant documents, cf. Silvia STRASSI, ‘Prassi giuridico-amministrativa nella χώρα egiziana fra *lex romana* e diritto locale’, [in:] R. HAENSCH, *Recht haben und Recht bekommen im Imperium Romanum* [*JfJrP Suppl.* 24], Warschau 2016, pp. 213–239, at pp. 229–236.

<sup>45</sup> MÉLÈZE MODRZEJEWSKI, *Loi et coutume* (cit. n. 43), pp. 261–262; followed by Barbara ANAGNOSTOU-CAÑAS, ‘La femme devant la justice provinciale dans l’Égypte romaine’, *RHD* 62 (1984), pp. 337–360, at 352, n. 45.

<sup>46</sup> *P. Oxy.* 11 237, col VII, ll. 28–29 (AD 128): Προβατιανὸς ὑπὲρ Ἀντωνίου προσέθηκεν, ἐὰν ἀπερίλυτος ᾦν ὁ γάμος, τὸν πατέρα μήτε τῆς προικὸς μηδὲ τῆς παιδὸς τῆς ἐκδεδομένης ἐξουσίας εἶχειν. – Probatianos adduced (speaking) for Antonios that if the marriage has not been dissolved the father had power neither in regards to the dowry, nor the given-away child (tentatively translating ἀπερίλυτος as ‘dissolved’: which, negated, normally refers to a document still in force, cf. particularly interesting in this context line 40 of *P. Oxy.* IV 713, AD 97, a claim for property registration based on the marriage document of the parents, still binding notwithstanding the father’s death).

sible claim, as it coincides with the expert opinion by Ulpus Dionysiodoros, also cited by Dionysia).<sup>47</sup> Yet Flavius Titianus did not even take a while to consider it, choosing to follow the Roman construct of marriage: formed by the parties and thus free from any external influence. It is the will of the parties to the marriage that creates it and sustains it, the father has nothing to say. Any norm, even well-established, in the local legal order cannot be upheld for the simple reason that its application would constitute of threat to the *ordre public* of the Romans (Claudia Kreuzsaler and I argue that the claim of inhumanity used by the lawyers in front of Bassanus is not a mere rhetorical tool, that it rather employs a well-established legal argument used by the imperial chancery to abolish old norms deemed now socially unacceptable).<sup>48</sup>



### III. A SYNTHESIS SOCIAL POWER VS. LEGAL PREGOGATIVE

It seems now that, all in all, the Roman model does not necessarily constitute an antithesis of the Greek/Athenian one. Both – proven by, among oth-

<sup>47</sup> *P. Oxy.* II 237, col. VIII, ll. 2–4 (AD 138): ... Οὐλπιος Δ[ι]ονυσόδ[ωρος] τῶν ἡγο-  
ρανομηκό<sup>3</sup> των νομικὸς Σαλουιστ[ί]ω Ἀφ[ρικανῶ] ἐπάρχῳ στόλου καὶ [ἐπὶ τῶ]ν κεκριμένων  
τῶ τεμιμω[τά]τῳ χαίρειν. Δ[ιον]υσία<sup>4</sup> ὑπὸ τοῦ πατρὸς ἐκδοθεῖσα [πρὸς γάμον ἐν τῇ τοῦ  
π[α]τρὸς ἐξουσίᾳ οὐ]κέτι γέγνηται, ... – Ulpus Dionysiodoros, former agoranomos, a  
legal expert, to his most esteemed Salvius Africanus, prefect of the troop and judicial  
officer, a greeting. Dionysia, who has been given away by her father in marriage, is no  
longer under his authority ... (KREUZSALER & URBANIK).

On the role *ekdosis* in marriage formation, cf. most recently, U. YIFTACH, ‘The role of the *ekdosis* in the Greek Law of the Roman Period in light of second century marriage documents from the Judean Desert’, [in:] R. KATZOFF & D. SCHAPS (eds.), *Law in the Documents of the Judean Desert*, Leiden – London 2005, 67–84, and IDEM, *Marriage and Marital Arrangements* (cit. n. 42), ch. 3, whose views I now do not entirely share, on that cf. further my ‘Between the unity and the force of tradition: The case of *ekdosis* in Graeco-Roman Egypt’, (forthcoming).

<sup>48</sup> KREUZSALER & URBANIK, ‘Humanity and inhumanity of law’ (cit. n. 42), pp. 142–153.

ers, the case of Dionysia – demonstrate the tension between the rule of law and the social power. The legal experts who developed the classical legal construct of Roman marriage, freely contractable and freely dissoluble by the will only of the spouses, ('perhaps the most imposing, achievement of the Roman legal genius', *Schulz dixit*) clearly had in mind the protection of freedom to express this will by the spouses themselves, without any external influence considered undue. This influence was much more likely in the case of socially and legally weaker subjects, the women, and children, especially those *in potestate*. The on-going mitigation of the social dimension of *patria potestas*, the growing conviction that adult offspring is able to administer his or her affairs (foretold by the anonymous girl in *P. Didot* 1: 'yet a woman, father, though a fool in judgement of all else, may perhaps have good sense about her own affairs'), made the jurists realise that a child could actually had his or her own view on the matter of their marriage. One could not apply anymore the principle 'who remains silent is regarded to have agreed', as the socially-liberated children simply spoke their minds and these voices received a legal interpretation. And thus such construction of marriage was aimed at their protection and to their benefit, any tolerable exception to that construct will be the one that also takes into consideration the benefit of the protected subjects. Admitting dissolubility of marriage by the father in the case of the Athenian and Roman law alike would be a function thereof.

*Jakub Urbanik*

---

Chair of Roman Law and the Law of Antiquity  
Institute of History of Law  
Faculty of Law and Administration  
University of Warsaw  
Krakowskie Przedmieście 26/28  
00-927 Warsaw 64  
POLAND  
e-mail: [kuba@adm.uw.edu.pl](mailto:kuba@adm.uw.edu.pl)