

Helen Tank

University of Birmingham

LIVING WITH THE RULES: GENDER AND THE RULE OF LAW IN HERODOTUS' *HISTORIES*

INTRODUCTION

“At the heart of the concept of the rule of law is the idea that society is governed by law”¹.

“I think Pindar was right to say in his poem that law is king of all”².

In this article, I consider the ancient historian Herodotus' concept of the rule of law, and argue that he is committed, like Lord Reed, to the idea that society is, or should be, governed by law. The rule of law is a fundamental principle in the *Histories*, which Herodotus uses as part of his inquiry (*historiē*), to evaluate as well as describe events and characters, to interrogate questions on justice, law (*nomos*) and its role in a community (often reflect through the prism of gender), and to show that everyone, whether tyrant or slave, male or female, Greek or non-Greek, should live with the rules.

I consider Herodotus' model of the rule of law from a gender perspective, and argue that it has three strands: it is an external coercive force, which acts as a constraint on women as well as other subaltern groups, by excluding them from legal and political institutions within which they have no agency or authority. However, the rule of law also operates as an agent of social cohesion, identity, and control within communities, in which women feature prominently as actors, speakers, and figures of authority as well as voiceless victims of male power. The rule of law in constructing, and at times contesting, communal rules, and the ideology which underpins those rules, is an essential strand in Herodotus' *Histories*. Finally, the rule of law in the *Histories* is a normative ideal which applies to everyone, whatever their gender or status. The unequal position of women, both institutionally and ideologically, means that men in power are often shown to underestimate female capacity to make judgments, to act rationally or

¹ Lord Reed in *R (Unison) vs. Lord Chancellor* [2017] UKSC 51: [68].

² Herodotus, *Histories*, 3.38.4. All references are to Herodotus' *Histories*.

strategically, or to influence events; as a consequence they ignore the rules which regulate their relationships with women and suffer accordingly.

CONTEMPORARY DEFINITIONS OF THE RULE OF LAW

Tamanaha asserts that the rule of law is a “major achievement deserving of preservation and praise”, yet he acknowledges that it is difficult to define³. Does it mean a commitment to democracy, social welfare, and universal human rights (the “thick” definition) or is law the instrument of government, protecting individual rights, such as property, contract, privacy and autonomy, (the “thin” definition)?⁴ As he points out, the “thick” definition becomes contested in a legally pluralist world where global capitalism and liberal democratic norms can clash with customary or religious norms, or local methods of dispute resolution. The “thin” definition, however, can be used of a tyranny which uses state rules as a means to oppress the populace, or to legitimise abuses of power⁵. Nevertheless, Tamanaha argues that the ideology of the rule of law worldwide has a restraining influence on those in power and we should promote the concept of the rule of law as a means to prevent government tyranny, to prompt evaluative questions on necessary limits on government, and to interrogate whether law, in practice, achieves the good of the community.

THE RULE OF LAW IN ANCIENT GREECE

These are questions which were asked in classical Athens, leading scholars to draw parallels between ancient and modern concepts of the rule of law. Harris, for example, argues that classical Athens conforms to modern as well as ancient

³ B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004, pp. 3-4.

⁴ *Ibidem*, 91; *Order in the Jungle*, “The Economist” 15 March 2008, Vol. 386, issue 8571, pp. 96 for definition of “thin” and “thick” formulations of the rule of law in an economic context, in which development aid is conditional on a commitment to the rule of law.

⁵ B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004 pp. 91-96; B. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, „Hague Journal on the Rule of Law” 2011, issue 3, pp.1-17 on the rule of law and legal pluralism in development projects. In his book on *The Rule of Law*, pp. 67, 84, Lord Bingham “roundly rejects” a “thin” definition and regards respect for human rights and good governance as “inseparably linked”; “the rule of law requires that the law afford adequate protection of fundamental human rights”.

notions of the rule of law, to the extent that the law applied equally to all, all officials were accountable, all regulations were accessible, adjudicative procedures were fair, and there was no punishment without trial. Indeed he states that „one of the most important Greek values was the ideal of the rule of law” and he sets out four key attributes of law, namely, that it is enforced by political authority, is intended to have widespread or universal application, is prescriptive about conduct and contains a sanction⁶. Canevaro also argues that, in classical Athens, rules which defined the requirements for enacting law, a system of due process, that is, a trial system, and the use of oaths and rhetorical commentaries to enforce and clarify the law, meet modern definitions of the rule of law⁷.

However, if we consider the rule of law from a gender perspective, there is a huge gap between the modern “thick” definition and the ancient concept. Harris has to concede that, in gender terms, Athenian women were not agents in court proceedings, having to rely on male relatives to bring law suits on their behalf⁸. Legal and political rights were accorded to Athenian male citizens; there was no concept of fundamental human rights, and nondiscrimination between different groups, as the basis for the rule of law⁹. As Livingstone points out, the underlying *status quo* in democratic Athens was gender-based and wealth-based inequality¹⁰.

Moreover, Herodotus was writing about a wider world than democratic Athens; he interrogates the three political institutions of democracy, oligarchy and, most significantly, tyranny, all of which, as institutions, excluded women, with the exception of a few notable women, such as Tomyris, Pheretime and Artemisia, who exercised power in their own right. There are two aspects of Canevaro’s argument which I find helpful in thinking about the concept of the rule of law and its intersection with gender in Herodotus’ *Histories*. First, Canevaro argues that the rule of law was a normative ideal in the ancient Greek *polis* and that even tyrants had to show a law-abiding aspect, even if this was rhetoric rather than reality¹¹. It is an ideal to which Herodotus is committed, using it to assess, and distinguish between, those who exercise power, whether Greek or non Greek. In

⁶ E.M. Harris, L. Rubinstein (eds.), *The Law and the Courts in Ancient Greece*, London 2004, pp. 1-8, 26, 48; E.M. Harris *The Rule of Law in Action in Democratic Athens*, Oxford 2013, pp. 2-10 on rule of law in democratic Athens.

⁷ M. Canevaro, *The Rule of Law as the Measure of Political Legitimacy in the Greek City States*, „Hague Journal on the Rule Law” 2017, issue 9, pp. 213-216.

⁸ E.M. Harris, *The Rule of Law in Action...*, pp. 6-7

⁹ Human Rights Act 1998, Schedule 1, Article 14: Prohibition of discrimination. “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

¹⁰ N. Livingstone, *Athens: the City as University*, London, New York, p. 62, n.13.

¹¹ M. Canevaro *The Rule of Law...*, pp. 222-231.

the case of two Persians kings, Cambyses, for example, uses legal precedent to “do what he wants”, when he consults Persian legal experts about whether he can marry his sister, whereas Darius commits to a form of due process when dealing with Intaphrenes’ revolt, in that he interrogates all the co-conspirators before imprisoning Intaphrenes and his male family¹².

Second, he opposes *eunomia* to *hubris*: *eunomia* is linked to order, rules of behaviour, proper dealings with others including the gods, respect of one’s own and others rights and prerogatives, and knowing one’s place, whereas *hubris* is linked to overstepping the mark, improper, disrespectful or dishonourable dealings with others including the gods¹³. This is a much wider concept of the rule of law than one based on political institutions; it reflects the unwritten rules of family, community, and the gods, who are believed to intervene when power is exercised by those who think the rules do not apply to them, and forget human limitations¹⁴. Many of the rules in the *Histories* are not enacted in a formal sense but originate in custom and tradition.

This leads us to consider the meaning of the rule of law in a wider cultural sense. Pospíčil, a legal anthropologist, aimed to formulate an analytical concept of law that could be applied cross-culturally. His definition of law does not refer, therefore, to a sovereign or king but to the legal authority within a group, that is, those who have power to enforce an imperative decision (you must behave in this way), by way of a sanction (which can be physical or psychological), in a dispute between parties on rights and obligations, and who intend their decision to be applied universally (to all similar problems in the future)¹⁵. This analysis has some parallels with Harris’ examination of the Greek ideal of the rule of law. However, Pospíčil questions the idea that law is the property of society as a whole rather than subgroups within it, arguing that there is a plurality of legal systems within

¹² Hdt.3.31 (Cambyses); 3.118 (Darius).

¹³ M. Canevaro *The Rule of Law...*, p. 220 n 32.

¹⁴ D. Asheri, (in:) D. Asheri, A.B. Lloyd, A. Corcella (eds.) *Herodotus, Histories; Book I-IV* Oxford 2007, p. 38 on jealous gods “they cannot bear excessively successful human beings, their self confidence, boundless power, arrogance and, worst of all, their inborn tendency to transgress the limits imposed on them by nature or law”. D.L. Cairns, *Hybris, Dishonour, and Thinking Big*, „The Journal of Hellenic Studies” 1996, Vol. 116, p. 18 on Herodotus’ account of Xerxes’ invasion of Greece, “drawing clear links between *hybris*, human presumption, dishonouring the gods, and divine *phthonos*”. Cf. A.M. Bowie *Herodotus. Histories, Book VIII*, Cambridge 2007, pp. 8-11 for “divine compulsion” and the demands of the Persian court constraining Xerxes, and risk of orientalism in western portrayals (ancient and modern) of Eastern monarchs in terms of *hubris*.

¹⁵ L. Pospíčil, *Anthropology of Law: A Comparative Theory*, New York 1971, pp. 40-44, p. 95 on definition of law, pp. 81-87 on *obligatio* as social relationship between parties to the dispute, pp. 87-95 on legal sanction as either withdrawal of reward/favour or physical/psychological punishment (shaming, for example). He takes a functional approach to sanction: the effect of the sanction is more important than the form.

any society, with each functioning subgroup regulating its members by varying forms of social control, with the result that the individual may be subject to several legal systems. Though he distinguishes between authoritarian law, regarded as unjust by most people, and requiring external sanctions and enforcement, and internalised custom, which is followed by most of the group, he also recognizes that the boundary between “law” and “custom” is fluid; what may seem customary at a societal level may be seen as authoritarian at a sub-group level¹⁶. He concludes, therefore, that “law should be studied as an integral part of the cultural whole, not regarded as an autonomous institution”¹⁷. I argue that this is a more productive way to approach the rule of law in the *Histories*, as an intersection of law with the cultural whole, rather than considered in an institutional context.

Many legal scholars now use the term legal pluralism to reflect “the co-existence de jure or de facto of different normative legal orders within the same geographical and temporal space”¹⁸. In the *Histories*, one of these normative legal orders is the regulation and enforcement of gender norms, which is often done by women. The Lydian king Candaules’ wife, for example, issues her husband’s personal guard Gyges with an ultimatum: be killed or kill the king (he chooses to kill the king)¹⁹. The reason for this ultimatum is that the king has acted unlawfully (*anomos*) in arranging for her sexual exposure before Gyges. She can issue a command to Gyges because she has authority as queen, a fact her husband has disregarded; though he has the power of a tyrant, his wife is the one to pass judgment, and he is punished for disregarding legitimate gender expectations within the household (*oikos*). This makes her one of the many women in the *Histories* who protest against the violation of *nomos* by men. Megacles’ daughter is another example; she tells her mother that her husband Peisistratus is having sex with her “not in the customary way” (1.61.1). The mother reports this to her husband who, as a consequence, breaks off his alliance with Peisistratus and makes peace with the tyrant’s political rivals. Megacles’ daughter, married as part of a negotiated alliance between two powerful men, expects that the marriage will produce children; the attempt to thwart those expectations, has political as well as personal consequences²⁰. The rules which dictate appropriate gender performance apply to men as well as women, and are reinforced by social judgments. For example,

¹⁶ *Ibidem*, pp. 344-345.

¹⁷ *Ibidem*, p. x.

¹⁸ H. Quane, *Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?* „Oxford Journal of Legal Studies” 2013, Vol. 33, No. 4, pp. 676, 680, the term clearly refers to the existence of more than one legal or “law like” normative system. For link with rule of law see B. Tamanaha, *The Rule of Law...*, pp. 1-17.

¹⁹ Hdt. 1.8-12.

²⁰ There is a significant bibliography on women in Herodotus, see C. Dewald, *Women and Culture in Herodotus’ Histories*, (in:) R. Munson (ed.), *Herodotus and the World*, Oxford 2013,

when Croesus excludes his son Atys from an expedition to kill a boar, following a dream in which his son is killed by an iron spearhead, Herodotus expresses the weight of social expectation in the words he gives to Atys: “What kind of man will my fellow citizens take me to be? What will my new wife think of me? What kind of husband will she think she is living with?” (1.37.3).

Atys has to perform appropriately as a man to preserve the respect of the community and his wife.

These examples show that the rule of law cannot be based solely on external coercion. As H.L.A. Hart argues, such an approach fails to recognize the force of those customary laws which threaten those who deviate from the norms of the group. Members of a community are expected to internalise these rules, which are associated with “normative” language such as “ought” and “must”; “violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a reason for hostility”²¹. Law imposes obligations on members of the community based on societal control. One of the striking aspects of rules (*nomoi*) in the *Histories* is how many are grounded in customary practice, rather than enactment by an institution or civic body; in other words, there is no conscious law-creating act.

Rules have a social as well as a legal dimension, which require consideration of how those rules are perceived by community members, and how normative behaviours are enforced. For example:

The Argives made a law, with a curse added to it, that no Argive grow his hair, and no Argive woman wear gold, until they recovered Thyreae (1.82.7).

This is an order, with a penal sanction in the form of a curse. However, the law is also functional, in that it provides a means to display the Argives’ response to defeat and their resolve to recover Thyreae, thereby acting as an agent of social cohesion, and is also ideological, in that it reinforces gender performance through the regulation of outward appearance.

Scholars of ancient law have identified this internal aspect of law. Ostwald defines *nomos* as “a traditional attitude which implies certain deep-seated convictions and beliefs (...) something generally accepted as valid and therefore binding”²². In the *Histories*, we identify many cases where the sense of obligation is

pp. 151-179; and J. Blok, *Women in Herodotus’ Histories*, (in:) E.J. Bakker, I.J.F. de Jong, H.van Wees (eds.), *Brill’s Companion to Herodotus*. Leiden 2002, pp. 225-242.

²¹ H.L.A. Hart. *The Concept of Law*, Oxford 1961, pp. 55-56, 86- 88.

²² M. Ostwald, *Language and History in Ancient Greek Culture*, Philadelphia 2009, p.115,118; J. Hall, *Ethnic Identity in Greek antiquity*. Cambridge 1997, p. 30 on social identity as the internalising by individuals of “shared group norms and values”; S.C. Humphries, *Law, Custom and Culture*, „Arethusa”1987, issue 20, p. 217 defines *nomos* as “accepted and established rules of conduct handed down from the past”; J. Blok, *Women in Herodotus’ Histories...*, p. 227 on *nomos* as a sovereign force in people’s behaviour; S.Todd *Oxford Classical Dictionary*, 2012: 811: [Greek] law is perhaps best studied not as a source of juridical principles but rather as a way of understanding how particular ancient societies perceived and regulated themselves. D. M. MacDowell, *Oxford Classical Dictionary* (OCD), 2012: 802 on Athenian law and procedure: “an unwritten rule should

based on internal conviction not external pressure; the word conveys belief and attachment. Munson identifies both the external and internalised aspect of *nomos*: „the cause of the »must« is the force of *nomos*”²³. This internal aspect of the rule of law is highlighted by Herodotus in the following story. The Persian king Darius asks a group of Greeks how much money it would take for them to eat the corpses of their fathers. The Greeks reply that no sum of money would induce them to do this. Darius then summons an Indian tribe who have this very custom and asks them how much money they would accept to cremate their fathers’ corpses: they were horrified and told him not to say such a terrible thing. Herodotus concludes with this observation: “If one were to order all mankind to choose the best set of rules in the world, each group would, after due consideration, choose its own laws; each group regards its own as being by far the best” (3.38).

The rule of law in this instance is an internal rule which makes *nomos* king of all. People are attached to their own rules, however strange or abhorrent they may seem to others, they form part of collective identity, and people assert the superiority of their laws over those of other peoples. The power of law is based on social control, and communal pressure; these are the rules of the group, which must be internalised; they confer a sense of belonging, of identity. ”Living with the rules” in this context means following the social, cultural and religious rules which apply to everyone in a community. In contrast to the battlefield, the law courts or the assembly, women are part of this community, which is bound together by ties of family, religion and shared rules, “the kinship of all Greeks in blood and speech, and the shrines of gods and the sacrifices that we have in common, and the likeness of our way of life” (8.144.2).

Feminist legal theorists analyse the relationship between gender, law and power, the practice of structural gender inequality, and law as discourse, a manifestation of gender ideology, pointing out that lawyers often fail to interrogate the ideological framework they work within, and ignore important social and cultural rules²⁴. Other scholars also point to the ideological role of family law in defining who is excluded as well as who is included and to „the manipulation of social norms as well as legal ones” in the regulation of family life²⁵. Tamanaha notes that

be regarded as a law if *the community* (my emphasis) or the ruler approves it and imposes or authorises punishments for infringement of it”.

²³ R.V. Munson, *Ananke in Herodotus*, „Journal of Hellenic Studies” 2001, Vol. 121, pp. 43-44.

²⁴ N. Naffine, *In Praise of Legal Feminism* „Legal Studies” 2002, issue 71, pp. 71-101 for review of scholarship in feminist legal theory. M.A. Fineman, *The Autonomy Myth: A Theory of Dependency* New York, London 2004, p.154 on family not being a natural construct but highly regulated.

²⁵ J.Masson J., R. Bailey-Harris., R. Probert *Cretney: Principles of Family Law*, 8th edition, London 2008, pp. 6-7; A. Diduck, K. O’Donovan (eds.), *Feminist perspectives on Family Law*, Routledge Cavendish, 2006, p. 7.

formal legality has its uses but may have limited applicability to family and other communal activities²⁶. In the *Histories*, the rule of law applies to the everyday, in which women are involved as actors who police the boundary between the public and the private sphere, and enforce social and cultural norms, as well as being a subaltern group, excluded from legal and political institutions.

A SOCIOLOGICAL MODEL OF THE RULE OF LAW

I now consider three case studies from the *Histories* which interrogate the rule of law, using a modern sociological model as a comparative study. Rather than attempt to define the rule of law, Sibley and Ewick researched what the concept meant to Americans in their everyday lives. They came up with a tripartite model which reflected the “cultural narrative in people’s accounts of law” based on interviews with people from a range of social, economic and racial backgrounds. This, of course, was in the context of a society with a written constitution, very different from ancient Greece. However, it is a helpful way to think about *nomos* in the *Histories*, because Herodotus too gives us a cultural narrative in which people are not just subject to law, but engage with it even in situations where they have limited power. Strategy, storytelling, and ideology all play a part in constructing the rule of law.

In the first of the three cultural narratives the law is “a magisterial, remote, and objective force governing human affairs”, which is to be both revered and feared, is detached from everyday life, and requires conformity, or supplication, in the face of judicial power. The second cultural narrative, however, sees law as “a terrain for tactical encounters” and the boundaries that separate law from the everyday are understood to be “relatively porous and fragile”. In this story of law, it is a game requiring strategy and skilful manoeuvring. Those interviewed by Sibley and Ewick recognized that in this context what mattered was having a good lawyer, someone who could play the game effectively, who was skilled at manipulation and trickery. They also recognized that in practice those with power, money and status could “play the law game” more effectively than those without those resources.

The third cultural narrative identified by Sibley and Ewick is what they term “Up Against the Law”. In this account, people feel powerless; unable to keep law at bay, unable to play by the rules, recognizing themselves as “have nots”, they respond with acts of resistance, either relying on their invisibility, and social

²⁶ B. Tamanaha, *On the Rule of Law...*, pp. 137-141.

subordination, or telling their story to pass on the message that “legality can be opposed if just a little”. The two sociologists emphasise that these three narratives are not mutually exclusive, and that, as Pospíčil notes, people live with a plurality of rules. They argue that “the so called gap between the law on the books and the law in action might actually operate to define and sustain the law as a durable and powerful social institution”²⁷.

LAW AS DESPOT

In the first narrative I consider in the *Histories*, law is a powerful force, to be feared more than the commands of a monarch. In 480 BC Xerxes, king of the Persians, has invaded Greece and is about to fight the Greeks at Thermopylae. He wants to know if the Greeks will resist, and takes advice from the exiled king of Sparta, Demaratus, who tells him: “They [the Spartans] are free, yet not wholly free: law is their master, whom they fear much more than your men fear you. Each man does what the law commands, and its command never changes, which is that they should not flee from battle, no matter how many men are ranged against them, but stay in line and either win or die” [7.104.4].

The military *nomos* of win or die is a coercive force which dictates male conduct in battle no matter what the circumstances. In gender terms, it applies to men of military age, and is reinforced by an ideology of female inferiority which is articulated by both Persians and Athenians, who contrast the inferior female “other” with the superior normative male, both as a persuasive strategy in arousing men in battle and as a way to explain military defeat or victory in the field²⁸. The man who fails to live up to the expectations of him as a warrior is a coward, just like a woman.

However, the ideology is also reinforced by social control, as illustrated by the case of Aristodemus, who did not fight at Thermopylae: “When Aristodemus returned to Sparta, he was disgraced and without honour. He was deprived of his honour in this way: no Spartan would give him fire or speak with him, and they taunted him by calling him Aristodemus the Trembler. In the battle at Plataea, however, he made up for all the blame brought against him” (7.231).

²⁷ S. Sibley, P. Ewick, *The rule of law: sacred and profane*, „Society” 2000, Vol. 37, issue 6, pp. 49-56.

²⁸ H. Tank, *Powerful women and gender ideology in Herodotus’ Histories*, (in:) T. Tsakiropolou-Summers, K. Kitsi-Mitakou (eds.), *Women and the Ideology of Political Exclusion: From Classical Antiquity to the Modern Era*, London, New York 2019, pp. 74-88 on powerful women and the ideology of female inferiority in Herodotus’ *Histories*.

He is excluded from civil society, shunned, shamed, the object of contempt and only redeems himself by fighting to the death at the battle of Plataea. The rules are enforced at home, in the everyday; Aristodemus is punished through social exclusion²⁹. The rule of law, therefore, is not just an external force which compels the male warrior, it is also an internal rule of Spartan society which women as well as men enforce.

LAW AS A TOOL

Is obedience to the rule of law, therefore, a Spartan trait? That is not the pattern we find in the realm of family law. As Cartledge and Greenwood point out, marriage norms in Sparta had an unstable history, with instances of bigamy (5.40.2), wife-swapping (6.61-2) and marriage by capture (6.65.2)³⁰. This creative approach to marriage *nomoi* contrasts with the Spartans' military *nomos* which is inflexible and coercive. I now consider two powerful Spartan royals, who engage with *nomos*, they change it to suit their own ends and do not regard family *nomoi* as unchangeable.

1) At this point the ephors and the elders had a debate and then put this proposal to Anaxandridas. "We can see that you are reluctant to let go of your present wife; do this then and don't refuse, or the Spartiates might come to an unpleasant resolution in your case. We're not going to ask you to dismiss your existing wife, but you must bring in another wife, who can bear children, and you must treat them both the same. Anaxandridas agreed with their proposal, and from then on had two wives and two households, which was no part of Spartiate practice" (5.40).

The story of Anaxandridas of Sparta illustrates a negotiated change of *nomos*, whereby the king and his advisors (the ephors and the elders) both use law to achieve an objective that meets both their interests. The king has married his niece but they remain childless. The ephors point out that they cannot allow his line to die out, declaring the rule that a marriage must produce an heir. Anaxandridas, however, refuses to divorce and remarry as he is pleased with his wife and refuses to blame her for their childlessness. However, matters are not allowed to escalate. The ephors, joined now by the elders, debate and put forward proposals

²⁹ J. Ducat, *The Spartan "tremblers"*, P.J. Shaw (transl.), (in:) S. Hodkinson, A. Powell (eds), *Sparta and War*, Wales 2006, pp.10-16.

³⁰ P. Cartledge, E. Greenwood, *Herodotus as a Critic: Truth, Fiction, Polarity*, (in:) E.J. Bakker, I.J.F. de Jong, and H.van Wees (eds.), *Brill's Companion to Herodotus*, Leiden, Boston 2002, p. 368.

which include an element of coercion. The parties reach a negotiated settlement, because both sides are prepared to compromise; they agree on a change of *nomos*, which resolves the problem of childlessness.

2) The Spartans at that time decreed, according to law, that the kingdom should pass to the elder of the two boys. However, they did not know which one to choose, because they were identical twins and they could not tell them apart. Since they were unable to decide, they questioned the boys' mother. She claimed that she too did not know which was elder and which was younger, though in fact she knew perfectly well, but she wanted to find a way for both of them to become kings (6.52).

In another Spartan story, the Spartans plan to make the older of the twin sons of Argeia and Aristodemus king according to their rules. Their mother, however, attempts to manipulate circumstances to achieve a different end. She wants both to become kings, so pretends she does not know which was born first. The Spartans have no way of testing her story so must consult the oracle at Delphi, to obtain an authoritative answer, which is that they should make both boys king but give greater honour to the elder thus giving the dual kingship divine sanction and authority, but also requiring further investigation to work out which twin was born first.

In both cases therefore the status and power of the two protagonists trumps a strict adherence to the existing rules of marriage and succession showing the law is not inflexible; it can be changed in the light of circumstances, by those who have the power to do so.

LAW AS RESISTANCE

The Athenians did not bring wives with them on their voyage of colonization, but murdered some Carians and took their daughters to be their wives. It is because of this massacre that the women made it a law (a law they bound themselves to by oaths and passed on from mother to daughter) never to share a meal with their husbands and never to call out to them by name – these were, after all,

the men who had gained them as their wives by murdering their fathers, husbands and children (1.146.2-3).

I argue that this can be read both as an act of resistance, and in the longer term, an act of memorialising that resistance, which Herodotus himself perpetuates with his work. This resistance is to the rule of law as oppressor, a coercive power which forces women into marriage with the men who killed their husbands. The Athenians who colonise Caria assume a right analogous to the right in war, to capture these women as if they were spoils of war³¹. The Carian women respond by introducing a rule which unquestionably relates to the everyday. Just as Aristodemus was punished at home, so these women show their resistance in the home; they reject social intercourse with their husbands, not sharing meals with them or calling them by name, and this becomes an act of cultural memorialising, passed by mothers to their daughters, to preserve the memory of the massacre of husbands, fathers, and children by Athenians when they colonised Miletus³². Catherine Otten, who has interviewed some of the Yezidi women abducted and raped by men from ISIS, writes that they deal with the trauma of their experiences through telling stories of their captivity and resistance, in order to reassert their identity as Yezidi women and to reject the media stereotype of the passive victim, exoticised, for example, as a “sex slave”. They know their ancestors faced the same sort of persecution in the past and storytelling is a means of promoting survival and resistance, though Otten acknowledges this is not always successful³³.

In the story from Herodotus, it is also an act of rebellion for the Carian women to refuse to name their husbands. By imposing sex segregation at meals, moreover, these women are shown to manage both time and space within the household rather than being excluded from, for example, the Athenian symposium, a male space. And they also assert their Greekness, since it was the non-Greeks in the *Histories* whose custom was to share meals with their wives. These women make the rules of social intercourse within the *oikos*, suggesting that it is a mistake to focus on legal capacity in the narrow sense of participation in legal institutions. They have authority as mothers which enables them not only to control their daughters, and enforce that control through oaths, but also to limit their own interaction with their husbands. They create a precedent, which unquestionably

³¹ E.M. Harris, *The Rule of Law in Action...*, p. 7 “The universal rule among the Greeks was that persons captured in battle belonged to the victors by right of conquest’, with references to Plato, Aristotle and Xenophon.

³² J. Assman, *Religion and Cultural Memory*, R. Livingstone (transl.), Stanford, CA 2000, pp. 6-7 on the task of memory being to transmit cultural identity; p. 29: “Cultural memory is complex, pluralistic and labyrinthine; it encompasses a quantity of bonding memories and group identities that differ in time and place and draws its dynamism from these tensions and contradictions”.

³³ C. Otten, *With Ash on their Faces: Yezidi Women and the Islamic State*, New York, London 2017, pp. 8-9.

has a prescriptive aspect, and is intended to bind daughters as well as husbands, thus conforming to Hart's concept of law as including social norms which are accepted as valid and binding by those amongst whom it prevails³⁴.

Women generally both in the classical world and today have a role in inculcating behaviours and expectations in future members of the group and passing on group history and societal norms to them, thus preserving the cultural boundaries and identity of their community. For me, the significance of the story of the Carian women is that women assume the power that is available to them to pass on the memory of their oppression through a *nomos*. They perform this role in a hostile environment, and the story itself becomes an act of resistance.

CONCLUSION

"It is precisely because law is both god and gimmick, sacred and profane, objective, disinterested, and a terrain of legitimate partiality that it persists and endures. Legality is composed of multiple images and stories, each describing a particular relationship between ideals and practices, revealing their mutual interdependence"³⁵.

The Spartan *nomos* of "win or die" is a very powerful military ideal, and is supported by an ideology based on gender, and ethnic polarities. However the rules in practice are more flexible and negotiable if one has power, status, and authority, and even for those who have none of these, the story of resistance can be a powerful one, that gives at least some agency to the coerced. However these three models of law are not mutually exclusive; the Spartan king whose approach to family law can be remarkably flexible, is also bound to "win or die" in battle, and the story of the Carian women in one crucial respect is similar to that of Aristodemus the Trembler: the home is the place where the regulatory effect of social norms is experienced and where the rules are enforced. For Herodotus *nomos* is king precisely because it is multi faceted; it acts as a restraint on those who think the rules do not apply to them, it also reflects law in action, where rules can be manipulated and played with, and it encompasses the rules of everyday life, which women as well as men enforce, as well as the institutional rules which exclude them. At the heart of Herodotus' concept of the rule of law is the normative ideal that society should be governed by law.

³⁴ H.L.A. Hart., *The Concept of Law...*, pp. 86-88 on descriptive and prescriptive norms, pp. 91-96 on secondary rules of obligations.

³⁵ S. Sibley, P. Ewick, *The rule of law...*, p. 56.

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Summary

What does “the rule of law” mean to an ancient historian, Herodotus? This paper uses modern legal theories and a sociological model to consider how he presents the concept in his *Histories*. The author takes a novel approach in that she considers the rule of law from a gender perspective. She argues that law is as much about social and cultural rules, which involve women as much as men, as it is about institutional practices which exclude women and reinforce an ideology of female inferiority. She also shows that the rule of law is a powerful normative ideal which Herodotus uses to interrogate power.

The author uses the theoretical model of law developed by the English legal scholar HLA Hart, who argues that rules have a social as well as a legal dimension (the “internal” view of law), that is, how rules are perceived by community members, and how normative behaviours are enforced by that community. She also uses the work of a legal anthropologist, Leopold Pospíšil, and feminist legal theory, to argue for a wider definition of the rule of law than that used by most contemporary scholars. She uses three case studies to show that the rule of law is a powerful force in the *Histories* precisely because it combines external coercive force, internal rule of conduct and normative ideal.

KEYWORDS

rule of law, Herodotus, history, law/*nomos*, gender, legal pluralism

SŁOWA KLUCZOWE

rzędy prawa, Herodot, historia, prawo, płeć, pluralizm prawny