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CONTENTS

Abstract: This paper offers new annotated readings and corrections to the original edition of P. Berlin inv. 16876 = *SB* V 8754 (from the archive of Harchebis, the royal scribe of the Herakleopolite nome), also discussing subsequent corrections proposed by various scholars in the past. Special attention is placed on the *hapax legomenon* technical term *antapostoloi*. The connection of these documents with the term *apostoloi* is investigated as well as their function within the framework of the shipping procedure and the officials involved in their issuance. Finally, appended is a transcription that reflects the current state of the papyrus, together with a translation into English.
Keywords: Ptolemaic, first century BC, grain transport, samples, administration, archives, *naukleros*, *dioiketes*, *sitologos*, *strategos*, *basilikos grammateus*, *apostoloi*, *antapostoloi*, *phylakitai*, ship security guards, shipping, shipowners, corrections.

Abstract: The paper offers a reading of remnants of the Arabic text of *SPP* VIII 1198. The Greek part of this bilingual document has been known for a long time, but it could not be dated precisely with the indiction date preserved in the text. The dating formula that can be deciphered in the Arabic part allows the reconstruction of the exact dates for this and another tax receipt, *PERF* 573 = *SB* XVIII 13771, issued most probably by the same official.

Abstract: Recent years witnessed an increasing interest in Christin amulets with Biblical texts. Several catalogues and monographic contributions have been published, facilitating the research on historical and religious aspects of these artefacts. The paper offers a methodological framework, founded mainly on the concept of semiophore formulated by Krzysztof Pomian, as well as six case studies, which show how the analysis of material and textual aspects of a scriptural amulet might reveal theological ideas, more or less consciously shared by its producers and users.
Keywords: magic, Biblical amulets, scriptural amulets, texts of ritual power.

Abstract: In the recent *secunda cura* of the *Tabulae Herculanenses*, Giuseppe Camodeca has completely rebuilt the dossier *TH²* 8911 about the acquisition of the Roman citizenship by the *Latinus Iunianus* Venidio Ennico. Thanks to this study, it is currently possible to make further considerations about the procedure described in the *Fragmentum Riccardi* and its relationship with the *lex Aelia Sentia*.
Keywords: *Tabulae Herculanenses*, Roman citizenship, *Lex Aelia Sentia*, *Fragmentum Riccardi*, *anniculi causae* probation.

Abstract: Following the footsteps of Józef Mélèze Modrzejewski and reassessing his law-custom theory, the essay explores the principles of law-application under Roman law. Passages from Ps.-Menander's *Epideictic Treatises* and Gregory the Miracle-Worker's *Eulogy of Origen* are confronted with the selected papyrological evidence of apparent 'conflict of laws' faced by the Roman jurisdiction: the petition of Dionysia (*P. Oxy.* II 237), and a text concerning the testamentary freedom of the Egyptians (*P. Oxy.* XLII 3015), and finally with a fragment of a juridical work attributed to Volusius Maecianus (D. XIV 2.9 *pr.*). In conclusions, a new take of the problem is presented. I suggest the principle ordering the choice of competent law be *lex posterior derogat legi priori*. Thus, after the Roman conquest the old norms remained in force until expressively abrogated by a new Roman precept: be it in a form of a judicial decision (in line of the Roman magistrate-law making), or new imperial legislation.

Keywords: *Constitutio Antoniania*, *consuetudo*, usage, *Reichsrecht*, *Volksrecht*, Menander Rhetor, Dionysia, provincial law, conflict of laws.

Abstract: While focusing on the issues such as spirituality, faith, prayer, and discipline, the late antique literary discourse pays little attention to the engagement of monks in the mundane realities of daily life. The symbolic significance of the total withdrawal from the earthly matters have paved its way into common imagination of the monastic existence. One must, however, remain cautious while attempting to translate monastic writings into the reality of day-to-day life of a monk in Egypt. As shown by numerous papyri, social and economic relations between monks and the surrounding world were not sporadic, but an inevitable element of the monastic movement. The picture of Egyptian monasticism depicts a web of contacts with the 'outside world' and an entanglement of religious landscape in the local economy. In this article, I discuss only one aspect of the much broader issue, that is the existence of 'legal capacity' of monastic communities in late antique Egypt. I address the problem of 'legal representation' of monasteries as outlined in the sources of legal practice. For a lawyer, these observations are all the more stimulating as there has been an ongoing debate whether 'legal persons' as such existed at all in Roman law, and whether we could talk about anything approaching our current understanding of 'legal personality'.

Keywords: monks, monasteries, legal capacity, Late Antiquity, papyri, legal representation, *dikaion*, *diakonia*, Roman law, legal practice, Justinian, Egypt.

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Jakub Urbanik

JÓZEF *INTER GENTES*
ON STATUS AND LAW BETWEEN THE CENTRE AND PERIPHERY*

TWO YEARS AGO, in this *Journal* my obituary of Modrzejewski's outlined his scientific method.[1] In this paper I will focus on one of the main themes of his research: the problem of law application in the

* The strictly memorial part of my essay was published in this *Journal* 47 (2017), pp. ix–xxii. The research presented in this paper was possible thanks to the OPUS 14 research project granted by the Polish National Centre for Research (Narodowe Centrum Nauki, grant no. 2017/27/B/HS3/01350): *How to Apply Law in Egypt? A Practical Guide for the Roman Judge: A Case-study of P. Oxy. II 237 and Other Papyrological Evidence on Legal Pluralism in the Roman Times*.

My heart-felt thanks are owed to José Luis Alonso for an on-going discussion on the competent law(s) in Greek and Roman Antiquity (and in particular on this essay), and to Derek Scally for having proof-read the text. All translations, unless otherwise specified, are mine.

[1] This paper originates from an invitation from Uri Yiftach to pay tribute to my late, beloved mentor at the session held in his memory during the 2017 Tel Aviv Symposium of Greek Law. This society he had once created together with Hans Julius Wolff and Arnaldo Biscardi, keen to establish a platform for research, devoid of romanistic stereotypes, on *ius graecum*. Together with Patrick Sänger and Uri Yiftach himself, we were supposed to present, and critically appraise, the key-points in the scholarship of Mélèze. The two other papers, dealing with the statute of the Jewish *politeumata* and phenomenon of *politikoi nomoi*, respectively, were published in the Acts of Symposium 2017: P. SÄNGER, 'Die

Roman world. I will start with a sketch of his basic idea on the subject and then illustrate it with some of the relevant sources. I will thus try explaining and possibly supplementing the theory of Mélèze.

The first point of interest would be significant passages taken from *Διαίρεσις τῶν ἐπιδεικτικῶν* traditionally ascribed to Menander Rhetor. I will then look at the selected papyrological evidence of apparent 'conflict of laws' faced by the Roman jurisdiction: the famous petition of Dionysia, *P. Oxy.* II 237, and a text concerning the testamentary freedom of the Egyptians (*P. Oxy.* XLII 3015). Finally, in my conclusions I will use a text that has not been hitherto properly employed in the debate: a fragment of a juridical work attributed to Volusius Maecianus and transmitted under D. XIV 2.9 *pr.*, and return to the third century evidence of Pseudo-Menander.

PROLOGUE: LAW AND CUSTOM

Józef's quest for understanding of the principles governing the choice of the applicable, competent law marks practically all his scientific work. In fact, two publications framing his life œuvre are a manifest proof thereof. It all started with his first article on law in the light of private letters in Roman Egypt (a reworked version of his first doctoral thesis directed by Rafał Taubenschlag) published in this very *Journal*.[2] These interests cul-

soziokulturelle Stellung des ägyptischen Diasporajudentums im Hellenismus nach Joseph Mélèze Modrzejewski'; U. Yiftach, '*Dikai* in the *chôra*: Another perspective of Mélèze Modrzejewski's *politikoi nomoi*', *Symposion 2017*, pp. 3–15, and 17–29, respectively. My task was to examine his views on personal status and law application. Since I was unfortunately unable to submit my contribution in time to have it printed in the Proceedings of this gathering (Józef's reproach for my habit of missing deadlines was a constant topic of our conversations ...), I have decided to publish this, thoroughly reworked – since the debate after made me aware of how much research and discussion was still needed – piece on a key aspect (and possibly also one of the most influential) of his research in the *Journal* that benefitted from his advice and support almost since its very creation.

[2] 'Le droit de la famille dans les lettres privées grecques d'Égypte', *The Journal of Juristic Papyrology* 9/10 (1956), pp. 339–363 (= *Droit et justice dans le monde grec et hellénistique* [= *The Journal of Juristic Papyrology Supplement* 10], Warsaw 2011, pp. 379–406).

minated with the ground breaking studies on the *Règle de droit* in Ptolemaic and Roman Egypt,[3] and other essays dedicated to more particular, yet not less important aspects of the problem. They supplemented the general studies and served as workshop for the development of the law-application-theory at large. Among these the research on *Loi des Égyptiens*[4] deserves a particular mention.[5] Other outstanding items were specifically dedicated to family and personal relations, where his primary study cases were marriage and guardianship (in this respect both Uri Yiftach and I, as well as many others owe him credit for giving us our initial direction in our scientific undertakings).[6] These ideas were mastered and brought together in his third doctoral thesis written originally under Jean Gaudemet in 1970.[7] The updated and amended version thereof, *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*, happened to be Modrzejewski's last published piece. We had honour to edit it within the series of our *Supplements*.

[3] 'La règle de droit dans l'Égypte ptolémaïque. État des questions et perspectives de recherches', [in:] *Essays in Honor of C. Bradford Welles* [= *American Studies of Papyrology* 1], New Haven 1966, pp. 125–173, and 'La règle de droit dans l'Égypte romaine. État des questions et perspectives de recherches', *PapCongr.* XII, pp. 317–378.

[4] '«La loi des Égyptiens»: le droit grec dans l'Égypte romaine', *PapCongr.* XVIII, pp. 383–399 (= [in:] *Historia Testis. Mélanges T. Zawadzki*, Fribourg 1989, pp. 97– 115 = *Droit impérial et traditions locales dans l'Égypte romaine* [= *Collected Studies* 321], Aldershot 1990, no. IX). The text corresponds closely to § 21 of *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* [= *The Journal of Juristic Papyrology Supplement* 21], Warsaw 2014.

[5] Some of the most important ones are collected in *Droit impérial* (cit. n. 4), *Statut personnel et liens de famille dans les droits de l'Antiquité* [= *Collected Studies* 411], Aldershot 1993, and in *Droit et justice* (cit. n. 2).

[6] Equally ground-breaking 'La structure juridique du mariage grec', [in:] *Scritti in onore di Orsolina Montevecchi*, Bologna 1981, pp. 231–268 (= *Symposion 1979*, pp. 39–71 = *Statut personnel* [cit. n. 5], no. V), and from the others a true gem of ancient comparative research: a study on *tutela* in Roman Egypt, 'À propos de la tutelle dative des femmes dans l'Égypte romaine', *PapCongr.* XIII, pp. 263–292 (= *Droit impérial* [cit. n. 4], no. III).

[7] *Loi et coutume dans l'Égypte grecque et romaine. Recherches sur les facteurs de formation du droit privé en Égypte aux temps des Lagides et sous la domination romaine*, PhD dissertation, Paris, Université de Paris-II, 1970, 480 pages (typescript).

This essay on law and custom in Greek and Roman Egypt is indeed a *summa* of the theory Modrzejewski devised to convincingly describe how law may have applied in Egypt, first under the Ptolemies, then the Romans (both under the likeness of the Egyptian pharaohs). The easy explanation – still today found in some university manuals of ancient law – assuming general application of the principle of personality of law was naturally discharged. It simply cannot have been compatible with the constant daily contacts of the representatives of all different nations in the ancient Mediterranean, a phenomenon particularly present in Greek and Roman Egypt. And indeed, it was not, as numerous papyri documenting commercial transactions show.[8] And thus the usage of the principle of personality of law must have been suitably limited only to these aspects of social and legal life in which one's personal statute indeed played role: that is family relations. In practice this covers the cases involving marriage, legitimacy, legal kinship patterns, and, obviously, succession.

In this Modrzejewski followed his grand forerunners, Ludwig Mitteis, Vincenzo Arangio-Ruiz, and agreed with the other contemporary champion of legal historical studies exploring Hellenistic and Roman *oikumene*, Hans Julius Wolff. This setting, however, provided only the basic rule of law application in Roman Antiquity. Still, there remained a vital question how to explain these particular instances in which the Roman authority blatantly ignored the apparently competent law, concordant with one's personal status. Hans Julius Wolff offered a vision of a legal vacuum caused by the Roman conquest, with the Ptolemies gone, the legitimation of 'their' law was gone, too. In that emptiness the norms had to be created anew by the Romans. The application of the old norms

[8] This is not the place to develop on this problem further, let me just evoke, *exempli gratia*, the variety of types of slaves sales: interestingly enough even with Roman participants these acts tend to follow rather the Greek than the Roman model of the contract (unreturnable goods vs. the Roman warranties for physical defects), the only notable exceptions being papyri composed outside in Egypt: *P. Lond.* II 229, p. xxi = *FIRA* III 132 = *ChLA* III 200 = *CPL* 120 = *Jur. Pap.* 37 (Seleukia Pieria, AD 166), and two documents from Side: *P. Turner* 22 (AD 141), *BGU* III 887 = *FIRA* II 133 = *MChr.* 272 = *CPJud.* III 490 (AD 151). Cf. further my '*P. Cairo Masp.* I 67120 *recto* and the liability for latent defects in the late antique slave sales: or back to *epaphe*', *The Journal of Juristic Papyrology* 40 (2010), pp. 219–248.

of whatever origin – be it Egyptian, be it Greek of various provenance, – gave them legal force as if it had never been attributed before.[9] In turn, in a friendly rivalry with Wolff, Modrzejewski inspired by his Parisian mentor Jean Gaudemet, put forward a different, and a very elegant solution to this problem.[10] The earlier norms survived the Roman conquest as customs. One could then say that their normativity[11] was reduced, relegated to the second place, auxiliary to the Roman legal order. The local laws would be thus used in wont of a Roman legal rule.

The remnants of the works of the high-classical jurist Salvius Iulianus include a fragment particularly inviting to such reasoning. Julian's rank of the imperial advisor and, by the command of Hadrian, the codifier of edicts of magistrates, would provide a particularly authoritative setting to this statement.[12]

> D. I 3.32 *pr.* (Iul. *dig.* 84): De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est: si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet.
>
> For the cases in which we do not use written laws, one should observe what has been introduced by customs and tradition. And should they not

[9] Cf. H. J. Wolff & H.-A. Rupprecht, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats* I, Munich 2002, pp. 115–121, esp. 116–117. In this final elaboration of his views, published posthumously by Rupprecht, Wolff, actually adhered partially to Modrzejewski's law-custom theory (*ibidem*, p. 117 and n. 16).

[10] Mélèze Modrzejewski, 'La règle de droit dans l'Égypte romaine' (cit. n. 3), pp. 318, 324; *Loi et coutume* (cit. n. 4), § 35.

[11] Cf. the studies by D. Nörr in which he puts forward the notion of grades of normativity, e.g. 'Spruchregel und Generalisierung. Zugleich Rezension Bruno Schmidlin, *Die römischen Rechtsregeln*, Köln – Wien 1970', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 89 (1972), pp. 18–93, esp. 86–89; idem, 'Zur Reskriptenpraxis in der hohen Prinzipatszeit', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 98 (1981), pp. 1–46 at 38–45.

[12] Cf. the meticulous critical analysis of this source and its application by Modrzejewski by J. L. Alonso, 'The status of peregrine law in Roman Egypt: 'Customary law' and legal pluralism in the Roman Empire', *The Journal of Juristic Papyrology* 43 (2013), pp. 351–404, esp. § 4 (on custom in the late republican sources, showing that it has no autonomous normative force); § 6 (discussion of D. I 3.32 *pr.*); and § 7 (the resulting critique of application of notion of custom to the persistent peregrine laws).

> exist in this matter, then (one should observe) what is close and competent to such matter; yet if neither this should be evident, then the law, which is applied in the City of Rome, should be observed.

Read as it is, and especially within the configuration of the third title of the first book of the *Digest* designed to provide the reader with the definitions of the sources of the law (*De legibus senatusque consultis et longa consuetudine*, 'On laws, senate-resolutions, and long-established custom'), the text undeniably gives the impression of a rule of law establishing hierarchy of norms. Yet, placed with Lenel in its likely original context,[13] it receives a way more limited application. This fragment of book 84 of Julian's *Digest* seems to have referred to civic *munera* (or liturgies), more specifically, possibly to the cases in which one could exempt himself from their performance. And so, it establishes or, perhaps better, conveys a rule pertinent only to the execution of civic duties within a community. In wont of a written statute governing them, one was to apply the pertinent customs and tradition, the existing (administrative) practice. Then, a new solution should be formed via analogy to the existing ones. Finally, should this be impossible, a norm (rather than the legal order, *tout court*) regulating the matter in the City of Rome shall be used. It is thus much safer to assume that the Justinianic collocation of Julian's assertion was a product of *duplex interpretatio*, the general tenor thereof was in all likelihood not intended when the text was first composed.[14] Besides, let us notice – a point to which I will return at the end of this essay (below, pp. 316–317) –the principle declaring the primacy of written law over anything else does not specify further the law to which it refers: nor in the least does it suggest that these written laws be Roman (only the legal environment of the Justinianic law made *leges scriptae* obviously Roman). And so, in the second

[13] O. Lenel, *Palingenesia iuris civilis* I, Leipzig 1889, col. 480, Iulian, fr. 819.

[14] See also *Deo Auctore* 10 (= *CJ.* I 17.1.10), where Justinian, obviously referring to this fragment of Julian's work, makes it into a guiding principle of the selection of the statues still in force at the time of the complication. Their still-binding force results from frequent judicial application, or if upheld by the custom, *consuetudo*, of the Cities of Old and New Rome. It is the City of Rome – according to Salvius Iulianus – that should be followed by other cities, and not the other way around.

century AD, these written laws may very well be the local statutes – what else but them should have regulated the local civic duties?

The mechanism presented above, application of a local unwritten usage where no written law was extant, may be illustrated by a singular papyrus, *SB* VI 9016 (Koptos, after 3 Apr. AD 160).[15] It contains a report of proceedings in which Antarchiereus Ulpius Serenianus was to confirm the right of *boule* of Ptolemais to freely appoint *neokoroi* in the temple of Soter at Koptos (which, since the appointments were made against payment, constituted part of the city revenue). The judge had previous verdicts on the matter read in order to establish whether the city had such a prerogative. In the first judgement, dated to the eighth year of Claudius (1 Feb. AD 48), the prefect Vergilius Capito confirmed this original custom (ll. 8–9: *τὸ ἐξ ἀρχῆς ἔθος*) upon request of the city representative. In the second cited ruling of the 2nd year of Galba (29 Jan. AD 69), the supervisor of *idioslogos*, Lysimachos, ascertained such right of the *boule*, too, having followed the royal – obviously Ptolemaic – ordinances and the previous prefectural decisions.[16] Twenty years later (20th year of divine Vespasian, 29 Jan. AD 88),[17] the same Lysimachos issued a uniform decision justifying it again by the practice of the kings and the prefects.[18]

[15] J. SCHERER, 'Le Papyrus Fouad I[er] Inv. 211', *Bulletin de l'Institut français d'archéologie orientale* 41 (1942), pp. 43–73. On this text cf. a diverging opinion by ALONSO, 'The status of peregrine law' (cit. n. 13), pp. 393–395, who stresses that it would be the only case in which the Ptolemaic royal laws received an explicit confirmation of the Roman judge, unlike other instances where they are simply applied without any justification (*ibidem*, n. 120). I do not think that even here such caution is necessary: the supervisor of *idiologos* stresses that he often 'had used' the royal decrees, it is perfectly normal for him to follow the royal ordinances, the fact they exist, and may be used, serves as the sole justification of their application.

[16] Ll. 14–16: *ἐκ τῶν προστα[γμ]άτων τῶν βασιλικῶν ἃ πολλάκις μου εἰς τὰς χρεί|ας ἦλθεν καὶ ἐκ τῶν κρίσεων τῶν ἡγεμονικῶν ὁρῶ τὴν βουλὴν τὰς τοιαύτας τάξεις κατὰ | ψηφίσματα οἷς ἂν κρείνῃ παρέχουσαν*, 'from the decrees of the kings which have often come to my use, and from the judgements of the prefects, I see that the Council has granted these offices in accordance with (its) resolutions to those it would choose'.

[17] This late date is somewhat surprising. SCHERER, 'Le Papyrus Fouad I[er]' (cit. n. 15), pp. 56–57, explains it suggesting that *damnatio memoriae* of Domitian would cause the copied documents to be re-dated to the artificially prolonged reign of Vespasian. If this is really the case, the Lysimachos would be active for quite some time in the Roman administration. He had either been reappointed the head of idioslogos before AD 88 (*P. Ryl.* II 598

In conclusion, Ulpius Serenianus, having conferred with his advisers,[19] concurred with his predecessors. In the letter preserved in the column II of the papyrus he instructed the *strategos* of the Coptite Nome to upkeep the custom originating from the times of city foundation.[20] The choice of *neokoroi* was freely decided by a voted resolution of the city-council (*psephisma*). The Roman judge thus followed a custom which, albeit unwritten, had been applied constantly first in the Ptolemaic ordinances,[21] and then in the Roman prefectural decisions. It is obvious that the *ethos* in the text coincides with Julian's *mos et consuetudo*. Its application, however, does not depend on its 'customary', that is lesser status to which a former local law was to be reduced by the Romans. It was applied since no written record (*lex scripta*) vesting the disputed right in the hands of the city councillors of Ptolemais was extant, but it did not make any less binding.

In fact, on the theoretical level there is even a grosser problem with the law–custom theory as José Luis Alonso showed in an essay first delivered

attests Mummius Gallus holding this office in AD 73), or adjudicated the second case in a capacity of some other judicial officer, perhaps *antarchiereus*, as P. R. SWARNEY, *The Ptolemaic and Roman Idios Logos*, Toronto 1970, pp. 84–85 with n. 2, and 127, presumes. Alternatively, the κ in the line 19 might have been a scribal error.

[18] Ll. 21–22: *κατὰ ἐπι[τ]ηρηθέντα ὑπὸ βαϲ[ιλ]έων καὶ ἡγεμόνων [τ]ὰϲ ἐπιμελητείαϲ καὶ | [νεωκορ]ίαϲ οἱ ἀπὸ τῆϲ βουλῆϲ φαίνοντ[αι κ]ατὰ ψήφιϲμα δι[δό]ντεϲ οἷϲ ἂν κρε[ί]νωϲιν*, 'according to what has been safe-guarded by the kings and the prefects, it appears that the members of the council assign by a resolution the office of *neokoroi* and *epimeletai* to whom they choose'.

[19] The document unfortunately breaks in this place, so we cannot be certain who exactly was consulted about the matter: the generic 'present' (as in e.g. *SB* XXVI 16643 [Arsinoites, 1 Jan. AD 137], ll. 5–6: *Πετρώνιοϲ Μαμερτεῖνοϲ λαλήϲαϲ μετὰ τῶν ἐν τῷ | ϲυμβουλ[ίῳ] ἐκέλευϲεν*; see also *MChr.* 372 [28 Aug. AD 142], col. IV, l. 16), or perhaps, more specifically the local legal advisors, *nomikoi*, who had acquired by that time quasi-official function in the Roman courts – see further my '*Nomikoi* in and out of the Roman courts in Egypt' (forthcoming).

[20] Col. II, ll. 13–14: *ἀκόλου|θόν ἐϲτι τὸ ἐξ ἀρχῆϲ ἔθοϲ αὐτοῖϲ φυλάϲϲεϲθαι*, 'and accordingly the custom from the beginning shall be safe-guarded for them'.

[21] M.-Th. LENGER, *Corpus des ordonnances des Ptolémées*, Brussels 1980 (2nd ed.), p. 271: All. 121, identifies as ordinances of Ptolemy I Soter and his successors, see already, EADEM, '-Les vestiges de la legislation des Ptolémées en Égypte à l'époque romain', *Revue internationale des droits de l'Antiquité* 3 (1949), pp. 69–81, at 77–80.

in presence of Mélèze during the 27th International Congress of Papyrology in Warsaw in 2013, and then published in this *Journal*: the Romans from the later Republic till the later imperial era did not apply to *mos* a normative quality. We are the ones who do this, transforming it into customary law under the influence of nineteenth-century Puchta's terms. For the Romans *mos* is a source of authority – Alonso explains – but it only finds its realisation within jurisdiction and jurisprudence.[22] There the most important institutions of *ius civile*, such as *patria potestas* or the principles of guardianship find their protection, because of the authority of the old usages. Therefore, we should not be misled by the tempting modern reading of the binominal *leges – mores* as the two equivalent sources of law. *Mores* are to be understood there as practices, traditions, usages, thus informing in a practical way about the shape and the content of the law. It is why Capito praised Labeo for being an expert in *leges* and *mores*.[23]

Exactly this elucidation shows why the Romans cannot have transformed the indigenous laws into customs retaining their normative force. Even less so, they would have been able to assign to these a subordinate, ancillary position.

Let us keep this clarification in mind while we proceed with an examination of the sources. I hope that by the end of this essay I may be able to revest Modrzejewski's idea, respecting both his original thought and the sound criticism thereto by Alonso.

1. ROMAN LAW TRUMPS IT ALL: PS.-MENANDER ENTERS THE STAGE

In order to explain the phenomenon of co-existence of different legal orders under the Roman rule, Modrzejewski researched also the apparent turning point in its being. The Edict of Caracalla in the old Mitteis' vision

[22] Alonso, 'The status of peregrine law' (cit. n. 12), pp. 373–377.

[23] Gell. *NA* XIII 12.1: *Labeonem Antistium legum atque morum populi Romani iurisque civilis docutum adprime fuisse*, '(We have read in a letter of Ateius Capito, that) Labeo Antistius was most excellently learned in laws and usages of the Roman people, and in civic law.'

was to end the Roman tolerance, terminating this peaceful cohabitation of the different regimes of law, and establishing the domination of the Roman order.[24] My mentor showed, carefully and diligently, that Mitteis's belligerent view of now-all-encompassing and exclusive *Reichsrecht* was a misconception.[25] In his view the old usages continued to populate '*more regionis*'[26] the legal panorama of the now Roman, *oikumene* just as they had before. In fact, *Constitutio Antoniniana* did not constitute a sharp censure. It was not a cause, but an effect of the processes started with the Romans' taking control of the Mediterranean.[27] What happened after it was a con-

[24] Cf. naturally, L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*, Leipzig 1891, *passim*, but esp. pp. 8, 110, and 160–165.

[25] Cf. for the overview Mélèze Modrzejewski, *Loi et coutume* (cit. n. 4), §§ 20–22, and esp. 27, and 'La règle de droit dans l'Égypte romaine' (cit. n. 3), pp. 347–368. Such was already the initial criticism of Ernst Schönbauer, whose way of dealing with the problem was to promote the concept of double citizenship, as the possible ordering factor of law-application after Caracalla's grant. It would allow the new citizens to carry on using their 'old' laws alongside Roman law; cf., i.a., his first studies devoted to the subject: E. Schönbauer, 'Reichsrecht gegen Volksrecht? Studien über die Bedeutung der Constitutio Antoniniana für die römische Rechtsentwicklung', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 51 (1931), pp. 277–335; idem, 'Reichsrecht, Volksrecht und Provinzialrecht. Studien über die Bedeutung der Constitutio Antoniniana fur die römische Rechtsentwicklung', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 57 (1937), pp. 309–355, and also in this *Journal*, one of the final takes on the problem: idem, 'Deditizier, Doppelbürgerschaft und Personalitätsprinzip', *The Journal of Juristic Papyrology* 6 (1952), pp. 17–72. In defence of the gist of Mitteis's views, V. Arangio-Ruiz, 'L'application du droit romain en Égypte après la constitution antoninienne', *Bulletin de l'Institut d'Égypte* 29 (1946/7), pp. 83–130, at 92–93 (cf. also much more concise Italian version thereof: 'L'applicazione del diritto Romano in Egitto dopo la costituzione di Caracalla', *Annali del Seminario Giuridico della Reggia Università Catania* 1 [1947], pp. 28–37), reproached Schönbauer for attacking an idea which he had himself put into Mitteis's mouth. For Arangio-Ruiz, Mitteisian *Kampf* was a rhetorical exaggeration, devoid, in the original thought of the German scholar, of technical implications.

[26] On this expression, cf. below, pp. 314–317 and 343–345.

[27] For *summa* of Modrzejewski's ideas on the legal effects of *Constitutio Antoniniana*, intended as a manifestation of continuity rather than revolution, cf. *Droit et justice* (cit. n. 2), ch. XXIV: 'Un empire universel', pp. 475–496, esp. 492–*fin.* (= 'L'Édit de Caracalla de 212: la mesure de l'universalisme romain', [in:] T. Giaro (ed.), *Roman Law and Legal Knowledge. Studies in Memory of Henryk Kupiszewski*, Warsaw 2011, pp. 21–36). There also his final view on the μένοντος-clause (pp. 488–492). Originally seduced by its possible understanding of the new citizens' 'keeping (the original laws)' – which would corroborate perfectly his customs-the-

tinuation of what had already been there before, and so by focusing on the third-century sources, one can also shed light on the earlier times.

For this aspect of his œuvre two pieces are particularly significant. Both focus on rhetorical works, Gregory the Miracle-Worker's *Oratio Panegyrica* honouring his teacher Origen, and a handbook of rhetorical art ascribed to Menander of Laodicea.[28] These were used to prove the veracity of Mitteis' hypothesis on the exclusivity of Roman legal order after *Constitutio Antoniniana.* I will come back to the corresponding fragment from Gregory's Declamation in my conclusions (pp. 338–341), commencing now with an exploration of *Διαίρεσις τῶν ἐπιδεικτικῶν* transmitted under the name of Menander.

Modrzejewski took interest in this work in response to its analysis by Mario Talamanca.[29] The Italian scholar used the 'Menandrian' passages to

ory (cf. 'La règle de droit dans l'Égypte romain' [cit. n. 3], pp. 359–360), Modrzejewski opted there for the 'retention of fiscal duties' burdening the new Romans before the grant.

[28] Mélèze Modrzejewski, 'Ménandre de Laodicée et l'Édit de Caracalla', *Symposion 1977*, pp. 335–364 (= *Droit impérial* [cit. n. 4], no. XII); and idem, 'Grégoire le Thaumaturge et le droit romain. À propos d'une édition récente', *Revue historique de droit français et étranger* 49 (1971), pp. 313–324 (= *Droit impérial* [cit. n. 4], no. XI), reviewing edition by H. Crouzel, *Remerciement à Origène, suivi de La lettre d'Origène à Grégoire,* Paris 1969 (= *Droit imperial* [cit. n. 4], no. XI). An overview of both in the first of a recent article by D. Karambelas, 'Greek laws after *Constitutio Antoniniana*: ideology, rhetoric and procedure in Eunapius of Sardis', *Symposion 2015*, pp. 263–285; the author intends to adduce the evidence of Eunapius of Sardis, *Vita sophist.* 9.2 to further illustrate the process: the nature of this text, however, raises doubts on whether it could have any credibility in presenting the actual legal aspects of the problem.

[29] M. Talamanca, 'Su alcuni passi di Menandro di Laodicea relativi agli effetti della Constitutio Antoniniana', [in:] *Studi in onore di Edoardo Volterra* V, Milan 1971, pp. 433–560; most recently these texts have been analysed by C. Humfress, 'Laws' Empire: Roman universalism and legal practice', [in:] P. du Plessis (ed.), *New Frontiers. Law and Society in the Roman World*, Edinburgh 2013, pp. 73–101. She, like Talamanca, assumes that they would describe the legal reality post-dating *Constitutio Antoniana*; her approach, however, thanks to methodology of legal anthropology, is more nuanced and balanced, far from the Roman law absolutism. Humfress, reminding that non-Romans had had access to Roman law thanks to the system of fictions developed by *ius honorarium*, favours a bottom-up unification rather than top-down vision of domination and suppression (cf. pp. 83–87). Her vision on the 'second life' of the local laws after the Edict of Caracalla (applied in the imperial jurisdiction), draws near to Modrzejewski's thesis, without the latter's over-theorization.

uphold the views of Mitteis, earlier already adhered to, elaborated, and defended by Arangio Ruiz.[30] Talamanca firmly believed to have rescued from an oblivion a precious literary witness of *Constitutio Antoniana*, missed by a learned Modern Era scholar Ezechiel Spanheim in a *opus* dedicated to mentions of the Edict in the available sources.[31] These fragments thus became yet more proof of a complete withdrawal of the old orders and their replacement by the law of the Romans universally binding all (or almost all) inhabitants of the Empire, just created Romans by the grant of Caracalla. In his piece Talamanca criticized thus Modrzejewski's *idée fixe*, first put forward in the *Règles* and perfected in *Loi et coutume* (the chosen title of the thesis and then the book was by no means accidental): since the beginning of the Roman conquest the Romans tolerated the local laws treating them as the customs.

[30] Arangio-Ruiz, 'L'application du droit romain' (cit. n. 25). All the subtleties of Arangio-Ruiz's discussion aiming at showing the divergence between the imperial law, and the persisting local uses of the old laws are devoid in the radical view on the terminating effects of *Constitutio Antoniniana* on local legal orders of C. Andò, 'Administration of the provinces', [in:] D. S. Potter (ed.), *A Companion to Roman Empire*, Oxford *et alii* 2006, pp. 178–192, at 178: 'Caracalla's grant of citizenship to all freeborn residents of the empire in 212 ce will have dramatically altered the legal landscape: any and all earlier 'provincial edicts' will have had to be entirely rewritten'; idem, *Imperial Rome ad 193 to 284. The Critical Century*, Edinburgh 2012, p. 98: 'For the extension of Roman citizenship – and the eradication of alien communities as autonomous political entities – had also necessarily invalidated local codes of law'. Such a generalization suffers from over-simplification. Let me just notice in passing that a provincial edict (not edicts, at least in the course of the 2nd c. ad), would not collect indigenous law, but the standard Roman jurisdiction, and did not depart much, *grosso modo*, from the Edicts applied in the City of Rome gathered into *Edictum perpetuum* under Hadrian. One notable example will suffice here: it is in the Gaius' commentary to provincial edict that we find the only direct quotation from the 1st chapter of *lex Aquilia*! – cf. D. IX 2.2. *pr.* (7 *ed. prov.*), which he further explains referring to the *Law of XII Tables* – D. IX 2.4. Neither was there any need to rewrite the provincial edict: let us recall it organized the formulary procedure, which by that time had probably disappeared. It is also a misconception (possible due to a catchy formulation) that there would be any 'local codes of law' – and especially ones covering all the legal matters from family law to obligations. I intend to return to the problem in a forthcoming article.

[31] E. Spanheim, *Orbis Romanus, seu ad Constitutionem Antonini Imperatoris, de qua Ulpianus Leg. XVII. Digestis de statu hominum: Exercitationes duae*, first published in 1697, the Lipsiae edition of 1728 available on line at <https://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10220723_00003.html> (accessed December 2019) Cf. Mélèze Modrzejewski, 'Ménandre', (cit. n. 26), pp. 339–341, and, radically contra at pp. 350–351.

Modrzejewski approached the problem by assuming, *pace* his rival, that the passages of the so-called *Treatise* I would indeed describe the reality post-dating the universal grant of citizenship. Yet, a complex textual analysis (I will return to this point in detail on the following pages) allowed him to push its contribution back in time: to the commencements of the universal Roman rule. And so, the text was to corroborate his hypothesis on the local laws as customs even more.

Not much may be said with complete certainty about the source we shall examine.[32] Some scholars tailed the Late Antique readerships' conviction, that Menander of Laodicea was indeed the author of at least one of the rhetorical works surviving under his name in the early medieval manuscripts.[33] The attribution was accorded with the evidence of *Liber Suda*,[34] and seemingly confirmed by a singular fifth-/sixth-century papyrus letter requesting return of some works by Menander[35] (even if neither of these witnesses explicitly refers to the extant books),[36] corrob-

[32] On the problem, see the overview in the edition by D. A. Russell & N. G. Wilson, *Menander Rhetor. A Commentary*, Oxford 1981, introduction, esp. pp. xxiv–xl; M. Heath, *Menander. A Rhethor in Context*, Oxford 2004, pp. 127–131, and the most recent monographic treatment by F. Gascó, 'Menander Rhetor and the works attributed to him', *Aufstieg und Niedergang der Römischen Welt* II 34.4 (2016), pp. 3110–3146, esp. 3113–3120 and n. 19, as well as a detailed overview in Talamanca, 'Su alcuni passi' (cit. n. 29), pp. 464–470 and n. 51–52.

[33] Above all in the chief source for transmission, i.e. the 10th-cent. *Codex Parisinus gr.* 1741.

[34] *Suda*, *s.v. Μένανδρος* (*M* 590). Heath, *Menander* (cit. n. 32), p. 94, soberly observes limitations of our documentation evidenced by the fact *Suda* fails to list under the rhetor's oeuvre both the Epideictic Treatises and Commentary on Demosthenes (which is particularly striking especially in the latter case, since numerous testimonia confirm Menander's work on Demosthenic oratory – see also *ibidem*, pp. 96–116).

[35] *SB* XII 11084 (= *C. Pap. Hengstl* 91 [Hermopolis, 5th c. AD?), published by H. Maehler, 'Menander Rhetor and Alexander Claudius in a papyrus letter', *Greek, Roman, and Byzantine Studies* 15 (1974), pp. 305–311. In this memorandum, Viktor urges Thegnostos to restore the books he had lent him. The list of demanded items ends on the recto with mention of a work by Menander, *Art* (*Τέχνη*), and then continues on the verso with *Methods* (*Μεθόδοι*), and *Praises* (*Ἐγκώμια*): they are all to be swiftly returned. Maehler assumed that the two unattributed pieces on the verso would naturally be also works of Menander. This may be very well so, but as Gascó, 'Menander' (cit. n. 32), p. 3117, soundly points out does not necessarily have to be.

[36] Maehler, 'Menander Rhetor' (cit. n. 35), p. 309, identified the item listed in the papyrus as *Techne* with *Μενάνδρου ῥήτορος Περὶ τέχνης ῥητορικῆς* mentioned by the anonymous author of *On the Four Parts of the Complete Speech*, and recognized it further as *Treatise* II.

orated by the 11th cent. Byzantine testimonia.[37] My mentor, for his own convenience and that of readers,[38] followed this idea.

In fact, the divergences in treatment and language could suggest the same writer could not have written both books.[39] Thus, alternatively,

Russell & Wilson, *Menander* (cit. n. 32), p. xxxv, would rather see in it *Treatise* I. Heath, *Menander* (cit. n. 32), pp. 126–127, having admitted plausibility of Maehler's solution, and pointing out possible links between *Methods* and *Praises* and the epideictic works, concluded that the Menandrian works listed in the papyrus cannot undoubtedly positively identified with any of the extant pieces attributed to him.

[37] 11th-century theoretician of rhethorics, Johannes Doxapatres, in his commentary on Aphthonius *Progymnasmata*, and an anonymous work *On the Four Parts of the Complete Speech*: see Heath, *Menander* (cit. n. 32), pp. 124–125.

[38] The authorship, eventually, was for him secondary: cf. 'Ménandre' (cit. n. 28), pp. 337–338 with notes, for the reasoned doubts, and the use of the *SB* XII 11084 (above, n. 35), to tendentially restore the authorship of both works to Menander. Same 'convenience' approach is adopted by the editor of *Loeb Series* newest edition of the works: H. W. Race, Menander Rhetor, [Dionysius of Halicarnassus], *Ars Rhetorica*, Cambridge, ma – London 2019, p. 9.

[39] '[T]hese testimonia' evidence 'that the "authority" on epideictic in Byzantine times was known to be Menander': Russell & Wilson, *Menander* (cit. n. 32), p. xxxvi; at pp. xxxvi–xxxviii a résumé of the earlier scholarship on the issue. Likewise, Heath, *Menander* (cit. n. 32), p. 127.

Menander's (relative) popularity in the rhetorical department of eulogies in this period is proven by *SB* XII 11084 (above, n. 35), but also by Rafaella Cribiore's captivating reading of one of Dioskorean poetic *encomia*, *P. Aphrod. Lit.* 4 + *P. Rein.* II 82 + *P. Lond. Lit.* 98 (*c.* ad 551): 'Menander the Poet or Menander Rhetor? An *encomium* of Dioscoros again', *Greek, Roman, and Byzantine Studies* 48 (2008), pp. 95–109, esp. 101–105. Unlike the earlier commentators, who identified 'Menander of ancient' (*παλαιὸς ὡ[ς] Μένανδρος*) in l. 7 with Menander the Playwright (cf. for all, J.-L. Fournet, *Hellénisme dans l'Égypte du vi^e^ siècle. La bibliothèque et l'œuvre de Dioscore d'Aphrodité* [= *Mémoires publiés par les membres de l'Institut français d'archéologie orientale* 115), Cairo 1999, vol. II, p. 478 [*comm. ad h.l.*]), Cribiore, links him to Isocrates mentioned in l. 8, and the expressed inability of Dioskoros of Aphrodite to compose an apt panegyric for his addressee, Lord Romanos, concluding that this context points more to the author of rhetoric manuals as the poetic comparison than to the known comedy-writer. Such idea may be perhaps enforced by detecting in l. 9 (*ὧ̣]δ̣ε δὲ π[α]ρ' ἡμῖν ἡ πόλις σωφροσύνης*, 'but our city here has temperance' (Cribiore) a possible echo to the categories according to which Ps.-Menander advises to praise a city: *ἀνδρεία, δικαιοσύνη, σωφροσύνη, φρόνησις* (below, p. 331 and n. 68).

Russell and Wilson point out convincingly that the observed divergences between the *Treatises* do not constitute a final argument against the hypothesis that the works were

Menander could have been the author of one of the works, and the other piece may have been ascribed to him for the similarity of the topic treated, and perhaps fashioned on the example of his original book.

Some, in a slight statistical minority, follow the idea of Bursian, that Menander was the real author of the *Treatise* I; their not exceedingly majoritarian opponents would prefer *Treatise* II instead as the original work of our rhetor.[40] Yet, the attribution to Menander of either of the Treatises is far from certain. The scepticism thereof had been already expressed by authorities such as Urlich Wilamowitz von Möllendorf and Richard Volkmann.[41]

In this place we are chiefly concerned with the *Treatise* I. As its alternative authors Genethlios of Petra (living in mid-3rd c. AD in Athens),[42] or Tiberios (2nd – early 3rd c. AD?) have been suggested. The former provenance is based chiefly on the copyist's amendment of the treatise title,[43]

authored by the same person writing in different times of his life (p. xxxviii). Decisively contra, Gascó, 'Menander Rhetor' (cit. n. 32), pp. 3113–3114, with literature cited in n. 22: 'of all the various proposals … the last convincing is that which holds that one single author was responsible for both'.

[40] C. Bursian, *Der Rhetor Menandros und seine Schriften* [= *Abhandlungen der königlische-bayerischen Akademie der Wissenschaften, philos.-philol. Cl.* 16.3], Munich 1882, pp. 15–17. Heath, *Menander* (cit. n. 32), p. 129, and Gascó, 'Menander Rhetor' (cit. n. 32), p. 3114, instead, tentatively opted for Menander's authorship of the second *Treatise*, given its closer relationship to the fragments of commentary of Demosthenes. The conclusions of other authors have been, however, quite the opposite (*ibidem*, pp. 3114–3115, and n. 27–29).

[41] See Gascó, 'Menander' (cit. n. 32), p. 3114.

[42] See Heath, *Menander* (cit. n. 32), pp. 129–130; Russell & Wilson, *Menander* (cit. n. 32), pp. xxxvii, 226 (comm. to § 331), and Talamanca, 'Su alcuni passi' (cit. n. 28), p. 465, n. 52, summarizing earlier views. Mélèze Modrzejewski, 'Ménandre', (cit. n. 28), pp. 337–338, was rather sceptical.

[43] *Μενάνδρου ῥήτορος γενέθλιων διαίρεσις τῶν ἐπιδεικτικῶν* is superlinearly corrected in *Codex Parisinus graecus* 1741 as *ἢ Γενεθλίου*. H. Valesius, *Emendationum libri quinque et de critica libri duo, num quam antehac typis vulgati*, Amsterdam 1740, pp. 26–27, suggested to amend the text into *πρὸς Γενέθλιον* – making him the addressee of the work: cf. Russell & Wilson, *Menander* (cit. n. 32), p. xxxvii and 226 (comm. to § 331), Gascó, 'Menander' (cit. n. 32), p. 3114. Cf. P. Janiszewski, K. Stebnicka, & E. Szabat, *Prosopography of Greek Rhetors and Sophists of the Roman Empire*, Oxford 2015, no. 413 'Genethlios', point out the temporal implausibility of such attribution.

clearly showing that he had troubles with its understanding. Therefore, Genethlios' authorship alongside the idea that he might have written the *First Treatise* on the basis of the *Second* in the actual Menander's hand is rather unlikely.[44]

The credit to a Tiberios, listed as a *philosophos* and *sophistes* by *Liber Suda*[45] is argued in turn, even with a margin of reasonable doubt, by Heath on the basis of numerous references to Plato and Platonism in the text.[46] This Tiberios, as *Liber Suda* reports, apparently wrote, among other works, a book entitled *Περὶ λόγων ἐπιδεικτικῶν*, which could indeed be our treatise. Nothing is known about his life. Heath tentatively again dates his lifespan to the second and the early third century AD, since in another book to him ascribed, *Περὶ τῶν παρὰ Δημοσθένει σχημάτον*, one does not seem to find any references to theories proposed by Hermogenes († *c.* AD 230).[47]

If Tiberius was truly the author of the work under scrutiny, it could contribute to Modrzejewski's reading of the passages in a much vaster, atemporal way (below, p. 313), and make an even stronger case against Talamanca's explanation. Yet, as Heath concludes, given all the uncertainties the 'judgement on the identity of [Menander] must be suspended',[48] leaving us in the realm of feeble conjectures.

With this puzzle unsolved, efforts have been made to date the treatises on the basis of their internal textual evidence.[49] The first Treatise gives as an example of the cities founded out of necessity the towns established on the river Istros (modern Danube), called the Carpian towns. The foundations

[44] Cf. Janiszewski, Stebnicka, & Szabat, *Greek Rhetors* (cit. n. 43), nos. 413 'Genethlios', 696 'Menandros (Rhetor)', & 1052 'Tiberios'; and Heath, *Menander* (cit. n. 31), p. 129, who rejects this identification sensing a distance of the *Treatise* I author to sophistic declamation (331.16–17 Spengel), rather implausible, he thinks, in a learned sophist like Genethlios.

[45] *Suda* τ 550; Heath, *Menander* (cit. n. 32), pp. 75–76 & 129–131; cf. also Janiszewski, Stebnicka, & Szabat, *Greek Rhetors* (cit. n. 43), nos. 696 'Menandros (Rhetor)' & 1052 'Tiberios'.

[46] Heath, *Menander* (cit. n. 32), pp. 130–131.

[47] Cf. Janiszewski, Stebnicka, & Szabat, *Greek Rhetors* (cit. n. 43), no. 481 'Hermogenes'.

[48] Health, *Menander* (cit. n. 32), p. 131. Almost identical consideration by Talamanca, 'Su alcuni passi' (cit. n. 29), p. 466.

[49] Cf., an overview in Russell & Wilson, *Menander* (cit. n. 32), pp. xxxix–xl; and Gascó, 'Menander' (cit. n. 32), pp. 1315–1316.

were to prevent the raids of the barbarians in lower Moesia and Thrace (358.12 Spengel). That may either describe the settlement of some of the Carpi under the reign of Aurelian (i.e. post AD 272), or under Diocletian in AD 293, after the ultimate submission of this tribe by Galerius in AD 294.[50]

Treatise II (but as we have seen, there is no firm reasons to believe they need to be closely temporarily related to one another, the possible intertextual references are matter of conjecture) could bear some indications of victories of Aurelian over Zenobia and Priscus in Egypt (387.17–28 Spengel), or perhaps again to triumphs of Diocletian. These indications are at any rate extremely vague and thus difficult to interpret.[51] Additionally, *Treatise* II advises to praise the advent of a governor sent by glorious emperors (387.31–379.2, and 415.14–15 Spengel). If the mention of the rulers in plural is to be taken at the face-value (but again why not as a generic plural denoting any emperor who would remit his envoys to a province), it could refer either to the reign of Carus together with his sons Carinus and Numerian (AD 283), or to that of the Tetrarchs (post AD 285).

All in all, neither here can anything definite be stated with certainty, even if these factors, taken globally, hint to the last decades of the third century AD as a slightly likelier composition date of both *Treatises*.[52] This again was not a huge problem for Modrzejewski for whose reading the exact dating was in fact immaterial, while for Talamanca it remained pivotal. The narrative context of Pseudo-Menander's work was to describe the legal standing of postdating the grant of universal Roman citizenship.

Before I proceed to the interpretation of the texts proper, an important *caveat* would be convenient: both as a commentary on the great debate between Modrzejewski and Talamanca, and, more universally, for any conclusions drawn from these fragments. One needs to be rather cautions while postulating any legal implications from a text that was by no

[50] Cf. Gascó, 'Menander' (cit. n. 32), pp. 1315–1316 and n. 31; Talamanca, 'Su alcuni passi' (cit. n. 29), p. 473, n. 57, and Russell & Wilson, *Menander* (cit. n. 32), pp. xxxix and 259 (*comm. ad loc.*).

[51] Cf. Russell & Wilson, *Menander* (cit. n. 32), pp. xxxix–xl and 291–293 (*comm. ad loc.*).

[52] Talamanca, 'Su alcuni passi' (cit. n. 29), p. 472, found the dating to AD 270s as the most plausible.

means conceived as juridical treatise. It is – let us be reminded – in a somewhat simplified apprehension – merely a manual of how to successfully compose and deliver a rhetorically sound praise of a city. We should and cannot therefore expect any particular attention for the legal matters and even the less for the *apices iuris*.[53]

Let me now turn to the crucial passages. The author of the *Treatise* I, having explored as themes of a praise the city natural location, its citadel, and genesis, starts this part of his manual[54] explaining that a city may be also eulogised for its accomplishments, or pursuits (*ἐπιτηδεύσεις*). These are: constitution (*πολιτεία*),[55] knowledge (*ἐπιστήμαι*), skills (*τέχναι*), and any special powers (*δυνάμεις*, for instance excellence at athletics, or rhetorical aptitudes)[56] that make the city outstanding.

Here the apparent supremacy of Roman law appears for the first time:

> Ps.-Menander Rhetor, *Διαίρεσις τῶν ἐπιδεικτικῶν* 360.10–15 Spengel = 1.16.5 Loeb: *Δεῖ δὲ νομίζειν περὶ πολιτείας ἄριστον εἶναι {καὶ}*[57] *τὸ ἑκοῦσαν ἀλλὰ μὴ ἄκουσαν ἄρχεσθαι τὴν πόλιν, καὶ τὸ ἀκριβῶς φυλάττειν τοὺς νόμους, ἥκιστα δὲ νόμων δεῖσθαι. τοῦτο δὲ τὸ μέρος τῶν ἐπαίνων κινδυνεύει σχεδὸν ἀργὸν εἶναι· ὑπὸ γὰρ μιᾶς*[58] *αἱ Ῥωμαϊκαὶ ἅπασαι νῦν*[59] *διοικοῦνται πόλεις, τελειότητος δὲ ἕνεκεν ἐχρῆν περὶ αὐτοῦ μνησθῆναι.*

[53] Contra Talamanca, 'Su alcuni passi' (cit. n. 29), p. 490–491: 'ho sottolineato il carattere univoco e preciso [sic! – J.U.] dei passi Menandro nei confronti di alter attestazioni che potrebbero suonare allo stesso modo, ma sono troppo vaghe ed imprecise nei loro contorni'.

[54] 359.17–22 Spengel. The section is traditionally thought to have opened Book 3 of the original work.

[55] Cf. Mélèze Modrzejewski, 'Ménandre', (cit. n. 28), pp. 340–341

[56] In an amusing coincidence, Hermopolis, the city of provenance of *SB* XII 11084, the request for return of Menander's books (above, n. 35), is given as an example of a place to be praise for its rhetorical *dynamis* (361.1–3 Spengel).

[57] Russell & Wilson, *Menander* (cit. n. 32), suggest exclusion of *καὶ*. This emendation, at any rate, does not change the sense of the fragment.

[58] Text restored. *Parisinus gr.* 1741 has a 5–6 letters long lacuna after *μι*: Russell & Wilson, *Menander* (cit. n. 32), p. 261 (*comm. ad l.*). They suggest *μι[ᾶς ἀρχῆς]*, rejecting the corrupted reading of *Parisinus gr.* 2423: *μίας + πόλεως* (emendation proposed by Bursian, *Der Rhetor Menandros* [cit. n. 40], pp. 60–61). They point out that to state that one city controls Roman cities is 'not very apt'. I do not share their scepticism: the clause meaning may have been: 'the (now) Roman cities (which were yet not Roman before), are con-

> One should assess the city-constitution to be the best, if the city is ruled according to its will and not unwilling; whether it strictly observes the laws, yet needs them not. This part of praises risks to be roughly fruitless, since all Roman cities are nowadays administered by One (City). However, recalling it was necessary for the sake of completeness.

I daresay we may disregard swiftly this evidence for our discussion.[60] The statement clearly refers to public and not to private law. Nobody would question that Constitutio Antoniniana factually removed the non-Roman, autonomous organization of the previously self-governing cities, it is indeed useless to find aptness in a city constitution as monarchy, aristocracy, democracy, or its mixed statue in the course of the third century AD.

Having explored departments of knowledge, skills and powers, Ps.-Menander advises to develop the praise further glorifying the city actions or deeds (361.11–31 Spengel). These need to be assessed 'in terms of the virtues and their parts'.[61] As Modrzejewski points out the subsequent categorization follows the Stoic catalogue of four cardinal virtues: courage, justice, moderation, and prudence (in managing of the city affairs): *ἀνδρεία*, *δικαιοσύνη*, *σωφροσύνη*, *φρόνησις*. All are then subdivided. ***Justice***, or perhaps more adequately, ***Fairness***, breaks down to piety (*εὐσέβεια*), that is the relation towards gods, fair, just conduct (*δικαιοπραγία*), that is attitude versus humans, and reverence of the dead (*ὁσιότης*). Both ***Moderation*** and ***Prudence*** are to be tested against the public, communal, deeds, and the private ones (*ἔν τε τῇ κοινῇ πολιτείᾳ καὶ τοῖς ἰδίοις οἴκοις*, 363, 29–30 Spengel = 1.16.20 Loeb, and 364, 10–15 = 1.16.22 Loeb).

trolled by One (city) (i.e. the City par excellence).' Similar view by MÉLÈZE MODRZEJEWSKI, 'Ménandre', (cit. n. 28), p. 341 n. 36, who takes *πόλις* to have been implied, and thus dismisses the integration by Bursian, and [*πολιτείας*] suggested by TALAMANCA, 'Su alcuni passi' (cit. n. 29), p. 462 n. 49. One has also to observe that the latter one does not respect the length of the lacuna. At any rate the sense seems to be clear.

[59] *νῦν* rejected by BURSIAN, *Der Rhetor Menandros*' (cit. n. 40), p. 61, but with no good reason as pointed out by TALAMANCA, 'Su alcuni passi' (cit. n. 29), p. 462 and n. 50, pace MÉLÈZE MODRZEJEWSKI, 'Ménandre', (cit. n. 28), *loc. cit.*

[60] TALAMANCA, 'Su alcuni passi' (cit. n. 29), p. 479, abstains from a closer analysis of this passage, having deemed its valour 'ambiguous'.

[61] RUSSELL & WILSON, *Menander* (cit. n. 32), p. 61.

It is in the description of just conduct that we find the second mention of Roman law.

> Ps.-Menander Rhetor, *Διαίρεσις τῶν ἐπιδεικτικῶν* 363.5–13 Spengel = 1.16.17 Loeb: *ἡ δ' αὖ δικαιοπραγία διαρεῖται εἴς τε τοὺς ἀφικνουμένους ξένους καὶ εἰς ἀλλήλους, μέρος δ' αὐτῆς καὶ τοῖς ἔθεσις ἴσοις καὶ φιλανθρώποις καὶ τὸ νόμοις ἀκριβέσι καὶ δικαίοις χρῆσθαι. εἰ γὰρ μήτε ξένους ἀδικοῖεν μήτ' ἀλλήλους κακουργοῖεν τοῖς δ' ἔθεσιν ἴσοις καὶ κοινοῖς καὶ τοῖς νόμοις χρῷντο δικαίοις, οἱ πολῖται ἄριστα καὶ δικαιότατα τὰς πόλεις οἰκήσονται. ἀλλὰ τὸ τῶν νόμων ἐν τοῖς νῦν χρόνοις ἄχρηστον· κατὰ γὰρ τοὺς κοινοὺς τῶν Ῥωμαίων νόμους πολιτευόμεθα· ἔθεσι δ'ἄλλη πόλις ἄλλοις χρῆται, ἐξ ὧν προσῆκον ἐνκωμιάζειν.*
>
> Just conduct is in turn divided into the one towards the visiting foreigners and towards each other, and a part thereof is living according to equitable and humane customs and to just and precise laws. And so, if the citizens do not do injustice to the foreigners and do not wrong each other, if they live according to equitable and humane customs and to just laws, they do live in their cities in the best and most just manner. And yet in the present times (praising in an encomium of a city) (its) laws has become useless: we are indeed governed according the common law of the Romans. And yet each city has use of its customs: from these its encomium should be started.

Obviously, the key element of the text for its erudite commentators is the remark of the uselessness of discussing the city laws in its praise.[62] It is of no importance for a successful speech describing the present features of a polis; the old customs, the old laws are just a fade memory in view of the fact that now the only law that binds all together is the universal, common law of the Romans. Interestingly, the rhetorician fails to observe, or perhaps he does not want to, that now 'we' are all Romans! The passage taken at face value indeed seems to confirm Talamanca's adamant statement, in line with the Mitteis's predictions, of the end of the local laws post AD 212. Or at least of their official and programmed end, since – again in Mitteis's view – that project would not be fulfilled on

[62] Mélèze Modrzejewski, 'Ménandre', (cit. n. 28), pp. 342–344; Talamanca, 'Su alcuni passi' (cit. n. 29), *passim*, but esp. pp. 482–491.

the ground, due to resistance of the local communities to the diktat of the new, and principally, alien order. Still, even with the abrogation of laws in the proper sense (as the author seems to suggest), something of the old legal texture of a polis survives. These are the customs – *ἔθη*. And an encomium may commence from their appraisal. For Modrzejewski this observation constituted a vital proof for his customary law theory: the old city laws survived and were still applied, yet as customs, even with the dominating position of Roman law.[63]

The third mention of Roman law as opposed to the local legal regimes is found in the following part of the *Treatise* in which the author advises how to glorify *phronesis* – *Prudence* – also in the sense of prudent governance.

> Ps.-Menander Rhetor, *Διαίρεσις τῶν ἐπιδεικτικῶν* 364.10–15 Spengel = 1.16.20 Loeb: *Φρονήσεως δὲ κατὰ τὸν αὐτὸν τρόπον· ἐν μὲν τοῖς κοινοῖς εἰ τὰ νόμινα καὶ περὶ ὧν οἱ νόμοι τίθεται ἀκριβῶς ἡ πόλις, κλῆρον ἐπίκληρων,*[64] *καὶ ὅσα ἄλλα μέρη νόμων· ἀλλὰ καὶ τοῦτο τὸ μέρος διὰ τὸ τοῖς κοινοῖς χρῆσθαι τῶν Ῥωμαίων νόμοις ἄχρηστον.*
>
> In the same (i.e. as with moderation) way on (governmental) prudence. Regarding the common affairs: how the city accurately arranged about them in the legal affairs and what concern the laws, (as for instance), the succession of (? and?) *epiklerate*, or other matters of the laws. But this part has become useless since in these matters we use the common laws of the Romans.'

[63] Mélèze Modrzejewski, 'Ménandre', (cit. n. 28), pp. 349–350.

[64] The text is corrupt. The manuscript tradition conveys *ἐπὶ κλῆρον* (or *κλῆρῳ*). The correction of the text usually accepted by the editors (Bursian, Russell, and Wilson) is owed to A. H. L. Heeren, *Menandri rhetoris commentarius*, p. 106, n. *r*. Talamanca, 'Su alcuni passi' (cit. n. 29), p. 482 n. 73, points out that genitive plural of *epikleros* following a singular *kleros* creates problems. (1) If *kleros* is to be understood as a 'lot', the fragment would speak of some kind of drawing of heiresses, a custom otherwise unknown, and thus likely to be discarded. (2) If instead, it means 'a share in inheritance', we would then have information of the *epikleroi* inheriting shares, which does not correspond to what we know of the Greek legal reality (it is not impossible that the passage is simply inexact). The Italian scholar opted thus for two singular accusatives. That idea was accepted by Mélèze Modrzejewski, 'Ménandre', (cit. n. 28), pp. 347 n. 60, and 363, who also considered a double genitive plural, pointing out that such a set *kleros* – *epikleros* is not uncommon in the legal Athenian sources, such as *Ath. Polit.* 42.5.

The local institutions (even if momentarily) do come to the surface: the city may be praised through the accolade given to its lawmakers. How prudently they designed the laws and the legal relations in a polis. Among 'other legal matters' two particular examples follow: the law of succession, as it seems, and the institution of *epiklerate*. Now, having pointed them out the author dismisses again the idea of using them in a laudatory speech – it is useless again, since 'we are governed by the laws of the Romans'.

Two aspects come as a surprise here. Firstly, why did the presumed Menander first suggest praising the city-laws, gave some examples thereof and then totally dismissed this idea? Secondly, the examples proper, which in the approximate understanding (the troubles with the text transmission allow only that, cf. n. 64) mention the order of succession, and the *epiklerate*. The law of succession, naturally connected to the political organization of a Greek city-state (and thus indeed stemming from the 'prudent' constitution of a city) is relatively comprehensive. In contrast, the mention of the *epiklerate*, an institution dead for centuries before the *Constitutio Antoniniana*[65] is very, very odd, that is unless the writer did not really understand what he was writing about, and this dyad should generically denote the law of succession. But if he goes back to an institution long fallen into oblivion, perhaps also the firm statement of the decline and fall of the local laws caused by the universal citizenship should not be taken at their face value? There are numerous cases of the survival of the extremely non-Roman (if not anti-Roman) legal figures in the papyri post-dating the *Constitutio Antoniniana*: direct agency, full legal capacity of adult sons with living fathers, bizarre, hybrid forms of wills to name just the most surprisingly outstanding.[66] Should we – let me reiter-

[65] See, now for all, E. Karabélias, *L'Epiclérat attique* [= *Académie d'Athènes Annuaire du Centre de recherche de l'histoire du droit grec* 36.3], Athens 2002, and idem, *Recherches sur la condition juridique et sociale de la fille unique dans le monde grec ancien excepté Athènes* [= *Académie d'Athènes Annuaire du Centre de recherche de l'histoire du droit grec* 37.5], Athens 2004. Karabélias very rightly sets epiclerate in the context of a democratic polis, with its-oikos-based structure. Once these institutions had gone, so must have also epiclerate. See esp. *L'epiclérat*, pp. 227–251 (at 249–251 a very suggestive demonstration how a rich orphan replaces the Attic topos of an *epikleros* in the Latin rhetorical sources of the early imperial era).

[66] Most recently, the list of the most remarkable cases in Alonso, 'The status of pere-

ate – search for precise legal implications in a clearly literary text? I would say we may only expect it to give an approximate description of the most general legal consequences of the Edict of Caracalla, projected against the popular view of law. The author, whoever that may have been, would never pay attention to the troublesome details and possible exceptions to the postulated general rules. The examples mentioned, next to the law of marriage, belong to the sphere of law easiest identifiable with the civic order. Once all Romans, all were supposed to inherit and make wills according to *ius civile* and the praetorian Edict (even if will-making, as Maria Nowak has shown in her book had become not so Roman in the meantime).[67] What the presumed Menander does is a very rough approximation, a sort of popular vision of the problem, concerning the state laws of the polis and the cases that would be governed by the civic principle of personality of law, and not an exact rendition of the legal standing of the mid-third century AD.

This inexactness is even more manifest in another fragment of the *Treatise*, strangely missed by Talamanca, but neither examined by Modrzejewski. It is concerned with eulogy of *Moderation* within a city, and directly precedes the just discussed aspects of *Prudence*.[68]

> Ps.-Menander Rhetor, *Διαίρεσις τῶν ἐπιδεικτικῶν* 363.30–364.2 Spengel = 1.16.20 Loeb: *σωφροσύνης μὲν οὖν διττὸς ἔλεγχος, ἔν τε τῇ κοινῇ πολιτείᾳ καὶ τοῖς ἰδίοις οἴκοις. ἐν πολιτείᾳ μὲν κοινῇ περί τε παίδων ἀγωγῆς καὶ παρθένων καὶ γάμων καὶ συνοικήσεων καὶ τῶν νομίμων τῶν ἐπὶ τοῖς*

grine law' (cit. n. 12), pp. 47–49; and more in detail in IDEM, 'The *Constitutio Antoniniana* and private legal practice in Egypt', [in:] K. CZAJKOWSKI & B. ECKHARDT, *Law in the Roman Provinces*, Oxford 2020 (forthcoming); ARANGIO-RUIZ, 'L'application du droit romain' (cit. n. 25), naturally knew them, yet interpreted them in the opposite, Mitteisian way: as the last breaths of the local orders put down by *Constitutio Antoniniana*, soon to fade away.

[67] M. NOWAK, *Wills in the Roman Empire. A Documentary Approach* [= *The Journal of Juristic Papyrology Supplement* 23], Warsaw 2015, *passim*, esp. pp. 129–146.

[68] One could perhaps read a distant allusion to this chapter in city-praises in a Dioskoros' of Aphrodite panegyric addressed to Romanos (*P. Aphrod. Lit.* 4, l. 9), if we identify the Menander mentioned there in l. 7 with Menander the Rhetor, following CRIBIORE, 'Menander the Poet' (cit. n. 39), cf. further, above, n. 39.

> ἁμαρτήμασιν τοῖς ἀκόσμοις. καὶ γὰρ γυναικονόμους[69] πολλαὶ τῶν πόλεων εἰσὶν αἳ χειροτονοῦσιν
>
> and so, the scrutiny of Moderation is double: in the common government and in the private houses. In regard to common government it is about the education of boys and girls, and marriages, and concubinages, as well as legal matters on offences causing disorder. There are plenty of cities which elect supervisors of women.

Now, there is nothing less 'civic' in private law than the construct of marriage or the adopted model of women's legal autonomy. For Ps.-Menander these aspects of public (sic!) life would still be regulated according to the local traditions and thus may be legitimately praised in a city-eulogy. This clearly cannot be compatible with the expected consequences of the universal citizenship: the only admitted model of marriage, the control over women, would be the Roman one. And in fact, we may observe that post-212 endogamic marriages disappeared in Egypt in a steady pace.[70] Like-

[69] This office is attested for Athens, known, among others, from *Arist. Pol.* 1299a 22. Yet, its existence post-early 3rd century AD remains a bit of a mystery. The only secure instance would be *IG* V 1, 170, which LSJ, *s.v.* assigns to '(Sparta, III A.D.)', but the edition prefers an earlier dating, placing it around AD 180 (*Αὐρ(ήλιος) Καλήμε|ρος Ἀγαθο|κλέους γυ|ναικονό|μος*); given the names – all individuals mentioned on the stone bear the name of Aurelii, the LSJ attribution is more likely. The same term is also heavily reconstructed in the 3rd century AD *I. Milet* VI 3, 1151.

[70] Cf. J. Mélèze Modrzejewski, 'Die Geschwisterehe in der hellenistischen Praxis und nach römischem Recht', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 81 (1964), pp. 52–82 (= *Statut personnel* [cit. n. 5], no. VII), at 74–81, and most recently, generally on the subject J. Rowlandson & R. Takahashi, 'Brother-sister marriage and inheritance strategies in Greco-Roman Egypt', *Journal of Roman Studies* 99 (2009), pp. 104–139. The archive of Theognostos, currently under study by Peter van Minnen, evidences how the former spouses become in the documentary practice just 'siblings' after AD 212. Among the papers of Theognostos, see esp. *P. Pintaudi* 42 = *P. Lond.* III 947 i l + j + h + b = *P. Lond.* III 947 ii c (Hermopolis, AD 234/5) preserving a contract and receipt of a wet-nurse who was to breast-feed the baby born to the man and his sister Dioskorous.

It is worth noticing how the contemporary jurisprudence tends to leniently treat these, now incestuous unions, showing again any kind of legal radicalism is alien to the Roman way: D. XLVIII 5.39(38).2 (Pap. *quaest.* 36): *Quare mulier tunc demum eam poenam, quam mares, sustinebit, cum incestum iure gentium prohibitum admiserit: nam si sola iuris nostri*

wise, the commonly added complement to a mention of guardianship that it was held according to Roman law shows that the only acceptable model of female guardianship – even if it had become by that time a mere formality – was unmistakably Roman.[71]

So, to what do these fragments bear witness? Modrzejewski had an idea that would actually piece together all the Menandrian evidence (including the passage I have just presented which he did not discuss). For the presumed Menander *Constitutio Antoniniana* was of no concern: after all, he did not mention it in a single instance. Spanheim, therefore, was right not to include this work in his treatment of the sources on this Edict.[72] For the author of the Treatise the censure was not the grant of citizenship, but the Roman conquest. In his exposition he juxtaposed the glorious 'Greek' past to the Roman 'present' – marked often by the *νῦν*.[73] It is in the present moment – as Modrzejewski stresses – that the Alexandrians still excel in geometry, grammar, and philosophy (360.23 Spengel). It is in these present times, when personal piety (towards the traditional religions) is hard to

observatio interveniet, mulier ab incesti crimine erit excusata. 3. Nonnumquam tamen et in maribus incesti crimina, quamquam natura graviora sunt, humanius quam adulterii tractari solent: si modo incestum per matrimonium illicitum contractum sit, 'For this reason, a female will suffer the same penalty as the males if she should perpetrate an incest prohibited by ius gentium. But if only the precept of our law intervenes, the female shall be exonerated of the crime of incest. Also, in the case of males, the crimes of incest, even though they are by nature graver, are treated sometimes even more lenient than the adultery: (this is in the case), when the incest has been committed in an illicit marriage.' This source makes manifest again the traditional Roman way of looking at marriage from two separate angles, the legal and social one. An illegitimate union still may bear legal consequences. See further, J. Urbanik, 'Husband and wife', [in:] P. J. Du Plessis, C. Ando & K. Tuori (eds.), *The Oxford Handbook of Roman Law and Society*, Oxford 2016, pp. 473–486, esp. at 474–477.

[71] Cf., e.g. women appearing without a guardian in virtue of their *ius liberorum*: *P. Lips.* I 3 = *MChr.* 172 (Hermopolis, 22 Dec. AD 256): *Αὐρηλ(ίᾳ) Ἀρτ[εμ]ιδώ[ρᾳ Π]ολυδεύκους γενομένου βουλευτοῦ τῆς αὐτῆς πόλ(εως) ἀναγρα(φομένῃ) ἐπὶ τοῦ αὐτοῦ| ἀμφόδου εἰ[δυίῃ γράμματα| χωρὶς κυρίου χρηματιζούσῃ τέκνων δικαίῳ κατὰ τὰ Ῥωμαίων ἔθη*; or the requests for a guardian in accordance of Titian and Julian Law, as, for instance, *P. Oxy.* XII 1466 = *ChLA* XLVI 1361 = *CPL* 204 (21 May AD 245). On the latter acts, see another masterpiece by Mélèze Modrzejewski, 'À propos de tutelle dative' (cit. n. 6).

[72] Mélèze Modrzejewski, 'Ménandre', (cit. n. 28), pp. 350–351.

[73] *Ibidem*, pp. 343–349.

find (362.30 Spengel): 'the past invades the present, it becomes the present … and so it coincides with the time of the epideictic oration' – summarizes Mélèze. In other words: these passages bear witness to what had been happening to local orders already before the moment there were supposed to completely vanish in consequence of the universal grant of citizenship. And so, we turn to the point from which we have started this journey: for Modrzejewski these fragments bore witness to his idea that the provincial laws survived the Roman invasion as customs – and thus were applied, prior to *Constitutio Antoniania* and after it alike, in the supplementary, and auxiliary way, in absence of a Roman norm.

Before we proceed, we need to confront briefly some sources from among the realm of Roman legal texts that Modrzejewski used to support this view. The idea to understand local laws as custom supplementing the Roman order finds apparent, but misleading, corroboration in the scant references in the *Digest* and *Codex* to *mos*/*consuetudo regionis*. Read cursively they seem to substantiate his idea.[74] Yet, if we take a closer look,[75] we

[74] Mélèze Modrzejewski, 'Ménandre', (cit. n. 28), pp. 354–357 and n. 70; 'La règle de droit dans l'Égypte romaine' (cit. n. 3), pp. 354–357, followed by M. Kaser, *RPR*^{2}, pp. 218–220.

[75] D. XXII 1.1 *pr.* (Pap. *quaest.* 2): *Cum iudicio bonae fidei disceptatur, arbitrio iudicis usurarum modus ex more regionis ubi contractum est constituitur, ita tamen, ut legi non offendat*, 'When an action of good faith is disputed, the rate of interest is fixed by the decision of the judge according to the usage of the region in which the agreement has been made, in the way, however, not to violate the law'; D. XXX 39.1 (Ulp. *sab.* 21): *Fructus autem hi deducuntur in petitionem, non quos heres percepit, sed quos legatarius percipere potuit: et id in operis servorum vel vecturis iumentorum vel naulis navium dicendum. Quod in fructibus dicitur, hoc et in pensionibus urbanorum aedificiorum intellegendum erit. In usurarum autem quantitate mos regionis erit sequendus: iudex igitur usurarum modum aestimabit et statuet*, 'The fruits which are deducted in a claim are not these that the heir has obtained, but the ones which the legatee has been able to obtain: the same should be said on the work of slaves, transport by beasts of burden, or ship-fares. What is said about the fruits should also be applied to the rents of city buildings. And in what concerns the amount of interest, one should follow the usage of the region, and so the judge shall estimate the interest-rate and establish it (...)'; D. L 17.34 (Ulp. *sab.* 45): *Semper in stipulationibus et in ceteris contractibus id sequimur, quod actum est: aut, si non pareat quid actum est, erit consequens, ut id sequamur, quod in regione in qua actum est frequentatur. Quid ergo, si neque regionis mos appareat, quia varius fuit? Ad id, quod minimum est, redigenda summa est*, 'We always follow in stipulations and in other agreements, what has been done. And if what has been done is not apparent, consequently we should follow what is frequently done in the region in which it has been taken place. So, what will happen, if

notice that often *mos regionis* is just a factor used to interpret the will of the contracting parties, and not a source of law by itself. *Lex* does not originate from it, only *lex contractus*, dimmed through the carelessness of the parties, finds its elucidation in the rules established by the local customs. In default of any other clear indications, the parties are presumed to have made the agreement according the (commercial) usages of their place of residence.

In some instances, notably of imperial provenance, *mos regionis*, *consuetudo regionis/provinciae*[76] could explain what the external rules establishing

the usage of the region is neither apparent, since it was manifold? Then the sum must be established at what is the minimal value.'

Slightly different yet confirming the same application of *mos regionis* is the D. XXV 4.1.15 (Ulp. *ed.* 24) concerning the recognition of children: *Quod autem praetor ait causa cognita se possessionem non daturum vel actiones denegaturum, eo pertinet, ut, si per rusticitatem aliquid fuerit omissum ex his quae praetor servari voluit, non obsit partui. Quale est enim, si quid ex his, quae leviter observanda praetor edixit, non sit factum, partui denegari bonorum possessionem: sed mos regionis inspiciendus est, et secundum eum et observari ventrem et partum et infantem oportet*, 'If the praetor, having heard the case, decides that he will not grant the possession (of the estate) or that he will deny the actions, this implies, that if something of the things that the praetor has wanted to be observed, has been overlooked because of rusticity, it will not impair the standing of the fetus. What would it be then, if something of the norms that the praetor has decided in the edict that should not be so firmly observed, has not been performed, and possession of estate would be denied to the fetus? Yet the usage of the region must be checked: and it ought to be followed in examination of the womb, and of the fetus, and of the infant.'

[76] *CJ.* IV 65.8 *Imperator Alexander Severus Sabiniano Hygino* (AD 231): 'Licet certis annuis quantitatibus fundum conduxeris, si tamen expressum non est in locatione aut mos regionis postulat, ut, si qua labe tempestatis vel alio caeli vitio damna accidissent, ad onus tuum pertinerent, et quae evenerunt sterilitates ubertate aliorum annorum repensatae non probabuntur, rationem tui iuxta bonam fidem haberi recte postulabis, eamque formam qui ex appellatione cognoscet sequetur. PP. K. Aug. Pompeiano et Peligno Conss.', 'If you have leased land for a certain annual quantity, and it has not been stated in the lease-contract nor the custom of the country commends so, that if loss should result due to the effect of bad weather or some other accident, you will be burdened by it; and if it is proved that any barren years were not compensated by the abundance of others, you will, in accordance with good faith, be justified in petitioning (release from rent), and the judge who decides the appeal shall follow observe this rule' [transl. Scott, greatly altered]; *CJ.* IV 65.18: 'Imperatores Diocletianus, Maximianus Annio Ursino (AD 290): Excepto tempore, quo edaci lucustarum pernicie sterilitatis vitium incessit, sequentis temporis fruc-

the frameworks of contractual relations in land leases were. These would fix, unless otherwise agreed by the parties, the problem of management of risk between the landlord and the tenant and establish the possible right to *remissio mercedis*. Among these sources one is of a particular significance.

A constitution of Diocletian and Maximian (*CJ.* IV 56.15)[77] assigns to a local *consuetudo* a stronger value. The arrangements of the parties are to be observed only if not contrary to these regional customs. This binding force of *consuetudo* may be due to the fact that in this particular case public land leases were at stake. It could be so that the rules regulating them not only varied from a region to region, but also incorporated or repeated pre-Roman norms.[78] So then, a pre-Roman norm could be termed as 'custom' – pace Modrzejewski – but that did not make any lesser than a Roman norm in the strict sense.

Moreover, a *regio* in these fragments is never a counterpart to the Roman (or Romanised) 'centre': a *mos* in a given region, and the parties to the contract, could be as Roman as the inhabitants of the *Urbs* proper. And thus these fragments cannot really serve to prove the auxiliary character of the local laws, now allegedly transformed into 'customs'.[79] Even if

tus, quos tibi iuxta praeteritam consuetudinem deberi constiterit, reddi tibi praeses provinciae iubebit. Pp. XI K. Oct. ipsis IIII et III AA. Conss.', 'The Governor of the province shall order that crop-rent, befalling you in virtue of the previous custom, of the time following that when the locusts by their ravages caused sterility, be returned to you' [transl. Scott, altered]. I offer an in-depth study of these sources in my forthcoming 'Public land leases turn inhumane. Imperial grace and local custom(s), or the status of local law under Roman rule revisited'.

[77] *CJ.* IV 65.19: 'Imperatores Diocletianus, Maximianus Iulio Valentino (AD 293): Circa locationes atque conductiones maxime fides contractus servanda est, si nihil specialiter exprimatur contra consuetudinem regionis. Quod si alii remiserunt contra legem contractus atque regionis consuetudinem pensiones, hoc aliis praeiudicium non possit adferre S. V K. Mai. Heracleae AA. Conss.', 'In regard to leases and hires one should respect primarily the understandings of the contract, unless they are expressed in terms opposed in particulars to the custom of the region. Yet if some individuals have remitted the rent in breach of the contractual terms or the custom of the region, it cannot prejudice the others.'

[78] A perfect practical example of such would be *lex Heronica* on tax-farming, applied in the province of Sicily until Verres, apparently wrongfully, abrogated it (cf. below n. 127).

[79] Cf. Mélèze Modrzejewski, *Loi et coutume* (cit. n. 4), p. 316 and n. 19, and more generally § 29.

they were to be conceptualised as such (but even that statement may be anachronic as shown by Alonso, see above, pp. 296–297), they did not lose anything of their normativity, they did not become inferior to statutory law. How dangerous it is to rely on homonymity of words to build theories is made manifest by just one example. In the provincial context a purely Roman norm is referred to as 'custom': ἔθη, too. A wonderful example thereof is the mention of *ius liberorum* exempting women from guardianship 'according to the custom of the Romans'; at the same time paternal power is clarified as one 'according to the laws of the Romans'.[80]

If then Roman law does not automatically trump the local solutions, how should one order these strata of different legal orders? In what follows I will use three examples to illustrate how these legal realties interact and interweave. In all the Roman judge was invited to apply the local legal order. His reaction may serve to reconstruct the guiding principles of the decisions in these cases.

2. *ΝΟΜΟΙ ΤΩΝ ΑΙΓΥΠΤΙΩΝ*

Let me first turn to what is probably the most significant piece of evidence regarding the application of the local laws, that is the vexed question of the *νόμοι τῶν Αἰγυπτίων*.[81] Two problems need to be treated here: first their possible origin and then their efficacy. As for the first, in contrast to the Wolffian idea that of the Egyptian character of these norms (and thus

[80] *P. Lips.* I 3 (cit. n. 73): *χρηματιζούσῃ τέκνων δικαίῳ κατὰ τὰ Ῥωμαίων ἔθη*; *SB* XX 14681 (Oxyrhynchos, late 3rd c. AD), ll. 5–6: *Δημητρίᾳ τῇ καὶ Ταᾶμόι̣τι ἐκ μητρὸς Τ̣αᾶμόιτος ἀπὸ τῆς α[ὐτ]ῆς πόλεως [οὔ]||σῃ μοι ὑποχειρίᾳ κατὰ τοὺς Ῥωμαίων νόμους*.

[81] The literature on the subject is immense; most recently the problem with reference to the earlier scholarship was discussed by H. A. RUPPRECHT, '*Τῶν Αἰγυπτίων νόμοι*', [in:] *When West Met East. The Encounter of Greece and Rome with the Jews, Egyptians, and Others* (*Festschrift R. Katzoff*), Trieste 2016, pp. 255–268 (IDEM, *Beiträge zur juristischer Papyrologie. Kleine Schriften* [ed. A. JÖRDENS], Stuttgart 2017, no. 32, pp. 336–345) and S. STRASSI, 'Prassi giuridico-amministrativa nella *χώρα* egiziana: fra *lex romana* e diritto locale', [in:] R. HAENSCH, *Recht haben und Recht bekommen im Imperium Romanum* [= *The Journal of Juristic Papyrology Supplement* 24], Warsaw 2016, pp. 213–239, at 229–236 (with a useful list of pertinent documents and their description).

their identification with the Ptolemaic laws of the land, *nomoi tes choras*)[82] Mélèze opted for their genuinely Greek cradle, his position being especially stern in the earlier essays on the subject.[83] Even if he later somewhat mitigated that conviction, the 2014 edition of *Loi et coutume* brings about the same very certain hellenocentric idea. The relevant documents have been frequently discussed; in this instance I wish to deal in more detail with two just cases. The first will be the apparent power of the father to take away his daughter from her husband's household (equated to the Athenian *aphairesis*, by Lewis followed by Modrzejewski),[84] the second the freedom of testation among the Egyptians. These two examples will allow us to treat the question of the validity (and thus survival) of the laws of the Egyptians, since in the former case they were denied their efficacy, and in the latter were fully applied.

2.1. *Νόμοι τῶν Αἰγυπτίων* struck down: *apospasis*

The first instance is obviously illustrated by the petition of Dionysia, *P. Oxy.* II 237. The text is so well known to most of the readership, it will suffice just to recall the most basic facts of this case.[85] The story of the family conflict between the father Chairemon and his daughter Dionysia

[82] H. J. Wolff, 'Faktoren der Rechtsbildung im hellenistisch-römischen Ägypten', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 70 (1953), pp. 20–57, at 42–44.

[83] Mélèze Modrzejewski, 'La règle de droit dans l'Égypte romain' (cit. n. 3), pp. 332–333; and idem '«La loi des Égyptiens»' (cit. n. 4), and idem, *Loi et coutume* (cit. n. 4), § 21, pp. 259–271.

[84] N. Lewis, '*Ἀφαίρεσις* in Athenian law and custom', *Symposion* 1977, pp. 161–178; Mélèze Modrzejewski, *Loi et coutume* (cit. n. 4), pp. 261–262.

[85] Again, the literature on the subject is immense, from the recent works – all with the previous scholarship, let me just cite the most recent, J. Platschek, 'Nochmals zur Petition der Dionysia (*P. Oxy.* II 237)', *The Journal of Juristic Papyrology* 45 (2015), pp. 145–163, and Cl. Kreuzsaler & J. Urbanik, 'Humanity and inhumanity of law. The case of Dionysia', *The Journal of Juristic Papyrology* 38 (2008), pp. 119–155.

and her husband Horion could be reconstructed with a certain degree of probability from the Chairemon's petition appended by his daughter.

(*P. Oxy.* II 237, col. VI, ll. 12–20 (*c.* AD 186): [12] *Χαιρήμων Φανίου γυμνασιαρχήσας τῆς Ὀξυρυγχειτῶν πόλεως· τῆς θυγατρός μου Διονυσίας, ἡγεμὼν κύριε | πολλὰ εἰς ἐμὲ ἀσεβῶς καὶ παρανόμως πραξάσης κατὰ γνώμην Ὡρίωνος Ἀπίωνος ἀνδρὸς αὐτῆς, ἀνέδωκα ἐπιστο | λὴν Λογγαίῳ Ῥούφῳ τῷ λαμπροτάτῳ, ἀξιῶν τότε ἃ προσήνεγκα αὐτῇ ἀνακομίσασθαι κατὰ τοὺς νόμους, οἰόμενος | ἐκ του παύσασθαι αὐτὴν τῶν εἰς ἐμὲ ὕβρεων· καὶ ἔγραψεν τῷ τοῦ νομοῦ στρατηγῷ (ἔτους) κε, Παχὼν κζ, ὑπο |*[16] *τάξας τῶν ὑπ' ἐμοῦ γραφέντων τὰ ἀντίγραφα ὅπως ἐντυχὼν οἷ̣ς̣ π̣α̣ρεθέμην φροντίσῃ τὰ ἀκόλουθα πρᾶξαι. ἐπεὶ οὖν, | κύριε, ἐπιμένει τῇ αὐτῇ ἀπονοίᾳ ἐνυβρίζων μοι, ἀξιῶ τοῦ νόμου διδόντος μοι ἐξουσίαν οὗ τὸ μέρος ὑπέταξα ἵν' εἰδῇς | ἀπάγοντι αὐτὴν ἄκουσαν ἐκ τῆς τοῦ ἀνδρὸς οἰκίας μηδεμίαν μοι βίαν γείνεσθαι ὑφ' οὑτινος τῶν τοῦ Ὡρίωνος ἢ αὐ|τοῦ τοῦ Ὡρίωνος συνεχῶς ἐπαγγελλομένου. ἀπὸ δὲ πλειόνων τῶ[ν] π̣ε̣ρὶ το[ύ]των πραχθέντων ὀλίγα σοι ὑπέταξα ἵν' εἰ|*[20]*δῇς.* (ἔτους) *κς, Παχών.*

From Chairemon, son of Phanias, 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. In the year 25, Pachon 27, the prefect wrote to the strategos attaching copies of my pleadings so ordering to investigate what I have submitted and to check to what had to be done. 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 power 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.' (transl. Kreuzsaler & Urbanik)

It all started with some financial argument between the daughter and the father regarding Chairemon's not respecting Dionysia's lien, *katoche*, on the property her mother had brought to the matrimonial estate. Chairemon, dissatisfied with his daughter lack of cooperation, decided to resort to the ultimate instrument of pressure proceeding with *apospasis*: removing

the daughter from her husband's house. Like many of his counterparts, the claimant presents the authority with the law – *nomos* – that would grant him such power. He fears that the Roman judge, unfamiliar with the local law, might not recognise the prerogative. Moreover, he cites 'only a few' of cases 'from the multitude ... about these things' to prove that the provision he evokes had been actually recognized and applied by the Roman judges. Unfortunately, these are not extant. Dionysia did not want to weaken her argument by citing them. Instead she counterbalanced the claim by argumentation which may seem rather particular to a non-jurist, but which is, essentially, most 'juridical'. Let me paraphrase it briefly (cf. col. VII, ll. 8–19).

First of all, such a law does not exist. Second, if it existed, it would not be competent to Dionysia, because it would only be applicable to the daughters born to unwritten marriages. The woman seems to have been born to a written marriage instead: it was most probably the document of marriage of her parents which in the Egyptian fashion secured her (and probably her already deceased mother's) property rights, creating the *katoche* on the family property: the real bone of contention in the controversy. That should have ended the argument, yet just to be on the safe-side, Dionysia adduced that even if a daughter was born to an unwritten marriage, the father lost the right (that is, if it ever existed, which it did not!) to take her away from her husband's house, once he had given her to marriage, performing *ekdosis*. Giving-away was a mandatory act creating marriage for the Athenian, and probably Hellenistic Greek law,[86] yet in Roman Egypt it may have been used to mark the termination of paternal power, *exousia*, over a married daughter.[87] To support her last point

[86] Cf., Mélèze Modrzejewski, 'La structure juridique de marriage grec' (cit. n. 6), §§ 3, 4, and 5.

[87] By contrast Uri Yiftach, who in his excellent studies of marriage documents in Greek-speaking Egypt, maintains that *ekodosis* always remained marriage-creation essential: U. Yiftach-Firanko, *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], Munich 2003, ch. 3 (cf. also his earlier study of the problem, '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.],

Dionysia recalled a legal opinion by a ***nomikos***, Ulpios Dionysiodoros, given – apparently in a case similar to hers, over half a century before.

> *P. Oxy.* II 237, col. VIII, ll. 2–6 (AD 138): Ulpios Dionysodoros on *ekdosis*
> (…) *Οὔλπιος Δ[ι]ονυσόδ[ωρος] τῶν ἠγορανομηκό | των νομικὸς Σαλουισ τ[ίῳ Ἀφ]ρικανῷ | ἐπάρχῳ στόλου καὶ [ἐπὶ τῶ]ν κεκριμένων τῷ τειμιω[τά]τῳ χαίρειν. Δ[ιον]υσία |*[4] *ὑπὸ τοῦ πατρὸς ἐκδοθεῖσα [πρ]ὸς γάμον ἐν τῇ τοῦ π[α]τρὸς ἐξουσ[ίᾳ οὐ]κέτι γε\ί νεται. καὶ γὰρ εἰ ἡ μήτηρ αὐτῆς τῷ πατρὶ ἀγράφως | συνῴκησε [κ]αὶ διὰ τοῦτο αὐτὴ δοκεῖ ἐξ ἀγράφων γάμων γεγενῆσθαι, τῷ ὑπὸ τοῦ πατρὸς αὐτὴν ἐκδόσθαι πρὸς γάμ̣ον οὐκέτι | ἐξ ἀγράφων γάμων ἐστίν* (…)
>
> Ulpios Dionysodoros, former *agoranomos*, a legal expert, to his most esteemed Salvius Africanus, prefect of the fleet and judicial officer, a greeting. Dionysia, who has been given away by her father in marriage, is no longer under his authority. For even though her mother lived with her father in an unwritten way and therefore she seems to be the child of an unwritten marriage, by the fact that she has been given away by her father in marriage, she is no longer from an unwritten marriage. (transl Kreuzsaler & Urbanik)

Third, and finally, to make her counterclaim even stronger, Dionysia cites two precedents in which the law (non-existent!) would not be applied, if cited, by the Roman judge. Both, happening some 50 years earlier, seem to be mirror images of her own issue with the father, the second actually cites the first. Both offer some interesting points for our theme, but not willing to repeat the same story thrice, let me just single out these highlights.

> *P. Oxy.* II 237, col. VII, ll. 19–29 (2 June AD 128): Decision of Flavius Titianus
> (…) *ἐξ ὑπομνη|*[20]*ματισμῶν Φλαουίου Τειτιανοῦ τοῦ ἡγεμονεύσαντος. (ἔτους) ιβ θεοῦ Ἀδριανοῦ, Παῦνι η, ἐπὶ τοῦ ἐν τῇ ἀγορᾷ βήματος. Ἀντωνίου | τοῦ Ἀπολλωνίου προσελθόντος λέγοντός τε διὰ Ἰσιδώρου νεωτέρου ῥήτορος Σεμπρώνιον πενθερὸν ἑαυτο[ῦ] ἐκ μη[τ]ρὸς ἀφορ|μῆς εἰς διαμάχην*

Law in the Documents of the Judean Desert, Leiden – London 2005, pp. 67–84). Claudia Kreuzsaler and I followed this view in our 2008 essay (cit. n. 85); since then I have started having doubts about this premise, see URBANIK, 'Between the unity and the force of tradition: The case of *ekdosis* in Graeco-Roman Egypt', (forthcoming).

ἐλθ[όν]τα ἄκουσαν τὴν θυγατέρα ἀπεσπακέναι, νοσησάσης δὲ ἐκείνης ὑπὸ λοίπης τὸν ἐπιστράτηγον Βάσσον | μεταπαθῶς ἀναστρα̣φ[έν]τα ἀποφαίνεται ὅτι οὐ δεῖ αὐτὸν κωλύεσθαι εἰ συνοικεῖν ἀλλήλοις θέλοιεν, ἀλλὰ μηδὲν ἠνυκέναι· |[24] *τὸν γὰρ Σεμπρώνιον ἀποσι[ω]π̣ήσαντα τοῦτο καὶ τῷ ἡγεμόνι περὶ βίας ἐντυχόντα ἐπιστολὴν παρακεκομικέναι ἵνα οἱ ἀντίδι | κοι ἐκπεμφθῶσι· αἰτε̣ῖσθαι ο̣ὗ̣ ἐὰν δοκῇ μὴ ἀποζευχθῆναι γυναικὸς οἰκείως πρὸς αὐτὸν ἐχούσης. Δίδυμος ῥήτωρ ἀπεκρεί|νατο μὴ χωρὶς λόγου τὸν Σεμπρώνιον κεκεινῆσθαι· τοῦ γὰρ Ἀντων[ί]ου προσενεγκαμένου θυγατρομειξίας ἐγκαλεῖν, μὴ ἐνεγκαν|τος τὴν ὕβριν τῇ κατὰ τοὺς νόμους συνκεχωρημένῃ ἐξουσίᾳ κεχρῆσθαι, ᾐτιᾶσθαι δ' αὐτὸν καὶ περὶ* [.....]π̣ε̣ς̣ *ἐ̣[νκ]λ̣ημάτων. |*[28] *Προβατιανὸς ὑπὲρ Ἀντωνίου προσέθηκεν, ἐὰν ἀπερίλυτος ἦν ὁ γάμος, τὸν πατέρα μήτε τῆς προικὸς μηδὲ τῆς παιδὸς τῆς ἐκδεδο|μένης ἐξουσίας ἔχειν. Τιτιανός· διαφέρει παρὰ τίνι βούλεται εἶναι ἡ γεγαμημένη. ἀνέγνων. σεσημ(είωμαι).*

From the minutes of Flavius Titianus, sometime praefect. Year 12 of the deified Hadrian, Pauni 8, at the court in the marketplace. Antonios son of Apollonios appeared and stated through his advocate, Isidoros the Younger that his father-in-law, Sempronios at the instigation of his mother had made a quarrel with him and taken away his daughter against her will, and that when the latter fell ill through grief the *epistrategos* Bassus, being moved by sympathy, declared that if they wished to live together Antonios ought not to be prevented, but all to no effect. For Sempronios, ignoring this declaration, presented to the prefect a complaint of violence and had brought back an order that the rival parties were to be sent up (the river) for trial. Antonios therefore claimed, if it pleased the prefect that he should not be separated from a wife domestically disposed towards him. The advocate Didymos replied that Sempronios had had good reason for having been provoked. For it was because Antonios had threatened to charge him with incest that he, refusing to bear the insult, had used the power granted by the laws and had also brought …. accusations against the other. Probatianos on behalf of Antonios added that if the marriage had not been annulled the father had no power either over the dowry or over the daughter whom he had given away. Titianus said: 'The decisive question is with whom the married woman wishes to live'. Read over and signed by me (the prefect). (transl. Grenfell & Hunt, modified)

P. Oxy. II 237, col. VII, ll. 29–39 (14 Oct. AD 133): Decision of Pacomius Felix: *(...) ἐξ ὑπομ[νηματισ]μῶν | Πακωνίου Φήλικος ἐπιστρατήγου. (ἔτους) ιη θεοῦ Ἀδριανοῦ, Φαῶφι ιζ, ἐν τῇ παρὰ ἄνω Σεβεννύτου, ἐπὶ τῶν κατὰ Φλα̣υ̣ή̣σ̣ι̣ο̣ς | Ἀμμούνιος ἐπὶ παρούσῃ Τα̣ε̣ι̣χήκει θυγατρὶ αὐτοῦ πρὸς Ἥρωνα Πεταήσιος.*

Ἰσίδωρος ῥήτωρ ὑπὲρ Φλαυήσιος εἶπεν, τ̣ὸν οὖν α̣ἰ̣τ̣ι̣ώ̣μενον |[32] *ἀποσπάσαι βουλόμενον τ[ὴ]ν θυγατέρα αὐτοῦ συνοικοῦσαν τῷ̣ ἀντιδίκῳ δεδικάσθαι ὑπογύως πρὸς αὐτὸν ἐπὶ τοῦ ἐ̣[πι]σ̣τ̣ρ̣α̣τ̣ήγου* | *καὶ ὑπερτεθεῖσθαι τὴν δίκην ὑ̣μ̣ε̣ῖ̣ν̣ ἵνα ἀναγνωσθῇ ὁ τῶν Αἰγυπτίω[ν νό]μος. Σεουήρου καὶ Ἡλιοδώρου ῥητόρων ἀποκρειναμένων* | *Τειτιανὸν τὸν ἡγεμονεύσαντα ὁμοίας ὑποθέσεως ἀκούσαντα [ἐξ] Αἰγυπτιακῶν προσώπων μὴ ἠκολουθηκέναι τῇ̣ τοῦ νό*|*μου ἀπανθρωπίᾳ̣ ἀλλὰ τ[ῇ] ἐπι[νοί]ᾳ̣ τῆς παιδός, εἰ̣ βούλεται παρὰ τ[ῷ̣ ἀνδρὶ] μένειν, Πακώνιος Φῆλιξ· ἀναγνωσθητο ὁ ν[ό]μ[ος. ἀ]να*[36] *γνωσθέντος Πακώνιος [Φῆ]λιξ· ἀνάγνωται καὶ τὸν Τειτιανοῦ ὑπομ[ν]ηματισμόν. Σεουήρου ῥήτορος ἀναγν[όντος], ἐπὶ τοῦ ιβ̣ (ἔτους) Ἁ[δρια]νοῦ* | *Καίσαρος τοῦ κυρίου, Παῦν[ι] η̣, Πακώνιος Φῆλιξ· καθὼς ὁ κράτιστος Τ[ειτ]ιανὸ[ς] ἐ̣κ̣ρ̣ε̣ι̣νεν, πεύσονται τῆς γυναικός· κ̣α̣ὶ̣ ἐκέλευ[σε]ν δι̣ʼ [ἑρ]μ̣η̣|νέως αὐτὴν ἐνεχθῆν̣[α]ι, τ̣ί̣ βούλεται· εἰπούσης, παρὰ τῷ̣ ἀνδρὶ μένειν, Π[α]κώνιος Φῆλιξ ἐκέλευσεν ὑ̣πομνηματι[σ]θῆναι.*

From the minutes of the *epistrategos* Paconius Felix. In the 18th year of the deified Hadrian, Phaophi 17, at the court for the upper Sebennytos; case of Phlauesis, son of Ammounis, in the presence of his daughter Taeichekis, 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 *epistrategos* and that the case has been adjourned by you in order that the law of the Egyptians should be read. Severus and Heliodorus, 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. (transl. Kreuzsaler & Urbanik)

In the earlier case, tried in AD 128 by the prefect Flavius Titianus, the judgment is vital: 'The decisive question is with whom the married woman wishes to live'. This unconditional and firm statement ignores, bluntly and flagrantly, any possible local rule that may have been applicable here. And the rule did in fact exist, notably in a material version. The parties to the latter case, decided by the *epitrategos* Paconius Felix, were

able to produce it in court to be read, Chairemon appended it half a century later to his own petition.[88] Yet, the Roman judges do not even bother to check the requisites that may have (even in Dionysia's Chairemonos own statement) conditioned the execution of *apospasis* by the father, no legal expert, *nomikos*, was ever consulted on this solution. The application of the clearly Roman principle of marital affection as the founding factor of marriage takes it all, it simply cannot be conditioned by any other consideration.[89]

In these trials also the onomastics – I admit – fallible – is worth attention. It suggests the parties in the first case be through and through Hellenic (Antonios son of Apollonios appearing through his advocate, Isidoros the Younger versus his father-in-law, Sempronios). Yet the very same people are described by the lawyers as 'Egyptian persons' in the second case, in which this previous decision by the prefect was cited. Therefore, this prefectural decision was to be followed also by *epistrategos*, since the claimants in the litigation decided by him were ethnically Egyptian. Not only do their names prove it (case of Phlauesis, son of Ammounis, in the presence of his daughter Taeichekis, against Heron, son of Petaësis), but also, above all, the girl must be enquired through an interpreter what her decision may be.

Was there a father's prerogative to dissolve his daughter's marriage against her will? This seems likely. What does it mean that it belonged to the *νόμοι τῶν Αἰγυπτίων*? Who is an Egyptian in this context? Attempts have been made the reconstruct the origin of the principles in question and deduct therefrom their scope of application in the Roman times in

[88] This written feature of the law led U. Yiftach, 'Law in Graeco-Roman Egypt', [in:] R. Bagnall, *The Oxford Handbook of Papyrology*, Oxford 2009, pp. 541–560, at 551–552, to hypothesise a possible Roman 'codification' of the local rules, in a form of written manual for the Roman judges. This might be a bit far-fetched, as there are no traces of such action (nor possible counterparts from other places subjected to Roman rule.

[89] See further, J. Urbanik, 'Dissolubility and indissolubility of marriage in the Greek and roman tradition', [in:] Z. Benincasa & J. Urbanik (ed.), *Mater Familias. Scritti romanistici per Maria Zabłocka* [= *The Journal of Juristic Papyrology Supplement* 29], Warsaw 2016, pp. 1039–1068, esp. 1066–1068, as well as idem, 'Husband and wife' (cit. n. 70), pp. 479–481 with literature.

Egypt. Modrzejewski, and Lewis saw its antecedents in the Athenian *aphaireis*.[90] Others – like editors and the first commentators of the document in question – postulated the Egyptian beginning. Neither seems entirely provable.

On the one hand, it is not only because there are some reasonable doubts as the actual existence of such paternal prerogative in classical Greece, as I have recently argued.[91] Much harder is it to imagine a direct legal transplant from classical Greece to Egypt.[92] Even if it did happen,[93] it should have stayed within the norms reserved for the *astoi*, and not be open for use for the ethnically Egyptian population.

On the other hand, in the native Egyptian documentation there is no trace of a father's right to break his child's marriage, even if other aspects of these family dramas (written marriages, and *katoche*) do correspond to the reality known from the demotic acts of marriage.[94] Yet, if the rule had been indeed Egyptian in the proper sense of the word, why on earth would a proud Hellenos, Chairemon, ex-gymnasiarch, take recourse to it (Modrzejewski dixit)?[95]

[90] Lewis, '*Ἀφαίρεσις*' (cit. n. 82).

[91] Urbanik, 'Dissolubility' (cit. n. 89), pp. 1048–1056.

[92] I remain rather sceptical about the assertion of the Alexandrine defendant, Athenodoros, who asked by Hadrian whether the Athenians and Alexandrines used the same laws, proudly responded affirmatively, cf. *Acta Athenodori* (*P. Oxy.* XVII 2177, esp. ll. 12–15). On that evidence with some reservations, see Mélèze Modrzejewski, *Loi et coutume* (cit. n. 4), pp. 122–123 (§ 8: 'Les continuités grecques'), who confronted it with other apparent 'Athenian' traces in the *Dikaiomata*, *P. Hal.* 1. No doubts are shed by J. Velissaropoulos-Karakostas, *Droit grec d'Alexandre (323 av. J.-C. – 14 ap. J.-C.)* I, Athens 2011, p. 283, who hypothesises in that place that the necessity to make a second marriage document in front of the *hierothytai* could respect the old Athenian duality of the marriage-making act (*engye–ekdosis*).

[93] My disbelief was shaken, I admit, by Davide Amendola's paper at the 29th Congress of Papyrology in Lecce, stressing the role and possible legal advice of Demetrios of Phaleron at the court of Ptolemy I Soter ('Early Ptolemaic Alexandria as a 'City of Reason': Two Hibeh papyri and the Egyptian exile of Demetrius of Phalerum').

[94] P. W. Pestmann, *Marriage and Matrimonial Property in Ancient Egypt* [= *Papyrologica Lugduno-Batava* 9], esp. pp. 134–144.

[95] Mélèze Modrzejewski, *Loi et coutume* (cit. n. 4), p. 261.

It is thus much more reasonable to state with Rupprecht[96] in regard to their origin that these *nomoi* are a conglomerate of the norms of origins both enchoric and Hellenic, applicable to the Egyptians. This category seems to include, in the eyes of the new rulers of the country, all those who have no other citizen affiliation (so neither Romans, nor members of the Egyptian poleis), and hence are all treated, generically as Egyptians, being *peregrini nullius civitatis*. No wonder that this category comes to surface only with the Romans: they had to categorise their subject to know which law, personal law, to apply.

And that brings me to the second point: the application of the law. In all three cases tackled in the Petition of Dionysia (her own and the trials before Flavius Titianus and Pacomius Felix) the parties seeking *apospasis* legitimately could expect that their petition would be granted: such right existed, was confirmed as a *nomos* in a written form, the parties' personal status was 'Egyptian'. Why was it not then applied in these particular cases? Was it because Roman law trumped the local one? But Roman law of marriage and family should apply only to Romans, other peoples' marital regulations are not only tolerated but also up-kept and preserved (just to mention one example, also in Egypt: the Roman tolerance for endogamic marriages among the locals, paired with its severe repression among the Romans, cf. *Gnomon* § 23). Did the Roman official prefer to ignore the local law, or treat it as an inferior custom? I would rather say that there is nothing unusual in the non-application of the *nomos* by a Roman magistrate.[97] The same would be done in regard to norms of the

[96] Rupprecht, '*Τῶν Αἰγυπτίων νόμοι*' (cit. n. 81), p. 264 (= 344), likewise Yiftach, 'Law in Graeco-Roman Egypt' (cit. n. 88), pp. 550–552.

[97] Cf. Urbanik, '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, *Εὐεργεσίας χάριν. Studies Presented to Benedetto Bravo and Ewa Wipszycka by Their Disciples* [= *The Journal of Juristic Papyrology Supplement* 1], Warsaw 2002, pp. 293–336, at 318–319. A completely different, yet impossible interpretation, is presented by A. Dolganov, 'Reichsrecht and Volksrecht in theory and practice: Roman justice in the province of Egypt (*P. Oxy.* II 237, *P. Oxy.* IV 706, *SB* XII 10929)', article submitted to *Tyche* 34 (2019), albeit not yet published, available online on the author's Academia.edu. Dolganov imagines that Chairemon's claim would aim at obtaining a praetorian remedy allowing him to take his daughter away from her husband: the interdict *de liberis ducendis et exhibendis*. Chairemon's strategy (or his lawyers) would

archaic *ius civile* that the Roman magistrates found inequitable with time. And thus, the local norm does not cede its place before the Roman one, because the latter is superior and the former inferior, but simply because the application of the former cannot be found equitable anymore. It is thus trumped by the *iurisdictio* of the Roman judge.[98] A Roman magistrate will not find it equitable (or would find it inhuman[99] as we are reminded by the proceedings) because it challenges and endangers the Roman *ordre public* which by that time had long recognised the foundation of marriage upon the sole will of the marrying parties.[100]

2.2. *Νόμοι τῶν Αἰγυπτίων* upheld: *freedom of testamentary dispositions*

Contrariwise, when the local rule is not perceived as contrary to public order nothing would prevent its successful evocation and application.

have been to convince the Roman judge that his paternal *exousia* would be an equivalent of the Roman *patria potestas*, and in consequence obtain the legal instrument designed to protect it. Such reasoning misapprehends completely the natively Roman context of *patria potestas*, the principle of personality of law, applicable in family and personal law matters, and, last but not least, the fact that by the end of the 2nd AD cent., the Roman *patria potestas* had been greatly weakened especially in the realm of marriage law. The source Dolganov cites, disregarding its troubled textual transmission, D. XLIII 30.1.5 (Ulp. *ed.* 71) is a manifest proof thereof, proving exactly the contrary. It is indeed within *ius honorarium* that *ius civile*-based *patria potestas* finds its limitations. Cf. my in-depth discussion with reference to the earlier scholarship in URBANIK, 'D. 24.2.4' (cit. n. 98), pp. 302–310. After all, such application of the interdict (let alone the idea that Chairemon would be able to obtain it), would be incompatible with the principle of *affectio maritalis* as the cornerstone of the Roman marriage, cf. F. SCHULZ, *Classical Roman Law*, Oxford 1951, pp. 103–104, and my supplement thereto in URBANIK, 'Husband and wife' (cit. n 70), § 36.6: '*Cui bono?*'.

[98] In more detail ALONSO, 'The status of peregrine law' (cit. n. 12), pp. 395–401: '9. Roman conceptions of jurisdiction and the law'.

[99] We have argued with Claudia Kreuzsaler, that this term actually is not mere rhetoric, but was used in a very precise legal argumentation: KREUZSALER & URBANIK, 'Humanity and inhumanity of law' (cit. n. 85), *passim*, esp. pp. 144–155.

[100] Another example of such would be the oft-discussed *P. Oxy.* VI 706, and the creation, *ex nihilo* of the rights of patronage among the local population.

This is what is confirmed by a dossier of the cases confirming the apparent testamentary freedom of the Egyptians.

P. Oxy. XLII 3015 (after AD 117): Three judicial decisions on testamentary freedom: [- - -]..[..]...[..]....[- - -] | [...].. *μοῦ. κ*[-c.?-].[-c.?-]*υσι κάλλιστόν ἐστιν αὐτοὺς* | [*δικ*]*αιοδοτεῖν π*[*ρὸ*]*ς τοὺς Αἰγυπτίων νόμους* |[4] [*ἐ*]*φ' οἷς ἔξεστι κ*[*α*]*ὶ μεταδιατίθεσθαι. καλῶς δι*|[*έθε*]*το ὁ τελευτήσ*[*α*]*ς.* | (*ἔτους*) *ιβ θεοῦ Τραιανοῦ Παχὼν ιγ. Ἄρειος καὶ Σαραπίων* | *ἀμφότεροι Πτολεμαίου πρὸς Ἀθηνόδωρον καὶ* |[8] *Ἀπολλώνιον· ἐκ τῶν ῥηθέντων· Σουλ*(*πίκιος*) | *Σίμιλις πυθόμενος Ἀρτεμιδώρου τοῦ ἐξη*|*γουμένου τ*[*ὺς*] *νόμους περὶ τοῦ πράγματος* | *καὶ συνλαλήσας τοῖς συμ*[*β*]*ούλοις ἔφη· Αἰγύ*|[12][*π*]*τιος εἶχεν ἐξουσίαν καθὼς βούλεται διαθέσθαι.* | [(*ἔτους*) ..] *θεοῦ Τρα*[*ι*]*αν*[*ο*]*ῦ Τῦβι κ ἐπὶ τῶν κατὰ Τρύφωνα* | [*πρὸ*]*ς Διδ*[.....] *μεθ' ἕ*[*τερα*]*· Σουλ*[*πίκι*]*ος Σίμιλις* | [*συνλ*]*αλή*[*σας τοῖ*]*ς συνβ*[*ούλοις*] *καὶ ἀνα*[*κοιν*]*ωσαμέν*[*ος*] |[16] [*Ἀρ*]*τεμιδώρῳ νομικῷ ἔ*[*φη· λ*]*έγεται* .[...].*ονε*.[....] | [..].. *οὔτε ἡ γυνὴ ἐφ' ἧς καινότερόν τι συνεφώνη*[*σεν*] | *ὁ πατὴρ τοῦ γαμοῦντος οὔτε οἱ υἱοὶ αὐτῆς περίεισι* | *οἷς ἐδύνατο κατέχεσθαι τὰ κατὰ τὴν συμφωνίαν,* |[20] *ἄκυρόν ἐστιν ἤδη τοῦτο τὸ γράμμα. ὁ δὲ νόμος ὡς λέ*|*γεται δίδωσιν ἐξουσίαν τῶι τὸ πανπράσιον ὠ*ῖ*' κονομή*|*σαντι καὶ κατασχόντα τοῖς τέκνοις τὰ ἴδια ἐκλέ*|*ξασθαι ἐξ αὐτῶν ἕνα καὶ κληρονόμων ποιῆσαι. οὐκουν* |[24] *παραπεσούσης τῆς δευτέρας ἀσφαλείας εἰς τὴν προ*|*τέραν ἀνέκαμψεν τὸ δίκαιον. ἐξῆν αὐτῶ ὡς ἐβούλετο* | *διαθέσθαι κληρονόμους καταλιπόντι τοὺς παῖδας αὐ*|*τοῦ ἐφ' οἷς ἐποιήσατο τὸ πανπράσιον.*

... it is best to declare law for them upon the laws of the Egyptians, according to which they are allowed to dispose by wills. And the dying one has disposed properly.
Yr. 12 of the deified Trajan, Pachon 13 [8 May 109]. Arius and Sarapion, both sons of Ptolemaios, against Athenodoros and Apollonios. From the pleadings. Sulpicius Similis, after inquiring about the case from Artemidoros, the interpreter of the laws and talking with his advisers, said: 'As an Egyptian he had the right to make his will on whatever terms he wished'.
[Yr. ....] of defied Trajan, Tybi 20. In the case of Tryphon, etc. against Did...
.. After other matter. Sulpicius Similis, after talking with his advisers and referring the case to Artemidoros the lawyer, said: '... neither the wife over whom the father of the bridegroom made a more recent agreement, nor her sons, are alive, on which parties the (property) in the agreement could be entailed (*katoche*) – this document is now void. The law, I am told, gives to a man who has negotiated a 'general sale', even though he has entailed his property on his children, the power to choose out one of them and

> make this one his heir. It is therefore (not?) the case, that, with the disappearance of the second bond, the right reverts to the first one. It was open to him to make his will on whatever terms he wished (provided that?) he left as heirs those children of his in whose name he made the 'general sale'. (transl. Parsons)

This papyrus keeps three prefectural decisions. Only the second, decided by the prefect Sulpicius Similis preserves a complete dating: 8 May AD 109; the last one records the same prefect as the presiding judge, so it must be roughly contemporary. The first one may be either ascribed to the same official, or as least placed in time prior to the middle one. Trajan in the dating formulas is referred to as already deified and the cursive yet very legible hand could only be approximately assigned to the second century. Each case starts in a new line, and they are separated by empty half-lines.[101] It is thus clear that these three judgements concerning the testamentary freedom of the 'Egyptians' were collected after the suits had been tried for a purpose. The writer may have brought them together either for educational purposes, or perhaps as a ready dossier to be used in litigation, where the claimant wanted to serve the court with a 'presentation of the pertinent cases'.[102]

Of the first only the closing statement has survived: '... it is best to declare law for them upon the laws of the Egyptians, according to which they are allowed to dispose by wills.' Its formulation brings about an idea of universal principle of law, almost a *regula iuris* in the Roman sense.

The second of the three decisions reports only the relevant part of the verdict given by Similis in the case of Arios and Sarapion, both sons of Ptolemaios, against Athenodoros and Apollonios. The prefect, having

[101] Cf. the image at *POxy: Oxyrhynchus Online* at <http://163.1.169.40/gsdl/collect/POxy/index/assoc/HASHf052.dir/POxy.v0042.n3015.a.01.hires.jpg> (accessed December 2019).

[102] Cf. *P. Ryl.* II 76 (Hermopolis, late 2nd c. AD), ll. 8–14: *Κατὰ τοὺς νόμους καὶ τὰ κεκριμένα | ὑπό τε τῶν κατὰ καιρὸν ἐπιτρόπων τε | καὶ ἡγεμόνων περὶ τοῦ δεῖν κατ' οἶ|κον εἶναι τὴν διαίρεσιν τῶν κτη|μάτων καὶ μὴ κατὰ πρόσωπον, | ᾗ καὶ ἀναγνώσομαι λεγομένου τοῦ | [π]ράγματος*, 'I have done it according to the laws and the verdicts of the procuratores as well as prefects, by which the division ought to be done by households and not by persons, and these I will present once is the case is tried'.

conferred with his advisers and the legal expert, *nomikos*,[103] asserts firmly that '[the deceased] as an Egyptian had the right to make his will on whatever terms he wished'. We may assume that the party who was benefitted by the will presented this legal claim, which was later verified with the local legal expert – how else would the prefect know the exact tenor of the 'law of the Egyptians'.

The last decision restates the same principle, submitting it, however, to a number of conditions. An 'Egyptian' is free to make wills as he pleases, as long as – for the sake of the brevity let me simplify the argument here – he provides for the pre-established rights of his children, including any possible *katochai* which secured the rights of the wife and her children. Again, the prefect needed a learned opinion of the local legal expert to confirm the hypothetical claim of the pleaders.

One may reiterate the question of the meaning of the law of the Egyptians in this context. Modrzejewski postulated again the Greek antecedents – claiming that testamentary freedom was innate for the Greeks (and that the pharaonic Egypt knew nothing of such).[104] As a matter of fact, the papyrus does not bear witness to anything like absolute testamentary freedom (be it, or not, innate for the Greeks). The third case of the collection subjects it a number of conditions. And so, one may testate as he pleases only in wont of any prior *panprasia* (general sale), or *katochai* (liens) still effective. These figures – already known from the Petition of Dionysia – point to the milieu of marriage arrangements germane to demotic acts rather than to the Hellenic environment. And yet demotic marriage arrangements had most probably disappeared by that time, alongside the common knowledge and use of this script. The onomastics of the involved parties cannot be decisive, they bear both Greek and Egyptian names, we know how misleading may be reliance of the apparent

[103] On *nomikoi*, see my forthcoming article, in which I am trying to present a new view on these 'legal experts' in Egypt, and a cursory summary by R. Taubenschlag, 'The legal profession in Greco-Roman Egypt', [in:] *Opera Minora* II, Warsaw 1958, pp. 161–165 (= *Festschrift F. Schulz* II, Weimar 1951, pp. 189–192). Mélèze Modrzejewski, *Loi et coutume* (cit. n. 4), p. 295, n. 14, evaluated very severely their professional qualifications, which I think is rather exaggerated, if not entirely unfounded.

[104] Mélèze Modrzejewski, *Loi et coutume* (cit. n. 4), pp. 269–270.

Hellenic sound of the name in establishing the ethnicity of its bearer (or vice versa).[105] The identity of the legal expert is fascinating: Artemidoros was Greek or at least profoundly Hellenized, and perhaps a Roman – if we are to identify him with Claudius Artemidoros in *MChr.* 84 (AD 124). In reality, we do not know how accurately these rules have been transmitted, so any speculation on their possible counterparts in the Greek (i.e., chiefly, Athenian) or pharaonic Egyptian law remains highly hazardous. All in all, the 'law of the Egyptian' cannot have referred to a system of law solely based on ethnicity or the language spoken.

One final note here. We should not miss the cautious introduction of the legal rule in question: 'it is best to declare'. The judge does best, if he applies the local law, but he is under no obligation to do so. What will prevent him from doing it, as we already know from the case of Dionysia, is the incompatibility of the norm with the Roman public order. Yet that is not the case here, nothing in the system of succession among the Egyptians could endanger the Roman *boni mores*, and so the judges upheld the local law.

3. *NOMOS* TRUMPS ALL

Let me now follow the final test-case, this time from outside of Egypt.

> D. XIV 2.9 *pr.* (Maec. *ex l. Rhodia*): *Ἀξίωσις Εὐδαίμονος Νικομηδέως πρὸς Ἀντωνῖνον βασιλέα· Κύριε βασιλεῦ Ἀντωνῖνε, ναυφράγιον ποιήσαντες ἐν τῇ Ἰταλίᾳ*[106] *διηρπάγημεν ὑπὸ τῶν δημοσίων* – or *δημοσιωνῶν*?[107] – *τῶν τὰς*

[105] Cf. various studies especially by Willy Clarysse and Katelijn Vandorpe on 'double' – Egyptian/Greek identities – a useful overview with literature in W. Clarysse, 'Ethnic identity: Egyptians, Greeks, and Romans', [in:] K. Vandorpe, *A Companion to Greco-Roman and Late Antique Egypt*, Hoboken, NJ 2019, pp. 299–313, at 300–302 (Greek names in Greek documents and Egyptian ones for the contracts formulated in demotic).

[106] Already J. Gothofredus corrects the senseless *Ἰταλίᾳ* in *Ἰκαρίᾳ*, cf. G. Merola, 'Una *lex collegii* marittima? A proposito di D. 14.2.9', [in:] E. Lo Cascio & G. Merola, *Forme di aggregazione nel mondo romano*, Bari 2008, pp. 259–272, at 263 and n. 16.

[107] Part of the scholarship suggests this reading, which indeed makes more sense, Merola, 'Una *lex*' (cit. n. 106), p. 263, and n. 17, and so I follow it in the translation. The alternative could mean 'we have been robbed by the people living in Cyclades'.

> *Κυκλάδας νήσους οἰκούντων. Ἀντωνῖνος εἶπεν Εὐδαίμονι· ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ*[108] *νόμος τῆς θαλάσσης, τῷ νόμῳ τῶν Ῥοδίων κρινέσθω τῷ ναυτικῷ, ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναντιοῦται. τοῦτο δὲ αὐτὸ καὶ ὁ θειότατος Αὔγουστος ἔκρινεν*
>
> 'Petition of Eudaimon of Nikomedia to Antoninus, the Emperor: My Lord Emperor Antoninus, after having shipwrecked in Ikaria we were pressed by the publicans residing in the Islands of Cyclades. Antoninus replied to Eudaimon: I am the lord of the universe, but the law (governs) the sea, and sea-fare matters shall be judged according to the law of the Rhodians, in (the cases in) which no law of ours opposes it. And the most divine Augustus decided likewise.'

A thorough discussion of this extremely interesting and puzzling text would lead us astray from the main topic of this paper, so let me focus on the basics necessary for my point.[109] Its authenticity has been doubted for manifold reasons and thus the message it carries is possibly obscured.[110] Firstly, its placement in the *Digest* title XIV 2 *de lege Rhodia de iactu* seems arbitrary.[111] The fragments there discuss the Rhodian law of jettison in its

[108] G. Purpura, 'Il regolamento doganale di Cauno e la *lex Rhodia* in D. 14, 2, 9', *Annali del Seminario Giuridico dell'Università di Palermo* 38 (1985), pp. 273–331, at 324–330 suggests *τε*: this correction would then elevate the imperial dictum to the high philosophical level, possibly alluding to the idealization of the emperor as *nomos empsychos*. I am not sure if this very learned idea is not carried away too far.

[109] On this extremely problematic text see, most recently a clear exposition, and sound critique of the previous scholarship by Merola, 'Una *lex*' (cit. n 106), pp. 262–264 with notes; more recently, contextualising the Ancient sea-faring matters with the Byzantine, Arabic, and medieval regulations: E. Mataix Ferrandiz, 'Will the circle be unbroken? Continuity and change of the *Lex Rhodia*'s jettison principles in Roman and medieval Mediterranean rulings', *Al-Masāq. Journal of the Medieval Mediterranean* 29 (2017), pp. 41–59, as well as P. Candy, *The Historical Development of Roman Maritime Law during the Late Republic and Early Principate*, PhD thesis, Edinburgh 2019, pp. 172–175. I am grateful to the author for having provided me with his typescript.

[110] F. M. De Robertis, '*Lex Rhodia.* Critica e anticritica su D. 14.2.6', [in:] *Studi Arangio-Ruiz* III, Naples 1953, pp. 155–175, at 157–160 (= *Scritti vari di diritto romano* I: *Diritto privato*, Bari 1987, pp. 307–327, at 309–312).

[111] Cf. F. De Martino, '*Lex Rhodia*. Note di diritto romano marittimo', *Rivista del diritto della navigazione* 3 (1937), pp. 335–349, at 341–343 and 346–347 (= *Diritto economia e società nel mondo romano* I, Naples 1995, pp. 289–299, at 291–293, 296–297). The author postulated

proper context. It primarily operated, there is little need to recall, within the scheme of *locatio-conductio*, perhaps as *lex contractus*. Our text instead focuses on the customs exacted in the context of a maritime wreckage. It is only the *Basilica* version of this *rubrica* that having stripped our text of all details, made into the general principle governing the sea-matters.[112] Secondly, the authenticity of the cited rescript has been undermined. The inexact report of the emperor's name has arisen suspicions,[113] and additional doubts as to the text genuineness has been provoked by the unusual royal attribute applied to him. It is indeed rather odd, yet, as Urpo Kantola has kindly indicated to me *per epistulam electronicam*, not completely unprecedented, even in the second and early third century.[114] Finally, the aphoristic joke at the expense of the petitioner has made it

D. XLVII 9 *De incendio ruina naufragio rate nave expugnata* as possibly better setting for our fragment. This yet is not satisfactory, as this tile of the *Digest* focuses on penal (both under private and public law) liability of the ones who apprehended anything from a ruined ship, seizing the opportunity. On this point, cf. also, PURPURA, 'Il regolamento doganale' (cit. n. 108), p. 303 and n. 62; IDEM, 'Relitti di navi e diritti del fisco. Una congettura sulla *Lex Rhodia*', *Annali del Seminario Giuridico dell'Università di Palermo* 36 (1976), pp. 69–87.

[112] *Bas.* LIII 1.1: *Τὰ ναυτικὰ ἤγουν τὰ κατὰ θάλασσαν τῷ Ῥοδίῳ νόμῳ κρίνεται, ἐν οἷς αὐτῷ μὴ ἕτερος ἐναντιοῦται νόμος*, (SCHELTEMA AVII, p. 2435), 'The seafaring matters, that is to say regarding the sea, are decided by the Rhodian Law, in (the cases in) which a law of ours does not oppose it'.

[113] If Maecianus indeed authored this text (below, p. 334), then the ruler in question would be his contemporary Antonius Pius or Marcus Aurelius. The sole use of the name Antonius in conjunction with 'Caesar' and 'Lord' denotes much more frequently the former, only rarely the latter (P. BURETH, *Les titulatures impériales dans les papyrus, les ostraca et les inscriptions d'Égypte (30 a.C. – 284 p. C)*, Brusells 1964, pp. 66–72, 126, and 83). The identification issue here is actually parallel to the one in § 36 of the *Gnomon of Idios Logos*. In our case the argument is notably weakened by the unusual usage of the term '*βασιλεύς*' in place of the typical *Καίσαρ*.

[114] *SEG* 47 163 (AD 132), l. 9, refers to Hadrian as [*ὁ*] *μέγισ*[*τος τῶν ἀείπ*]*οτε βασιλέων*; *Agora* XV 460 = *IG* II/III^2 1077 (AD 209/10), l. 19, describes Septimius Severus and Caracalla as *οἱ ὅσιοι βασιλεῖς*; *IG* V 1 572 (Lakonike, AD 239–244), ll. 5–6, reads dedication to Gordian as *ὁ θεοειδέστατος βασιλεύς*; finally, *I. Ephesos* VII 1 3072 (mid-3rd c. AD), ll. 19–20, lists *βασιλεὺς Λούκιος θεὸς Σεβαστός* – perhaps Lucius Verus – in a genealogy. Also, the wives of the emperors are sporadically titled as queens. *Corpus Inscriptionum Iudaeae/Palaestinae* IV 1 2817 = *SEG* 31 1405 (Jericho, 1st c.) is a stone of a freedman of *βασιλίσση Ἀγριππείνη* (Younger); two dedications from Megara (*IG* VII 73 and 74 [AD 130–138]), are addressed to Hadrian's wife Sabina also naming her *βασίλισσα*.

hard to believe that a real emperor would have behaved in such a jesting way.[115]

The authorship of the fragment, if accurate, calls for our attention. If properly attributed (there has been some scepticism on this front, too), we face here the only extant fragment of a commentary on *Lex Rhodia* by Volusius Maecianus who, which should remain unobserved, served as the praefect of Egypt, and hence acquired first-hand experience in application of local laws. Some thought even (but that must remain a very feeble speculation) that Maecianus may have written his commentary while serving in Egypt and that is also why he would use the language of *oikumene* and not his native Latin.[116] The book may have also been authored in connections to his discharge of the duties of the *praefectus annonae*, and activity in Ostia.[117]

All in all, I think, the authenticity of this text, at least down to its basics, has been quite plausibly defended, and thus been accepted by the majority.[118] Let us then, with benefit of doubt, read the text at face value, accepting the proposed emendations which render its understanding more reasonable. The matter seems to have developed as follows. Escaping a storm, and shipwrecked, a Nikomedian Eudaimon was forced to call into the harbour of a Cycladian island. There his cargo was confiscated as undeclared and unpaid for with *portorium* by the local tax-collectors, con-

[115] Especially belligerent and overtly critical, De Martino, '*Lex Rhodia*' (cit. n. 111), esp. pp. 342–343 (= 292–293) and n. 6, who sees the idea expressed in the text as absurd and contradictory (the emperor declaring himself the lord of the universe, would at the same time exclude from the realm of the universe the seas); contra, De Robertis, '*Lex Rhodia*' (cit. n. 110), pp. 167, 172–173 (= 319, 324–325). One could evade this seeming paradox by understanding *κόσμος* as down-to-earth (pun intended) 'land' – as opposed to 'sea': cf. LSJ, *s.v.* IV. I am grateful to Adam Ziółkowski for this suggestion.

[116] De Robertis, '*Lex Rhodia*' (cit. n. 110), p. 161 (= 313).

[117] So, Candy, *Historical Development* (cit. n. 109), p. 174. Cf. also W. Kunkel, *Die römischen Juristen. Herkunft und soziale Stellung*, Cologne – Weimar – Vienna 2001 (2nd ed.), pp. 174–176. For his career, cf. honorific inscription from Ostia: *CIL* XIV 5347 (another copy: 5347).

[118] Most recently Candy, *Historical Development* (cit. n. 109), p. 174; Merola, 'Una *lex*' (cit. n. 106), p. 265 referring the earlier literature, and pp. 271–272 where she argues for originality of the text on the bases of its obvious connection to the Custom inscription from Kaunos. Similarly, Valerio Minale, in response to my paper presented in Naples in June 2019.

trary to the exemption granted to those who landed in a port out of necessity. Our text connects this immunity to the norm of Rhodian law of seafaring. Various authors suggested it be a set of rules, sort of a common maritime code, going even as far as imaging its Roman codification. The final clause of our text would point to Augustus as the proponent of such. This is rather unlikely, as our sources do not transmit any notice of a similar legislative undertaking. It is more conceivably to think of an amorphous amalgam of rules present in the Mediterranean maritime trade,[119] some arising from the local regulations on ports and their dues.[120]

What is important for us here is the fact that this text may be used to analyse the relations between the local law (here *lex Rhodia*) and Roman law. Some have argued for a reception of the local norms by the Roman law, others sensibly nuanced this view pointing out that it happened within the sphere of the good faith contract of *locatio-conductio*, and not as general process.[121] De Robertis in turn saw in it a proof of a perfect subordination of the Rhodian law to the Roman one.[122] Should it be the case, this text would corroborate Modrzejewski's reconstruction of the relationships between non- or pre-Roman norms and Roman law (to my knowledge, my mentor never used this piece in his puzzle).

Such framing of this fragment is supported by the jurisprudential texts which intend under 'our law', the 'law of the Romans', especially the ones

[119] In this way, e.g. M. Amelotti, 'L'epigrafe di Pergamo sugli *ἀστύνομοι* e il problema della recezione di leggi straniere nell'ordinamento giuridico romano', *Studia et Documenta Historiae et Iuris* 24 (1958), pp. 80–111, at 99–100, also Mataix Ferrandiz, 'Will the circle be unbroken?' (cit. n. 109), p. 52 (4).

[120] Cf., Purpura, 'Il regolamento doganale' (cit. n. 108), who connects our text with an inscription on customs of the port of Kaunos, *I. Kaunos* 35), where we find indeed an exception from customs for the ships seeking refuge at the harbour (E 18–F 4), this has been accepted by Merola, 'Una *lex*' (cit. n. 106), pp. 260–262.

[121] See, F. Wieacker, '*Iactus in tributum nave salva venit* (D. 14.2.4 *pr.*). Exegesen zur *Lex Rhodia de iactu*', [in:] *Studi in memoria di E. Albertario* I, Milan 1953, pp. 515–22; likewise ('a-technical reception'), E. Chevreau, 'La *lex Rhodia de iactu*: un exemple de la réception d'une institution étrangère dans le droit romain', *Tijdschrift voor Rechtsgeschiedenis* 73 (2005), pp. 67–80.

[122] De Robertis, '*Lex Rhodia*' (cit. n. 110), pp. 164–165 (= 316–317).

implying a difference between our, i.e. Roman norm, and an alien one.[123] This becomes all the more evident in the instances in which the juxtaposition of 'our law' to *ius gentium* ceases to be implicit.[124] Finally, doubly pregnant – since they exhibit the same structure as D. XIV 2.9, are (rare) occurrences of imperial rescripts, in which the rulers unmistakably refer to 'Roman law' as 'our',[125] again most probably contrasting it with some local practice.

[123] D. I 5.9 (Pap. *quaest.* 31): *In multis iuris nostri articulis deterior est condicio feminarum quam masculorum*, 'In many instances of our law, the standing of women is worse than of men'; D. XXVI 2.26 *pr.* (Pap. *resp.* 4): *Iure nostro tutela communium liberorum matri testamento patris frustra mandatur nec, si provinciae praeses imperitia lapsus patris voluntatem sequendam decreverit, successor eius sententiam, quam leges nostrae non admittunt, recte sequitur*, 'According to our law guardianship of common children is in vain commissioned to the mother in the will of (their) father. If the governor of the province, failing through inexperience, has decreed that the wish of the father should be fulfilled, nonetheless, his successor shall properly not follow his decision, which our laws do not allow'; D. L 17.7 (Pomp. *sab.* 3): *Ius nostrum non patitur eundem in paganis et testato et intestato decessisse: earumque rerum naturaliter inter se pugna est 'testatus' et 'intestatus'*, 'Our law does not admit that the same person from among civilians should die both with a will and intestate. There is natural conflict between 'testate' and 'intestate'.' All these texts, but especially the second, imply a difference between 'our', i.e. Roman law, and an alien rule.

[124] As in the famous fragment of Ulpian's Manual: D. I 1.6 *pr.* (Ulp. *inst.* 1): *Ius civile est, quod neque in totum a naturali vel gentium recedit nec per omnia ei servit: itaque cum aliquid addimus vel detrahimus iuri communi, ius proprium, id est civile efficimus. 1. Hoc igitur ius nostrum constat aut ex scripto aut sine scripto, ut apud Graecos: τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι*, 'Civic law is the one which neither differs in all from natural law and law of nations, nor upkeeps them in everything; and so if we add or detract anything from common law, we make out proper law, that is civic. 1. And so our law consists both of written and unwritten (rules), like the Greeks say 'there are written and unwritten norms of laws'.' Even more manifest is Papinian's consideration on whether a sexual intercourse constitutes a crime of incest both in law of nations, and Roman law. The jurist in this fragment (and also the following one) doubtlessly confronts the practice of endogamic marriages surviving the Edict of Caracalla (cf. D. XLVIII 5.39[38].2 [Pap. *quaest.* 36], cited and briefly commented above, n. 70).

[125] Both texts try making straight the non-Roman contractual practices. *CJ.* VIII 40.5: *Antoninus Augustus Potamoni: Iure nostro est potestas creditori relicto reo eligendi fideiussores, nisi inter contrahentes aliud placitum doceatur (PP.* VI *Non. Mai Messala et Sabino cons(ulibus)*, 'The Emperor Antoninus to Potamo: in our law a creditor has licence to choose to proceed against the sureties, having left the principal debtor alone, unless it is proven that something else has been agreed between the parties (a. 214)'. *CJ.* IV 65.27: *Diocletianus, Maximianus Augusti Agopodi: Si tibi quae pro colonis conducti praedii prorogasti dominus fundi stipulanti*

Yet, do we really find the same pattern of comparison in our text? The Rhodian law of the sea is to be applied in all sea-fare cases, unless 'our law' opposes it. It does sound a little bizarre that the emperor, speaking to apparently non-Roman, uses the qualifier 'our'. Would it not be possible to think that the emperor Antoninus (whoever that may be) employs this pronoun to stress the imperial character of the norm that would exclude the application of the Code of Rhodes? Such reasoning is made likely by three circumstances. Firstly, the content of the norm in question. As I have argued above the petition of Eudaimon most probably regarded duties of confiscation imposed on him without a legal ground. It would be a competence of the emperor to levy this burden. Secondly, the recollection (it is immaterial whether true or not) of the similar decision of the Divine Augustus: an early case of 'imperial', or rather, 'princeps-made'-law. Thirdly, such an assumption is fortified by fragments of Modestinus' book on *Exemptions from Guardianship*, in which *νόμος* unambiguously denotes an imperial rescript. Particularly interesting are bilingual passages, where the Greek introduction is followed by the Latin original of the imperial law.[126] These clearly reform the hitherto binding norms on guardianship.

dare spopondit, competens iudex reddi tibi iubebit. Nam si conventio placiti fine stetit, ex nudo pacto perspicis actionem iure nostro nasci non potuisse, 'The Emperors Diocletian and Maximian to Agopodes. If the landowner has formally promised to you, that he would restore to you what you have advanced for the tenant-farmers of the leased land, the competent judge will order that it be given to you. But if the agreement stood at the end of an informal settlement, you should know that on the basis of our law an action cannot arise from a nude pact (a. 294)'.

[126] All these rescripts in the matters concerning guardianship and exemption thereof, transmit imperial innovations. Particularly interesting is the pattern of the Greek text of Modestinus' book citing the original Latin rescript: D. XXVII 1.15.17 (Modest. *excus.*): *Ἐάν τις χειροτονηθῇ ἐπίτροπος ὢν ἐν τῇ τοῦ πατρὸς ἐξουσίᾳ, εἴτε ὁ πατὴρ μὴ βούλοιτο ὑπὲρ αὐτοῦ ἀσφαλίζεσθαι, ἐκέλευσαν οἱ νόμοι καὶ αὐτοῦ τὸν πατέρα χειροτονεῖσθαι ἐπίτροπον, ὡς μηδενὶ τρόπῳ διακρουσθῇ τὸ ἐπὶ ἐπιτροπῇ ἀσφαλές· ὡς δηλοῖ τοῦ θείου Ἁδριανοῦ διάταξις·*, *Imperator Hadrianus Vitrasio Pollioni legato Lygdonensi <Lugdunensis – Mommsen>. 'Si Clodius Macer, quamvis filius familias sit, idoneus tutor esse videbitur, pater autem eius idcirco cavere non vult, ut filium suum tutela eximat, et in hoc artificio perseveraverit, existimo te huic fraudi recte occursurum, ut et filius et ipse ad tutelam liberorum Clementis gerendam compellantur'*, 'If someone who is in his father's power, is appointed guardian, and the father does not want to provide a security, the laws command that his father be appointed guardian, so that in

It seems, therefore, with a benefit of doubt, that our text may refer to the imperial constitutions alternating the previous norms. When does 'our' law opposes to the Rhodian norms? Not if it pre-exists them, only if it is created later. Put another way, in a well-known, aphoristic way: *lex posterior derogat legi priori*. And so, the local laws continue populate the Roman legal panorama, not as 'customs', but until they would be expressively abrogated.[127]

4. GREGORY AND PS.-MENANDER RE-ENTER THE STAGE: THE IMPERIAL LAW

Before the final conclusion, it would be convenient to return now to the third-century sources from which our journey has commenced. First, we

no way a guarantee for guardianship could be evaded. This is established by a constitution of the Divine Hadrian: The emperor Hadrian to Vitrasius Pollio, the governor of Galia Lugdunensis. If Clodius Macer seems to be an adequate guardian, although he is a son-of-family, and his father does not want to provide a security for this, so that he can keep his son free of guardianship, and he carries this trick on, I think that you properly should oppose such fraud by compelling both the son and the father to undertake the guardianship of the children of Clemens.' D. XXVII 1.10.4 (Mod. *excus.* 3): *Καὶ οἱ κατὰ διαθήκας δοθέντες ἐπίτροποι παραιτήσονται κατὰ νόμους τὸν χειρισμὸν τῶν ἐν ἄλλῃ ἐπαρχίᾳ ὄντων κτημάτων, ὡς δηλοῖ ἡ ὑποτεταγμένη τοῦ θειοτάτου Σεβήρου διάταξις·*, *Divi Severus et Antoninus Augusti Valerio. Testamento tutor datus ante praefinitum diem adire debuisti et postulare, ut ab administratione rerum, quae in alia provincia erant, liberareris*, 'Also the guardians appointed in a will may exempt themselves according to the laws from management of estates situated a different province, as is manifested in the appended constitution of divine Severus: 'The Emperors Divine Severus and Antoninus to Valerius. Once you have been appointed a guardian in a will, you ought to present yourself before the established date and petition to be released from management of estates which are in a different province.' Cf. other notable sources: D. XXVII 1.4 *pr.* (the Divine Severus and Antoninus on procedure exempting from the 4th guardianship), and also D. XXVII 1.13.2, a constitution of Marcus Aurelius, referred to as *nomos*, establishing the deadlines for presentation of the excuse.

[127] Cf. similar considerations in Merola, 'Una *lex*' (cit. n. 106), pp. 271–272. Another marvellous example of a survival and application of an old law under the Roman rule would be the Syracuse *lex Heronica* regulating tax-farming, which application, until its abrogation by Verres, is attested by Cicero, II *Verr.* 3.14–24. cf. Amelotti, 'L'epigrafe di Pergamo' (cit. n. 119), pp. 102–103; recently Candy, *Historical Development* (cit. n. 109), pp. 175–176.

shall briefly explore the passage form the Eulogy of Origen by his student Gregory the Miracle-Worker.

> Gregorius Thaumaturgus, *ad Origenem oratio panegyrica* I 7: *⟨Οὐ μὴν⟩ δὲ ἀλλὰ καί γε τὸν νοῦν ἕτερόν τι μάθημα δεινῶς ἐπιλαμβάνει, καὶ τὸ στόμα συνδεῖ ⟨καὶ[128] τὴν γ⟩λ⟨ῶ⟩τταν, εἴ τι καὶ μικρὸν εἰπεῖν τῇ Ἑλλήνων ἐθελήσαιμι φωνῇ, οἱ θαυμαστοὶ ἡμῶν ⟨νόμ⟩οι, οἷς νῦν τὰ πάντων τῶν ὑπὸ τὴν Ῥωμαίων ἀρχὴν ἀνθρώπων κατευθύνεται πράγματα, ⟨οὔτε⟩ συγκείμενοι οὔτε καὶ ἐκμανθανόμενοι ἀταλαιπώρως· ὄντες μὲν αὐτοὶ σο⟨φ⟩οί τε ⟨καὶ ἀκρ⟩ιβεῖς καὶ ποικίλοι καὶ θαυμαστοί, καὶ συνελόντα εἰπεῖν Ἑλληνικώτατοι· ἐκφρασθέντες ⟨δὲ καὶ⟩ παραδοθέντες τῇ Ῥωμαίων φωνῇ, καταπληκτικῇ μὲν καὶ ἀλαζόνι καὶ συσχηματιζομένῃ ⟨πάσῃ⟩ τῇ ἐξουσίᾳ τῇ βασιλικῇ, φορτικῇ δὲ ὅμως ἐμοί.*
>
> And yet another study entirely seizes my mind, and binds my mouth and tongue, if I want to say even a little thing in Greek. It is our marvellous laws, by which now the matters of all people subjected to Roman power are directed. They are neither unfatiguely systematized,[129] nor learnt.[130] And they are wise, exact, intricately subtle,[131] and marvellous, to say it succinctly: Greek to the core. Yet they have been expressed and granted in

[128] Following Mélèze Modrzejewski, 'Grégoire le Thaumaturge' (cit. n. 28), p. 317, n. 19; without this alternation the text is less comprehensive ('the mouth binds the tongue).

[129] *Σύγκειμαι* is ambiguous. I follow again Mélèze Modrzejewski, 'Grégoire le Thaumaturge' (cit. n. 28), p. 317, n. 20, and p. 320, who adopted the understanding proposed by the French editor of the speech, H. Crouzel (Grégoire le Thaumaturge, *Remerciment à Origène suivi de la letter d'Origène à Grégoire* [= *Sources Chrétiennes* 148], Paris 1969, p. 97, n. 5). I find his idea that Gregory would allude here to *ius controversum*, dissents among the learned jurists that must have been a horror to young adepts of law extremely persuasive. It is even more convincing if we confront this part with the sycophantic end of the passage praising the imperial power, almost implying that it is the only force able to bring an order in that mass of norms (cf. Justinian's take on the legal education finally simplified and made accessible by the imperial splendour: *Imperatoriam maiestatem* 4–5).

[130] One is almost tempted to add 'by heart' following LSJ, *s.v.* III. If so, Gregory may want to say that learning of law much more than a mere memorizing of some rules or tropes.

[131] Multicoloured, richly-worked, shimmering, multi-faceted: one cannot help recalling the epithet *ποικιλόθρονος* opening the Sapphic Hymn to Aphrodite, and Józef's anecdote how the Goddess, 'the weaver of wiles, enchantress', sealed his fate to study juristic papyrology: J. Mélèze Modrzejewski, '*Encomium papyrologiae*', *The Journal of Juristic Papyrology* 47 (2017), pp. xxiii–xxxii.

> Latin, an admirable and complacent language, so compatible with the imperial power, yet so cumbersome for me.

For supporters of the theory of Mitteis, this source was yet another evidence of the demise of the local laws, once *Constitutio Antoniniana* had been enacted.[132] On the other hand, for Modrzejewski, it was a proof not of monopoly of Roman law but its priority and superiority over the still surviving local orders.[133] The cornerstone of his argumentation was the same as in other instances: the presence of *mos/consuetudo regionum* in the legal texts, both of jurisprudential, and imperial origin postdating the Edict of Caracalla. This aspect I have commented above (above, pp. 314–317).

Two perspicacious notes on this text by my mentor may be perhaps elaborated and contribute to his understanding of the text, weakening its possible absolute message in the sense postulated by Arangio Ruiz, and, with reservations, by Talamanca.

First, Modrzejewski noticed that Gregory used present tense in this introduction to the envisaged *Speech*; that means that he was still a student of law at the time of its composition. If so, I would be surprised if his curriculum (especially at the early stage of studies) would include learning local laws: it must have been primarily devoted to the *Reichsrecht*.[134] Gre-

[132] Cf. Arangio-Ruiz, 'L'application du droit romain' (cit. n. 25), pp. 93–95, who qualified this passage 'the Trojan horse' in argumentation of Schöbauer. It is true in his quest to prove the thesis of the surviving legal pluralism, the latter scholar read this text in a completely impossible way (Schönbauer, 'Reichsrecht gegen Volksrecht' [cit. n. 25], pp. 279–280, and idem, 'Personalitätsprinzip und Privatrechtsordnung im Römerreiche', *Anzeiger der Österreichischen Akademie der Wissenschaften. Phil-Hist. Klasse* 25 [1961], pp. 182–210, at 207–209): on that just critique of Talamanca, 'Su alcuni passi' (cit. n. 29), pp. 492–498 with n. 79. Talamanca himself admitted that this passage from the *Eulogy for Origen* read alone did not constitute the final proof for the effects of the Edict of Caracalla (pace D. Nörr, '*Origo*. Studien zur Orts-, Stadt- und Reichszugehörigkeit in der Antike', *Tijdschrift voor Rechtsgeschiedenis* 31 [1963], pp. 525–600, at 595–596, who stresses that one cannot conclude on the basis of this source that 'the application of non-Roman laws would become illegal'), yet set in the context fortified the opinion on the end of the local laws.

[133] Mélèze Modrzejewski, 'Grégoire le Thaumaturge' (cit. n. 28), pp. 322–324.

[134] Cf. §§ 56–72 of *Oratio*, where Gregory retells his early life and pursuit in legal studies. His first teacher of law was his Latin master. Gregory desired to join the already well-

gory's point on the matters (and with Talamanca I comprehend them as private law matters, too) of all people directed by Roman law becomes perfectly comprehensive without necessity of elimination of non-genuinely Roman elements from the legal panorama of his times. It is after all, an example made from the perspective of a not-so-advanced law student.

Second, Modrzejewski singled out the final apostrophe to the imperial power.[135] Even if the 'marvellous laws' at the beginning of the fragment cover all sources of law, that evocation of Latin language so well-adapted to the imperial power points to it as the primary mode of law-production in the times of Gregory. The imperial legislation took place previously occupied by the jurisprudence. The previously prominent Roman jurists became anonymous drafters of the rescripts prepared by the imperial chancery.[136]

*

Nearing to the end of this essay, let us open the floor again to the supposed Menander, this time taking a passage from the *Second Treatise*,[137] which starts with a propaedeutic of an imperial eulogy. Just like in the case of city, also the deeds of an emperor are assessed according to four stoic cardinal virtutes (373, 7–8). Among these *Justice* could be praised in reference to the emperor's legislative activity:

> Ps.-Menander Rhetor, *Περὶ ἐπιδεικτικῶν* 375.24–376.2 Spengel = 2.1.31 Loeb: *Ἐρεῖς τι καὶ περὶ νομοθεσίας, ὅτι νομοθετεῖ τὰ δίκαια, καὶ τοὺς μὲν*

established school of law in Berythus. No wonder that in connection to these instances he did not mention any other law in force than Roman: and thus this silence cannot be the decisive proof of non-existence of such; no surprisingly exactly opposite reasoning in Talamanca, 'Su alcuni passi' (cit. n. 28), pp. 496–497, n. 79.

[135] Mélèze Modrzejewski, 'Grégoire le Thaumaturge' (cit. n. 28), p. 319.

[136] One understands well why Dieter Nörr developed his vision of the grades of normativity, working on these specific sources of law (Nörr, 'Zur Reskriptenpraxis' [cit. n. 11]). On the law-making activity of the emperors, see, for all, J.-P. Coriat, *Le prince législateur. La technique législative des Sévères et les méthodes de création du droit impérial à la fin du Principat*, Paris 1997, *passim*, but esp. p. 70.

[137] An excellent overview in Humfress, 'Laws' empire' (cit. n. 29), pp. 74–75.

> ἀδίκους τῶν νόμων[138] διαγράφει, δικαίους δὲ αὐτὸς θεσπίζει· τοιγάρτοι νομιμώτεροι μὲν οἱ νόμοι,[139] δικαιότερα δὲ τὰ συμβόλαια τῶν ἀνθρώπων πρὸς ἀλλήλους. ἂν δέ τις ὑπολάβῃ τὴν νομοθεσίαν φρονήσεως εἶναι μόνης, γινωσκέτω ὅτι τὸ μὲν νομοθετῆσαι μόνης φρονήσεως, τὸ δὲ προστάττειν πράττειν τὰ δέοντα δικαιοσύνης, οἷον ὁ μὲν τύραννος πολλάκις συνίησι διὰ φρόνησιν ἃ συμφέρει αὐτῷ νομοθετεῖν ἢ μή, νομοθετεῖ δὲ τὰ ἄδικα, ὁ δὲ βασιλεὺς τὰ δίκαια.
>
> So you shall speak about law-giving, that he legislates justly, that he removes unjustness of the laws, and himself establishes just ones. And thus the laws become more legitimate, and contracts between men fairer. And if anyone should retort that legislation belongs only to prudence (phronesis), he should know that while to frame laws (is a function) of prudence, to prescribe proper deeds (partakes) in justice. And so a tyrant often perceives through prudence what it be of use for him to legislate and what not, and yet passes unjust (laws), the emperor, on the contrary, passes just ones.

The emperor single-handedly strikes down the old laws, providing new solutions to the legal problems to him presented, and thus he makes the laws fairer. These new, imperial, laws are operative within the emperor's authority, yet at the end of the day there are above all, new laws. As such they abrogate the old ones. Following my mentor's a-temporal interpretation of the *First Treatise*, I think we may fairly safely assume that this passage, too, instructs on a praise not of a particular third-century ruler, but of a generic one. The difference between the earlier Roman period and this time is of scale of intensity.[140]

[138] A reasonable correction by the Byzantine erudite, Joseph, traditionally known as Rhakendytes (on him see, Russell & Wilson, *Menader* [cit. n. 32], p. xliv), coddices: *πόλεων*.

[139] So, in *Codex Parisinus gr.* 1741, some other manuscripts have *γάμοι*, which, however, does not make much sense as observed by Race in Loeb edition (cit. n. 38), p. 158 n. 14.

[140] Caroline Humfress, 'Laws' empire' (cit. n. 29), p. 75, perspicuously points to perfect illustration of such practice in the earlier period. In D. XLVII 12.1.5 (Ulp. *ed.* 25) the jurist discusses the effect of Hadrian's decision on the city law. The emperor imposed fines for burying dead bodies in a city in contradiction to an earlier *lex municipalis* that had allowed such practices. The rescript deprives the city statue of its force, since 'rescripts are general, and imperial statutes has its own force and is in effect everywhere' (*Post rescripta principalia an ab hoc discessum sit, videbimus, quia generalia sunt rescripta et oportet imperialia statuta suam vim optinere et in omni loco valere*).

EPILOGUE: *LEX POSTERIOR DEROGAT LEGI PRIORI*

Now could we not extrapolate this result to the Egyptian cases discussed before? The norms of the local laws of clearly heterogeneous origin would interweave with the Roman ones. They may indeed be generically referred to as customs, or traditions, in particular where no written trace of them remained, but it did not deprive them of their normative force. According to the principle of personality of law they remained primarily applicable in the cases of family and succession, but actually also in the realm of law of obligations.[141] They would not subdue to Roman laws, their non-application, should it happen, would actually constitute a new law which replaces the old one.

An imperial decision of such kind would unquestionably be law-making (*Gai* I 5: 'id legis vicem optineat, cum ipse imperator per legem imperium accipiat', and D. I 4.1 *pr.* [Ulpian *inst.* 1]: 'quod principi placuit, legis habet vigorem').[142] In the case of Roman judges, governors and their delegates the same principle of Roman jurisdiction was applied that had once given rise to *ius honorarium*.

Let me just finish now with another passage from the Digest discussing how a judicial authority should address local law. It will corroborate with the hitherto discussed Egyptian evidence.

> D. I 3.34 (Ulp. *off. proc.* 4): Cum de consuetudine civitatis vel provinciae confidere quis videtur, primum quidem illud explorandum arbitror an etiam contradicta aliquando iudicio consuetudo firmata sit.

[141] An in-depth discussion of this aspect here would make this paper indigestible. I will develop this problem in 'Public land leases turn inhumane. Imperial grace and local custom(s), or the status of local law under Roman rule revisited' (forthcoming), discussing public land leases and the impact of *consuetudo/mos regionis* on their structuring (analyzing chiefly the imperial rescripts cited above, n. 76, their possible relation to D. XLIX 14.3.6 (Callistratus *iur. fisc.* 3), as well as the Heptakomia public land leases known from the Archive of Apollonios).

[142] 'It obtains the force of a statute, since the emperor himself, receives the imperium by in virtue of a statute', and, 'What has pleased the princeps, has the force of a statute'.

> If it seems that anyone relies on the custom of a city or a province, I deem that first it should be established whether this custom has been approved in a judgment in which it had been contradicted.

In his manual for a Roman governor, Ulpian sets out the guidelines for judicial activity in a province. While confronted with a local law (here rendered as *consuetudo*, a term so dear to Modrzejewski), cited by the party to a trial, the Roman judge should check whether this custom had been upheld in previous judgements. Let us observe that even in that relatively late period the governor is not bound to follow these decisions, but only persuasively invited too. At the end of the day, he is still a Roman 'magistrate', with law-making prerogatives.

That is the mechanism we have traced in the Egyptian sources. The claimants cited a local norm, relying on its application. Their opponents contradicted this norm. The Roman judges followed the guidelines set by their predecessors' decisions. In the case of *neokoria* of Ptolemais, and the testamentary freedom of the Egyptians they upheld the local rule; they rejected it in *P. Oxy.* II 237 since it came in conflict with the Roman principle of freedom of marriage; thus they created a new rule. This new one trumped the old, not because it was Roman, but because it was posterior. So, if there is any order to be sought in the mass of the co-existing norms, it may be this one: of *lex posterior* which abrogates *lex prior*.

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While writing this paper for the first time I did not have Józef literally next to me: in all my previous attempts he was always there. He agreed on some points, he criticized others, always pointed out aspects that I had missed, the sources I should still consult. ... I only hope that the result hereby presented would not have been too severely judged by my teacher, and I would be spared the usual anecdote starring his 'très regrettable maître', Rafał Taubenschlag (but actually part of the common tales of the typically German academic world for over two centuries),[143] who

[143] One of the earliest 'codified' examples of such in the anonymous *Theorie der Beredsamkeit für alle Formen prosaischer Darstellung. Nach den besten Quellen der Alten und der Neuern*

commenting a recently read book (article), was prone to say 'Dieses Buch (– Der Aufsatz –) enthält viel Gutes und Neues, nur Schade, daß das Gute nicht neu, und das Neue nicht gut ist'.

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bearbeitet, und mit Mustern und Beyspielen belegt [= *Bibliothek der Humanitäts-Wissenschaften zur Selbstbildung für Jünglinge von reiferem Alter* 5], Vienna 1825, p. 204 (§ 212: 'Antithese'); attributing the dictum to Gotthold Ephraim Lessing; this is, however, strictly speaking, apocryphal, probably due to J. H. Voss' distich 'Nach Lessing: Dein redseiliges Buch lehrt mancherlei Neues und Wahres | Wäre das Wahre nur neu, wäre das Neue nur wahr!', in his *Vossischen Musenalmanache* 1792, p. 71, which alludes to Lessing's *Briefe die neuste Literatur betreffend* (Letter 111 of 12 June 1760), according to the classic G. Büchmann, *Geflügelte Worte. Der Zitatenschatz des deutschen Volkes*, Berlin 1920 (26th ed.), pp. 166–167.