

JAKUB URBANIK (WARSAW)

A RESPONSE TO BARBARA ANAGNOSTOU-CANAS

The paper by Barbara Anagnostou-Canas touched upon a number of subjects and ideas. She dealt first with the possible ways of establishing the bond of filiation and the exposed different legal effects that result from the said relation. As the topic chosen by Barbara Canas is obviously rich in multifaceted issues, it will be very difficult to address all of the matters involved. It broadly covers many aspects of the daily life in Graeco-Roman Egypt. I would like, therefore, to limit myself to a further discussion of just two problems arising from the sources collected by Prof. Canas as the basis for her research, and please do forgive me for posing even more questions, rather than providing ready answers in my response.

Let me start with one of the issues covered by the speaker in the first part of her presentation, i.e. the adoption. Before I proceed to that point, however, I would like perhaps to express a certain concern about Diodorus' testimony reporting that the Egyptians did not make a difference between the children born in legitimate and illegitimate unions. As in some other cases in which he discusses the Egyptian law¹, he might have again projected his (or rather his source in question, viz. Hecataeus of Abdera) ideas over the actual state of affairs, willing to present the Egyptian society as even more different from the Greek model than it actually was. My scepticism remains of course to be corroborated with the Egyptian sources.

On to the adoption. Obviously, the main problem here is that the evidence in hand is strikingly scarce and circumstantial (which poses also an interesting question why it is so). Only three documents deal directly with adoption and all of them date from a rather late period, i.e. two from the fourth century A.D. (*P. Oxy.* 1206 and *P. Lips.* 28) and the third one is as late as the mid-sixth century (*P. Oxy.* 1896).² Let me briefly recollect the content of these documents.

¹ As, for example, in the case of the alleged anti-usury legislation of pharaoh Bocchoris, Diod. I 79, on that point cf. most recently T. Markiewicz, " 'Abnormal' hieratic and early demotic documents concerning debts," *Proceedings of the 8th Congress of Demotic Studies. Würzburg 2002* (forthcoming).

² The scarcity of documentation is also probably the reason for rather limited literature on the subject, the main instance in that respect remains: M. Kuryłowicz, "Adoption on the Evidence of the Papyri," *The Journal of Juristic Papyrology* 19 (1983), pp. 61-75. For a concise summary and a commentary especially on the relation with the said papyri and the Roman law see H.J. Wolff, *Das Recht griechischen Papyri Ägyptens in der Zeit der*

In the oldest one, *P. Oxy.* 1206 (Oxyrhynchus, A.D. 335, = *FIRA* III 16 = *Juristische Papyri* 10 = *Select Papyri* I 10), Heracles and Isarion surrender to adoption their two-years-old son, Pathermouthis, to Horion. The adoptant in turn stipulates that he shall institute the boy as his heir. The parents promise not to withdraw their offspring from the paternal authority of Horion and he recognises the free-born status of the boy and promises that he will not disown the boy or reduce him into slavery. The adoptant's subscription informs us that he shall register the boy as his own son, he shall feed him and clothe him. Horion shall also guard all the goods and hand them over to the boy as soon as he comes of age.

The next document, *P. Lips.* 28 (Hermoupolis, A.D. 381, = *MChr.* 364) deals with a slightly more complicated matter. This papyrus documents an adoption conducted within the same family. Child's paternal grandmother, Teeus hands her 10-years-old grandson over to her younger son, Silbanos, as the child's father died. In contrast to the previously described document, Teeus additionally declares to have conveyed along with the child all of his paternal and maternal inheritance as well as some household items. What is really interesting is the fact that this document was actually executed between closest relatives: let us keep in mind that in general there is hardly any other evidence for adoption.

Finally, the last papyrus, *P. Oxy.* 1895 (Oxyrhynchus, A.D. 554 = *Select Papyri* I 11) records Herais giving her nine-years-old daughter to a married couple, because being a widow and a poor person she had no means to provide for her. The adoptants apparently stipulated accepting the little girl as their legal off-spring. It is an interesting case, because it seems to have created a hybrid type of adoption. According to the Justinian's legislation (*CI.* 8.47.10; *CI.* 8.47.11 and *I.* 1.11.2) a full adoption, *adoptio plena*, transferring paternal rights over the child was only possible between the closest relatives (and strictly speaking only in case of *fili alieni iuris*). In all the other cases one had to use *adoptio minus plena*, which had apparently purely hereditary purposes. In the case of *P. Oxy.* 1895, of course, the child was already *sui iuris*, so there could be no question of the transfer of *potestas* (and according to Roman rule they parties should have rather used *adrogatio* done by the way of an imperial rescript). The parties nonetheless made this simple agreement. Obviously, one cannot exclude the possibility that the adopting party was later to ask for the imperial acceptance for the act, but such an instance would have probably been also recorded in the preserved document. In any case, the goal of the act does not seem to have been only hereditary. The girl certainly moved to her new parents – the natural mother promised not to take her daughter away from the new parents – and natural-like relation seemed to have come into being.³

Ptolemaeer und des Prinzipats (hrsg. von H.-A. Rupprecht), Vol. 1, München 2002, pp. 142-143.

³ Cf. M. Kuryłowicz, "Adoptio plena und minus plena," *Labeo* 25 (1979), pp. 163-182, and the literature cited therein.

Two earlier instances are joint declarations of the adoptive parents/father and of the adoptee's legal guardians, the last is a unilateral declaration of the natural mother. The purpose of the acts was to document the acceptance of the adoptees as legitimate offspring by the adoptive parents as well as to secure benefits and general welfare of the children. What particularly calls our attention are the clauses guaranteeing rights of the adoptees. So in *P. Oxy.* 1206 not only do we have the clause in which adoptive father assures that all the rights of a legitimate heir shall be vested in the child, but he actually renounces his fundamental right to disinherit any of his offspring. Additionally, he promises that he shall not reduce the child into the state of slavery. In *P. Lips.* 28 the adoptive father, who is an uncle of the child, stipulates that the child would be properly nourished and clothed. He will also have to convey to the child, once it has come of age, all his property (he, we may say using Anglo-Saxon terminology, keeps the property in trust for the child). The lack of such a clause in the third document may be plausibly explained by two arguments. Firstly, this papyrus was meant to be adoptants' evidence, such a stipulation more likely would be found in the document presented to the natural mother. Secondly, there could be no need for such a clause. Justinian's reform aimed at securing hereditary rights of adoptees, so a prohibition of disownment was self-evident in the context.

Now, if we compare these clauses with the Diocletian's ban on the expulsion of children, mentioned by Barbara Canas, and preserved in *CI.* 8.46.6 (*apokeryxis*) it becomes obvious that in everyday practice the father, or maybe better: parents, even in such a late period retained a very strong influence over their children's lives, with no distinction between children born in the marriage and adopted. This authority is so omnipotent that the parties to these agreements felt a need to limit it for the benefit of the adoptees. In that sense the papyri show that the situation of adoptive children could be better than of natural ones.

This observation brings in yet another, much broader subject, i.e. the limits of parental authority or power over the children. The speaker has mentioned some of its aspects in the second part of the speech, now I would like to point out some more particularities. Let us first observe that in all three papyri that have been just briefly described women had quite an important role to play. In one of them it was the paternal grand-mother that gave away the child, and in the other both natural parents, the husband and wife, were party to the adoption contract. Finally, in the third act, the natural mother conveyed her daughter to the adoptants.

These and yet many other sources produce evidence that it was not only the father who could influence his children's lives, but in many cases also the mother. Rafael Taubenschlag having referred to these texts, already in 1929, coined the term *materna potestas*. This might be a little bit too far fetched, trying to give legal/judicial shape to this area of our lives which is not necessarily ordered and, let me add, orderable in terms of law. But still, this notion expresses the real, social if you like, power that parents do have over their children up to this very day. The law

does not and cannot interfere with this sphere unless it is expressively intended to protect some goods – just as in case of the anti-alienation and anti-disinheritance clauses in the earlier mentioned documents.

I will come back to this point briefly towards the end of my response, in the meantime let me address yet another issue from the broad field of children-parents relationship. A very clear illustration could be provided by the problem of parental consent to their children marriage or an arrangement of such. And not only do the sources of practice provide us with evidence that theoretically independent decision of children may be subjected to the will of their parents. We may also resort to dogmatic Roman law sources. I will use here a comparison to the Roman world, which albeit far-fetched, does seem to provide us with an interesting parallel. Of course, I do not want to suggest these two realities be identical or merely dependent on one another. They only show some similarities that may perhaps shed some light on the general practice and offer some solutions to the given legal problems. The Romans, legally speaking, expected marriage to be created by a pure agreement of the spouses. Nonetheless, the pure “dogmatic” sources present us with an abundance of texts alluding to the parental authority exercised on that matter.

I will just briefly quote only one source, which has in any case been excessively used by the scholarship.⁴ It dates back to the end of the Republic, i.e. the transition period between so-called preclassical and classical periods of Roman law.

D. 23.2.22: Celsus l. 15 *digestorum*: *si patre cogente ducit uxorem quam non duceret si sui arbitrii esset contraxit tamen matrimonium quod inter invitos non contrahitur: maluisse hoc videtur.*

In the 15th book of his Digest, Celsus states that if someone, being forced do so by his father, has married a woman, whom he would not have married had it been his own decision, he, nonetheless, has contracted a marriage. Although it (a marriage) cannot be contracted between unwilling parties, the son seems to have wanted to marry.

We can clearly see how the jurist struggled to match the reality with the legal theory. The son, once he has married, is deemed to have exercised his own will so thus the father's wish becomes his own.

According to the papyri, it is the parent's right (both of the mother and the father) to give a daughter into marriage. And we may safely assume that the act of

⁴ See above all: E. Volterra “Quelques observations sur le mariage des *filii familias*,” *RIDA* 1 (1948), pp. 213-242 [= *Scritti giuridici*, II, Napoli 1991, pp. 97-126], at pp. 229-230 [= pp. 113-114]; idem, *Lezioni di diritto romano. Il matrimonio romano*, Roma 1961 (2ed), pp. 204-206 cf. also, S. Treggiari, “Consent to Roman Marriage: Some Aspects of Law and Reality,” *Échos du Monde Classique/Classical Views* 26 (n.s. 1) (1982), pp. 34-45. See also my “D. 24.2.4: ... pater enim nuntium mittere posse ... l'influsso della volontà del padre sul divorzio dei sottoposti,” [in:] T. Derda, M. Wecowski & J. Urbanik, *Εὐεργεσίας χάριν. Studies Presented to Benedetto Bravo and Ewa Wipszycka by Their Disciples*, Warsaw 2002, pp. 293-336.

ekdosis had not purely symbolic and ceremonial function, it clearly referred to the actual arrangements done by the parents in respect of their children's marriage.⁵ The same kind of evidence arises from the text dealing with parental order to divorce (or in the Greek world with the practice of *apospasis*).

It is not my intention to state that Roman and Greek marriage were identical in their legal effects. What I would like to do is merely to stress that nobody really did ask, or cared to ask, about the child's idea on that point, and even if indeed somebody did ponder about the bride's will, he, in most cases, must have assumed that it did not differ at all from their parental authority. In addition to that, we have to bear in mind that many girls would marry in their early teens. Surely, their own preferences counted little at this stage. The model of the patriarchal family simply did not allow this kind of consideration. Even more, as Lewis' and Yiftach's research⁶ clearly shows this kind of authority was quite natural and it was vested by the community in the father for the child's benefit rather than detriment. Who else but the father could protect better the newly wedded girl, who in many cases was posed *vis-à-vis* her new family? Such an approach would be natural for a long time but at certain moment it obviously started creating problems.

I am recalling here the famous papyrus, *P. Oxy.* II 237 from the end of the second century AD, which preserves the sad story of a certain Dionysia and her abusive father, Chairemon.⁷ The man wanted to break his daughter's marriage and deprive her of her property. In reply to her father's claims, Dionysia cited four cases that she presented as similar to her own standing. The whole story of Dionysia and the cases quoted by her in her famous petition clearly exemplify the change in the legal policy in this respect. The Roman officials cited by the woman, in the cases referred to them, preferred to apply the Roman norm forbidding the father to break his children's marriage. By doing so, they dismissed an "indigenous"⁸ rule, totally unclear to us (and probably to them as well), which probably goes back to the

⁵ Cfr. U. Yiftach-Firanko, *Marriage and marital arrangements. A History of the Greek Marriage Document in Egypt. 4th century B.C.E.-4th Century CE*, MBPAR 93, München 2003, chapter 3; idem, "Kontinuität und Zäsuren im ägyptischen Eherecht – Die *Ekdosis* als Eheschließungsmodalität in der Ptolemäer- und Kaiserzeit," *Akten der zweiten Tagung der jungen europäischen Rechtshistoriker – München, Juli 1998*.

⁶ Vedi N. Lewis, "Aphairesis in Athenian Law and Custom," *Symposion* 1979, Köln 1982, pp. 161-82. See also my "D. 24.2.4: ... pater enim nuntium mittere posse" (cit. n. 4), pp. 326-328.

⁷ For the newest literature on the subject and important new interpretation see, U. Yiftach-Firanko, *Marriage and marital arrangements* (cit. n. 5), chapter 3 as well as pp. 84-90; cf. also my "D. 24.2.4: ... pater enim nuntium mittere posse" (cit. n. 4), pp. 315-322.

⁸ That is, as Lewis and Méléze-Modrzejewski have convincingly demonstrated of Greek tradition: N. Lewis, "Aphairesis" (cit. n. 6), pp. 161-82; J. Méléze Modrzejewski, "La règle de droit dans l'Égypte romaine," *Proceedings of the Twelfth Congress of Papyrologists. Ann Arbor 1968*, Toronto 1970, pp. 317-375, at p. 332. Same conclusion may be drawn from the latter's interpretation of the expression *nomos ton Aigyption*, see: idem, *loc. cit.*, p. 333.

Athenian *aphaeresis*.⁹ This rule attached different legal effects to the *engraphoi* and *agraphoi gamoi*.

This Roman principle was anything but a well-established practice, however, as I have tried demonstrating elsewhere.¹⁰ Still in the year 294 Diocletian felt the need to remind his subjects that neither the father nor – let us pay attention to this – the mother had the capacity to dissolve their children's marriage (see *CI*. 5.17.4 and *CI*. 5.17.5).

It is obvious that any father or mother, or as we may plausibly imagine, also some other close relatives had other than legal means to influence their children or wards. They did not (and still do not!) need to resort to any legal right arising from the once established relation of filiation (maternal and paternal power). They could simply impose their will on the children by exercising material pressure ("I will disown you, should you not follow my orders" – and there are proofs for that matter in the sources, see, for example: *CI*. 3.28.18 and *CI*. 6.25.5.1) or simply relying on sentimental ties, nourished additionally by the concept of *pietas* that was to characterise model parents-children relations.

To the conclusion: my recollection of the marriage regime in this paper has been meant to serve a sole purpose. I have been trying to show that the research of the effects of the relationship of filiation cannot be limited to the study of its legal status only. Or in other words: the family organisation is much more of a social than legal phenomenon. Finally, the law interferes only when the legal policy envisages a particular good to be protected, the legislator having a well-defined goal in mind, often trying, for instance, to protect certain citizenship rights, or in other words the common goods of the community. Or, if we are to reverse the proposition, it is rather the community that decided to intervene with the family structure in order to protect its own welfare and used law as the tool.

⁹ N. Lewis, "Aphaeresis," cit. n. 6), p. 179; V.L. Cohn-Haft, "Divorce in Classical Athens," *Journal of Hellenic Studies* 115 (1995) 1-14, at 5-8; V.J. Rosivach, "Aphaeresis and apoleipsis: a study of the sources," *RIDA* 31 (1984), pp. 193-230.

¹⁰ "D. 24.2.4: ... pater enim nuntium mittere posse" (cit. n. 4), *passim*.