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# HUMANITY AND INHUMANITY OF LAW: THE CASE OF DIONYSIA*

The case of Dionysia has been examined and re-examined many times by the most eminent scholars. Yet we think that it may still be worth reconsidering certain aspects of this extremely interesting papyrus. In the present paper we shall focus on the mention of ἀπανθρωπία – 'inhumanity' in one of the cases cited by Dionysia while arguing her legal standing versus the claims of her father Chairemon. We think it will be of value to discuss this aspect in a broader context, comparing the argu-

* This article is result of a research, which we originally conducted independently from one another. We both – being unaware of the investigation of the other – had previously published overviews of the subject (cf. Claudia Kreuzsaler, 'Dionysia vs. Chairemon: Ein Rechtsstreit aus dem römischen Ägypten', [in:] U. Falk, M. Luminati, M. Schmoeckel (ed.), *Fälle aus der Rechtsgeschichte,* München 2008 and J. Urbanik, 'Un padre inhumano y la humanidad del derecho: el caso de Dionisia', [in:] J. A. Tamayo Errazquin [ed.] *De la humanidad en el Derecho a los derechos humanos: de Roma a los tiempos actuales*, Bilbao 2008, pp. 59–72, within the research grant of the Spanish Ministerio de Ciencia e Innovación, SEJ 2006–08570 ). Since our ideas are very similar, we have deemed it right to publish a combination of our considerations here together. The translations of the sources are ours unless otherwise indicated .

We would like to express our gratitude to John Dillon and Derek Scally for correcting the linguistic side of this article.

mentation in the papyrus with the use of humanity and inhumanity in judicial reasoning by the Roman jurists and emperors.

## 1. INTRODUCTION: *HUMANITAS* AND THE MYTH OF ROMAN LAW

Still today, a mention of *Roman law* evokes in the collective imagination the concepts of *aequitas*, *benignitas* and *humanitas*, and so it becomes more a symbol of a legal order *par excellence*, a compound of just norms and solutions, far more than the legal order that actually existed. Needless to say is this idealistic vision, termed by Riccardo Orestano, *romanesimo*,[1] identical with the actual laws of the Romans, or with their Byzantine continuation, or with their Mediaeval application after its 'rediscovery' at the University of Bologna. The *Roman Law* of *romanesimo* is just a fine effigy of the qualities a fair legal order should possess. Once these virtues disappear from any legal order, a society enters into a Dark Age and submits to injustice and terror. This conviction is best illustrated by the title of a short story by Louis Aragon: *Le droit romain n'est plus,* published within the collection dedicated to the times of the war: *Servitude et Grandeur des Français. Scènes des années terribles*.[2] One of the protagonists of the narra-

[1] R. Orestano, *Introduzione allo studio del diritto romano*, Bologna 1987, p. 457. *Romanesimo* is 'l'ipostasi di aspirazioni molteplici ed eterogenee, le quali in una concezione tutta speciale di *diritto romano*, considerato in astratto, credono di trovare in essa volto e nome; e per rafforzare se stesse lo glorificano, elevandolo a bandiera, oppure – attraverso un procedimento inverso – lo combattono, contrapponendovisi: è il *diritto romano*, spesso materialmente e sempre idealmente con le iniziali maiuscole, oggetto di apologie o di lotte in base a valutazioni in sé prive di contenuto dottrinale. Esse sono però importantissime sul piano idealologico, traendo alimento da ispirazioni d'ordine politico e sentimentale, rivelatrici di coerrenti di pensiero che si urtano di epoca in epoca e di lugoo in luogo e che nutano con il mutare degli orientamenti di fondo in ciascuna esperienza'.

[2] On the subject see above all various works of Witold Wołodkiewicz, whose part of research has been dedicated to the deconstruction of the myth of Roman law, *e.g.* 'Diritto romano ed i regimi autoritari', [in:] W. Wołodkiewicz & Maria Zabłocka, *Le droit romain et le monde contemporain*, Varsovie 1996, pp. 259–266, passim as well as literature therein quoted. More recently, see M. Miglietta & G. Santucci (ed.), *Diritto romano e*

tive, a military judge in Nazi-occupied France and a former professor of Roman law, Major von Lüttwitz-Randau, laments the despicable influence of Roman law on the modern law orders:

> Le droit romani comme base de lois modernes, c'est une absurdité révoltante contraire à l'esprit allemande

And further, while reconsidering the case of the Reichstag Fire:

> en ce temps-là nos tribunaux étaient encore infectés par le droit romain, le Code Napoléon, les lois juives ... Aujourd'hui, jamais nous n'aurions laissé repartir Dimitrov, il aurait été condamné selon le droit allemand.

Let us recall that following the acquittal of four of five presumed arsons by the Reichsgericht in Leipzig, the infuriated German chancellor established the infamous Volksgericht. And so in this literary picture the Roman law symbolises the just order, governed by the principles of presumption of innocence, non-retroactivity of law, of legalism and humanity.

The very same literary *topos* of Roman law is evoked by a Polish poet, Mieczysław Jastrun, who recalls in a lyric *Z pamiętnika byłego więźna obozu koncentracyjnego* ('From the Memories of a ex-prisoner of a Concentration Camp') the times and his life in a state in which '... Roman law ceased to exist':

> Żyłem w latach,
> Gdy mord masowy miał sankcję najwyższą
> Państwa, w którym prawo rzymskie przestało istnieć.
> To okropne, że ludzie zaczęli się przyzwyczajać
> Do faktu, że prawo rzymskie przestało istnieć,
> Że śmierć z ręki kata jest rzeczą pospolitą,
> A ludzka rzecz jest wymysłem i przesądem
> Wolnomyślicieli...

*regimi totalitari nel '900 europeo. Atti del Seminario internazionale (Trento, 20–21 ottobre 2006)*, Trento 2009, *passim*, but especially the essay of W. Wołodkiewicz, 'Il diritto romano nei paesi del "socialismo reale" ed il cambiamento delle opinioni dopo il corolo del sistema totalitario', *ibidem*, pp. 143–173.

I lived in the times,
When mass-murder had the highest sanction
Of the State in which Roman law ceased to exist
It is horrible, that people started getting used to
The fact, that Roman law ceased to exist,
That death at the hands of an executioner is a common thing,
And that humane thing is an invention and prejudice of
Libertines...

Such a collective imagination (which existence is further proved – and also fuelled – by the court decisions revoking more or less accurately the principles of Roman law, as well as – in a more grotesque way – by the political discourse in some countries),[3] did not arise from nowhere. It is fed by numerous mentions of high values in the Roman sources themselves. Their interpretation – even if not entirely in their historically proper key – during the reception and by modern scholarship spreads the myth still further. It shall suffice for the this purpose to recall one of the most famous, and probably most cited fragments of Roman Jurisprudence authored by the late-classical jurist Ulpian and later placed by Justinian's compilers at the very beginning of the *Digest*:

D. 1.1.1 pr.-1 (Ulpianus, 1 *institutionum*): Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi. Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam, affectantes.

Ulpian, *Handbook* book 1: The one who shall study law will ought to know first where the name 'law' derives from. It was named after justice: since, as Celsus elegantly defined, the law is the skill of the good and the equitable. For this reason some call us 'priests': for we worship justice and we

[3] For political debate in Poland, see: W. Wołodkiewicz, 'La nozione "diritto romano" nelle polemiche del Parlamento polacco dopo la trasformazione del sistema politico', [in:] *Fides, humanitas, ius. Studi in onore di Luigi Labruna* VIII, Napoli 2008, pp. 5959–5973; for court decisions: idem, 'Il diritto romano' (cit. n. 2), pp. 159–169.

> proclaim the news of what is good and equitable, separating the equitable from the inequitable, differentiating the licit from the illicit, willing to make [people] good not only through the threat of penalties, but rather through appeal of rewards and affecting, if I am not mistaken, the true not the false philosophy.

Even a rapid appraisal of the text is enough to understand how the *topos* of Roman law came into being. Neither does it surprise that many have considered and still consider the Celsus' passage quoted by Ulpian at the very beginning of his *Handbook* as the true definition of the *Law*. 'Good and equitable' sound particularly well in our ears. The Roman jurists did certainly employ such great concepts in their juridical discussions and vested in them a certain argumentative force.[4] The only way, however, to approximate their true meaning in the historical Roman law is to study them in the context. No more than just one example, and again closely related to our topic, will suffice here to prove this point. Aulus Gellius explains how the philologists – like him – understand much better the word *humanitas* in the sense of the Greek *paideia* – education – and not – as the commoners would do – as *philanthropia*.[5] It is obvious therefore

[4] See, closely related to our subject, the book by A. Palma, *Humanior Interpretatio*. Humanitas *nell'interpretazione e nella normazione da Adriano ai Severi*, Torino 1992, *passim*, with the literature therein quoted, but in part. pp. 1–4.

For a very sound and firm statement on the topic, presenting the quintessence of the problem, albeit with few textual examples see, F. Schulz, *Principles of Roman Law*, Oxford 1936, Chapter Ten 'Humanity', *passim* but in particular pp. 195–196 ('Humanity softens harsh legal rules') & 208–209 ('Private law was influenced by the conception of humanity in innumerable individual questions'). In his right approach – and having found that the spirit of humanity had infiltrated the solutions reached by the classical jurisprudence, Fritz Schulz still could not liberate himself form the chains of the methodology of his times. He deemed all direct references to *humanitas* in the classical texts to have been a product of interpolations (*ibidem*, pp. 190 & 210). Nowadays – modern textual critics permits to take his reasoning a step further and to recognize originality of *humanitas* in the classical sources as well (see again, Palma, *loc. cit.*).

[5] See Gell. xiii 17, inscribed as '*Humanitatem' non significare id, quod volgus putat, sed eo vocabulo, qui sinceriter locuti sunt, magis proprie esse usos.* 1. *Qui verba Latina fecerunt quique his probe usi sunt, 'humanitatem'non id esse voluerunt, quod volgus existimat quodque a Graecis* φιλανθρωπία *dicitur et significat dexteritatem quandam benivolentiamque erga omnis homines promiscam, sed humanitatem appellaverunt id propemodum, quod Graeci vocant* παιδεία, *nos*

than this concept was by no means clear and undisputable already in the Roman times. If the Romans themselves – at least the more educated ones – were conscious of the possible miscomprehensions due to the ambiguity of terms used in the juridical discourse, then we – twenty centuries afterwards – should be double cautious while applying the very same terms to our reality, without giving a thought at least, if not a profound reflection on their original meaning.

Yet, *romanesimo* often opts for filling the empty words with the connotations that would fit our own beliefs and our own times. Is this conduct indeed never useful? At the very beginning of this article we have mentioned a couple of literary examples in which such a non-scientific approach could in fact be justified. Before proceeding to the actual problem let us recall yet another instance, this time a more scientific one, and as we shall see briefly very closely related to the topic in question.

## 2. *HUMANITAS* AND THE ROMAN CONSTRUCTION OF MARRIAGE

The great German Romanist Fritz Schulz, shortly before forced to retire – as a Jewish descendant – from the Chair of Roman Law at the Hum-

*eruditionem institutionemque in bonas artis dicimus. Quas qui sinceriter cupiunt adpetuntque, hi sunt vel maxime humanissimi. Huius enim scientiae cura et disciplina ex universis animantibus uni homini data est idcircoque humanitas appellata est.* (That *humanitas* does not mean what the common people think, but those who have spoken pure Latin have given the word a more restricted meaning. Those who have spoken Latin and have used the language correctly do not give to the word *humanitas* the meaning which it is commonly thought to have, namely, what the Greeks call *philanthropia*, signifying a kind of friendly spirit and goodfeeling towards all men without distinction; but they gave to *humanitas* about the force of the Greek *paideia*; that is, what we call 'education and training in the liberal arts.' Those who earnestly desire and seek after these are most highly humanized. For the pursuit of that kind of knowledge, and the training given by it, have been granted to man alone of all the animals, and for that reason it is termed *humanity* – trans. by J. C. Rolfe, *Loeb*). We will come back to this passage by the end of the article, (cf. *infra*, pp. 143, 151).

It is indeed this 'proper education', 'civility', *paideia*, with which Italy endowed various nations in the words of Pliny the Elder (*nat. hist.* III 5.39).

boldt University in 1933, delivered a series of lectures dedicated to the Principles of Roman Law. Reading the subsequent book, fruit of these talks, one sees in this highly scientific description of the Roman attitude towards law, foreigners and culture, an intellectual protest against the winning Nazi-ideology of a totalitarian state.[6] The titles of the chapters of the English version of the book, 'Abstraction', 'Nation', 'Isolation', 'Liberty', 'Fidelity', just to mention few, speak for themselves.

The title of the tenth chapter of the book recalls the presumed virtue of Roman law to which, indirectly, our article is dedicated *Humanity.* Interestingly Schulz, unlike many of the other Romanists, does not primarily see the justification of this characteristics in, say, Roman attitude towards slaves or apparent humanitarian approach of some emperors towards criminal law (above all Hadrian). The principal proof of the humanitarian values of the Roman order for Schulz, was the gradual limitations of the harsh original rules governing the inner situation of a Roman family, and, particularly, the juristic construction of marriage the Romans developed. The Roman marriage, unlike any other marriage, was principally based on the will to be and remain married in either of the spouses. We may read this rule in the well-known fragment of the Roman jurisprudential writings:

> D. 23.2.2 (Paulus, *35 ad edictum*) Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt.
>
> Paul, *On the Edict* book 35: A marriage may not be contracted, unless everybody agrees [to it], i.e the ones who get married and these in whose power they are.

It is important to draw the final conclusion here. The fact that the Roman marriage was based solely on *affectio maritalis*, made it freely dis-

[6] F. Schulz, *Prinzipien des Römischen Rechts*, Vorlesungen gehalten an der Universität Berlin (München – Leipzig 1934), slightly modified English version: *Principles of Roman Law* (cit. n. 4). On Schulz's life see the obituary by M. Lauria, 'Ricordo di Fritz Schulz', *Labeo* 4 (1958), pp. 237–238.

soluble at any given time by either of the parties without any formalities; in other words: the mere fact that the will to remain married, *affectio maritalis,* ceased to exist resulted in divorce.[7] And this liberty of marriage/divorce under classical was not to be in any way limited, as recalled in a famous constitution of Alexander Severus, reused in the Justinianic Code:

> *CJ*. 8.38.2: Alexander A. Menophilo: Libera matrimonia esse antiquitus placuit. Ideoque pacta, ne liceret divertere, non valere et stipulationes, quibus poenae inrogarentur ei qui divortium fecisset, ratas non haberi constat. PP. III non. Febr. Maximo II et Aeliano conss.
>
> Emperor Alexander to Menophilus: It has been accepted for unmemorable times that marriages are free. Therefore it is obvious that any pact excluding divorce or a stipulation imposing a pecuniary penalty on the party that has divorced shall not be accepted (3 February 223 AD).

The general principle of freedom of marriage is recalled by the imperial Chancery in a general statement addressed to the Praetorian prefect. This rule, however, while put into practice caused important practical

[7] See above all E. VOLTERRA, *Lezioni di diritto romano*. *Matrimonio romano*, Roma 1960–1961, *passim* but also the classical study of the same scholar, *La conception du mariage d'après les jurists romaines*, Padova 1940 [= *Scritti giuridici* II, Napoli 1991, pp. 1–61] and an encyclopaedic summa on the topic: IDEM, *Enciclopedia del diritto* XXV, *s.v*. 'matrimonio (diritto romano)' [= *Scritti giuridici* III, Napoli 1991, pp. 245–246].

[8] Just to get acquainted with one example of a few, read *D.* 23.2.33 *(Marcellus, 3 ad l. Iuliam & Papiam)*, which shows how difficult it is to establish whether a man and a woman are a couple or not (*Plerique opinatur, cum eadem mulier ad eundum virum revertatur, id matrimonium idem esse: quibus adsentior, si non multo tempore interposito reconciliati fuerint nec inter moras aut illa alii nupserit aut hic aliam duxerit, maxime si nec dotem vir reddiderit* – Numerous [jurists] state, that when the same woman returns to the same man, the marriage is the same; I share this view, unless they are reconciled after a long period or in this time either she married another one, or he took another wife, and above all, if the husband had not given back the dowry). See also other passages dealing with the same problem: D. 24.1.64 (Javolenus, 6 *ex posterioribus Labeonis*); D. 24.2.3 (Paulus, 35 *ad edictum*); *FVat*. 106-107 (Paulus, 8 *responsorum*) and D. 24.1.32.13 (Ulpianus 32 *ad Sabinum*).

issues: if the formation and dissolution of a marital union was so easy and formless, there could arise doubts about the validity of the legal effects that a legal marriage normally produced: the status of the children, inheritance rights, dowry *&c*.[8] Who benefited from the freely accessible divorce at the price of possible uncertainty of legal status? Nowadays it seems quite clear that in the social context of a patriarchal society, such a construction clearly favoured the wives. It was indeed the equal position of the partners, something unheard of in the legal orders in Schulz's times, that made this Author such a great admirer of Roman marriage.[9] Reading classical passages discussing Roman marriage and divorce makes us believe that Schulz was right. His hypothesis may be proven further through a study of the first attempts to limit divorces promoted by Constantine the Great in a constitution little more than a century posterior to the above-quoted regulation of Alexander Severus (*CTh.* 3.16.1 – 5 May 331]). The clearly antifeminist tenor of the norm shows that its actual addressees were women too keenly using their right to divorce.[10]

[9] Cf. the most emphatic formulation of this conviction in Schulz's classical manual, *Classical Roman Law*, Oxford 1951, p. 103: 'The classical law of marriage is an imposing, perhaps the most imposing, achievement of the Roman legal genius. For the first time in the history of civilization there appeared a purely humanistic law of marriage, viz. a law founded on a purely humanistic idea of marriage as being a free and freely dissoluble union of two equal partners for life'.

To hold a candle to the Devil as well it is worth recalling that the very same legal figure, the Roman marriage was also used to justify the exact opposite ideas. The German Pandectists since the times of Friedrich Carl von Savigny were using their vision of Roman marriage as the justification of the patriarchal form of marriage in their times. The Roman concept of *conubium*, 'right to marry according to Roman law', served a younger colleague of Schulz to substantiate the provisions of the so-called Nuremberg racial laws (see T. Giaro, 'Problemi romani e problemi romanistici in tema di matrimonio' [in:] Zuzanna Służewska & J. Urbanik, *Marriage: Ideal – Law – Practice. Proceedings of a Conference held in Memory of Henryk Kupiszewski*, Warsaw 2005, pp. 83–110, at p. 108). This fact only demonstrates yet again – in the key of the hermeneutic perspective – that the reading of Roman law depends more on the reader than on its true original sense. The *principles of Roman law* may still serve as examples, but one has to bear in mind that their argumentative force is limited to the concept of Orestano's *romanesimo*.

[10] See further, J. Urbanik, 'La repressione constantiniana dei divorzi: La libertà dei matrimoni trafitta con una forcina' [in:] *Fides. Humanitas. Ius. Studii in onore di Luigi Labruna* viii, Napoli 2007, pp. 5705–5726.

The research on the legal and literary sources concerning divorce suggests yet another possible beneficiary of the Roman construction. It seems that founding the marriage solely upon the free will of the spouses aimed as well at recognizing the individual will of the children, especially these still under the power of the family superior.[11] The original absolute power, *potestas*, over children would become more and more relaxed – due in particular to the economical and social emancipation of the offspring. Hence one may quite easily imagine a possible clash between the ideas of a *pater familias* and his adult child regarding the marriage, which was always crucial for the social network of the family. The law had to take a firm standing there and thus the recurring motif of fathers (but also mothers) trying to influence the marital life of their off-spring (by arranging marriages, compelling to marry or forcing divorces) is always counterbalanced by the unalterable legal principle: the marriage of the children is primarily founded on their will and free from external influences. To recall but an example,[12] we shall briefly refer to two imperial decisions concerning this issue:

> *PSent*. 5.6.15: Bene concordans matrimonium separari a patre divus Pius prohibuit, itemque a patrono libertum, a parentibus filium filiamque: nisi forte quaeratur, ubi utilius morari debeat.
>
> Divine Pius prohibited a harmonious marriage to be dissolved by the father, similarly a freedman's [marriage] by the patron and son's and daughter's marriage by the parents: unless there is a proceeding undertaken to check where [the spouse whose marriage is being dissolved?] should more usefully remain.[13]

[11] D. 23.2.21 (Terentius Clemens, *3 ad legem Iuliam et Papiam*): *Non cogitur filius familias uxorem ducere* (A son under paternal control cannot be forced to marry.)

[12] For a more profound approach see the study of J. 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 (ed.), *Euergesias charin. Studies Presented to Benedetto Bravo and Ewa Wipszycka by Their Disciples* (*JJurP Supplements* 1), Warsaw 2002, pp. 293–336. The literary sources and proofs for illegal albeit quite effective interference of the parents with the marriage life of their children are discussed *ibidem* at pp. 328–331.

[13] The meaning of the second part of the source is not clear – there must have occurred some alterations of the original Pauline thought. The text may have referred to the mag-

> *CJ*. 5.17.5 Diocletianus et Maximianus AA. et CC. Scyrioni: Dissentientis patris, qui initio consensit matrimonio, cum marito concordante uxore filia familias ratam non haberi voluntatem divus Marcus pater noster religiosissimus imperator constituit, nisi magna et iusta causa interveniente hoc pater fecerit. 1. Invitam autem ad maritum redire nulla iuris praecepit constitutio. D. v k. Sept. Nicomediae CC. conss.
>
> Emperors Diocletian and Maximian and Caesars to Scyrio: Our father, divine Marcus, the godliest emperor stated that the wish [to dissolve the marriage] of a dissenting father who initially had given consent to marriage shall not be approved in case of a daughter-in-power, who is a wife living harmoniously with [her] husband unless the father had done so because of an important and justified reason. 1. Contrariwise, no constitution obliges the unwilling daughter to return to the husband (28 August 294 AD).

Two emperors of the adoptive dynasty, Antonius Pius and Marcus Aurelius (his decision was reported in a decree of the tetrarchs) stated that a father had no power to interfere with a lawfully contracted marriage of his child against the will of the latter. *Pater* was also unable to compel her to return to the husband. It is very likely that the emperors did not introduce any new ruling but simply repeated a long-standing rule.[14] The fact that the virtually identical decision was promulgated twice in a short period and then subsequently reiterated by the Tetrarchs a century later seem to indicate that notwithstanding the firm legal principle, the fathers – thanks to the still very strong social family ties and customs and no less making use of natural parental/filial sentiments – continued to exercise influence over their children in the excessive and illegal manner.

Interestingly the jurists were quite conscious that the principle of *affectio maritalis* invented and promoted by them was at the same time

istrate's response to *pater familias* avail of *rei vindicatio* or *interdictum de liberis ducendis* or *exhibendis*. See further URBANIK, 'D. 24.2.4' (cit. n. 12), pp. 302–308 and 309–311 with further literature.

[14] See further E. VOLTERRA, 'Quelques observations sur le mariage des *filiifamilias*', *RIDA* 1 (1948), pp. 213–242 [= *Scritti giuridici* 11, Napoli 1991, pp. 97–126] at p. 223 and URBANIK, 'D. 24.2.4 ...' (cit. n. 12), pp. 307–311.

quite impracticable in the actual social context. The eminent second-century jurist Celsus in a much-disputed passage attempted to apply the rule more adequate to the social practice without abolishing it entirely. Let us see how skilfully he tried mixing apples with oranges:

> D. 23.2.22 (Celsus 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.
>
> Celsus, *Digest* book 15: If a son[-in-power] being compelled by the father, married a woman whom he would not have married, had he had free choice, the marriage was nonetheless [validly] contracted as marriages are not made between unwilling parties: he seems to have preferred it.

Celsus saved the principle that marriage was only contracted between the willing parties through a trick. He interpreted the son's behaviour in the following way, that he actually married the woman shows – or at least seems to show – his own consent to marriage. (*maluisse hoc videtur*!).

## 3. THE CASE OF DIONYSIA OR 'APPLIED' *HUMANITAS*

This introduction allows us to turn directly to the source in question, in which we shall find an example of actual application of the rules of humanity and observe how this influences the existing legal order.

The well-known papyrus *P. Oxy*. II 237 (written after 27 June 186 AD)[15] preserves for us the petition of Dionysia sent to the Prefect of Egypt, Pomponius Faustinianus, against her father Chairemon – and with it valuable information about legal rules and their application in Roman Egypt in the second century AD. Though less than half of the original text is preserved,

[15] Despite its considerable value for legal history, no comprehensive study has been dedicated to the papyrus since its first publication in 1899. There is, however, an unpublished master thesis by Varvara ANAGNOSTOU, *Le procès de Dionysia*, Paris 1973, of which we were able to consult a copy at the Leopold-Wenger-Institut für Rechtsgeschichte in Munich. For studies dealing with specific parts of the petition see the following notes.

the remaining part contains no fewer than three edicts of prefects,[16] excerpts of five reports of proceedings[17] and one lawyer's opinion.[18]

The amount of information packed in the text is due to the fact that the petition follows upon a series of previous procedural steps and documents, which Dionysia now recapitulates and cites. Her actual request, which she produces at the end of the petition, is primarily for the dismissal of all claims made by her father and for the definite settlement of the dispute – while she subtly insinuates that litigation was needlessly prolonged by her father's obstinacy (col. VII, ll. 8–12):

[16] 1. Col. VIII, ll. 7–18: the edict of Valerius Eudaimon about abusive claims by debtors unwilling to pay their debts; cf. P. COLLINET, 'L'Édit du Préfet d'Égypte Valerius Eudaemon (*P. Oxy*. II 237, col. VIII, ll. 7-18) (138 ap. J.-C.); une hypothèse sur l'origine de la *Querela non numeratae pecuniae*', [in:] *Atti del IV Congresso Internazionale di Papirologia*, Milano 1936, pp. 89–100, A. MENKMAN, 'The Edict of Valerius Eudaimon, Prefect of Egypt', [in:] *Symbolae van Oven*, Leiden 1946, pp. 191–210 and M. LEMOSSE, 'Querela non numeratae pecuniae et contradictio', [in:] *Studi in onore di Siro Solazzi*, Napoli 1948, pp. 470–482.

2. Col. VIII, ll. 21–27: the edict of Sulpicius Similis about the registration of Egyptian marriage agreements, which also contains a reissue of the corresponding edict of Mettius Rufus; cf. E. VOLTERRA, 'Quelques observations sur un édit du préfet d'Égypte Servius Sulpicius Similis', [in:] *Études offertes à Jean Macqueron*, Aix-en-Provence 1970, pp. 677–681.

3. Col. VIII, ll. 27–43: said edict of Mettius Rufus about the reorganization of the *bibliothêkê enktêseon*; see H. J. WOLFF, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats. II. Organisation und Kontrolle des privaten Rechtsverkehrs* (*HdAW* X.5.2), München 1978, pp. 222-255 with extensive previous literature and K. MARESCH, 'Die Bibliotheke Enkteseon im römischen Ägypten. Überlegungen zur Funktion zentraler Besitzarchive', *APF* 48 (2002), pp. 233–246.

[17] Col. VII, ll. 19–43 contain the reports of proceedings discussed below, held before the prefect Flavius Titianus and the *epistrategos* Pacomius Felix, as well as from l. 39 the beginning of a report of proceedings before the *dikaiodotes* Umbrius; col. VIII, ll. 18–21 contain a brief extract from proceedings before the prefect Munatius Felix, and col. VIII, l. 43 the beginning of proceedings before the prefect Petronius Mamertinus. For the use of precedents in court according to the papyrological sources see R. KATZOFF, 'Precedents in the Courts of Roman Egypt', *Zeitschrift der Savingy Stiftung für Rechtsgeschichte RA* 89 (1972), pp. 256–292, at pp. 257–268.

[18] Col. VIII, ll. 2–7: the opinion was given at the request of the assigned judge in a similar case by the former *agoranomos* and *nomikos* Ulpius Dionysodorus. Though such opinions are a well known instrument in Roman law, they are scarcely attested in the papyri; cf. R. KATZOFF, '*Responsa prudentium* in Roman Egypt', [in:] *Studi in onore di Arnaldo Biscardi* II, Milano 1982, pp. 525–535.

*πανταχόθεν οὖν, ἡγεμὼν {ουν} κ[ύ]ριε, τοῦ πράγματος || πρ[ο]δ̣ήλου γενομένου καὶ τῆς τοῦ πατρός μου πρός με ἐπηρείας ἐντυγχάνω σοι καὶ νῦν πάντα παρατιθεμένη τὰ ἐν τῷ πράγματι || καθὼς καὶ ὁ βασιλικὸς διαδεχόμενος καὶ τὴν στρατηγίαν ἠθέλησεν, καὶ δέομαι κελεῦσαι γραφῆναι τῇ στρατηγίᾳ τάς τε χορηγίας || ἀποδίδοσθαί μοι κατὰ καιρόν, ἐπίσχειν τε αὐτὸν ἤδη ποτὲ ἐπειόντα μοι πρότερον μὲν ὡς ἀνόμου κατοχῆς χάριν, νῦν δὲ προφάσει νό-|| μου οὐδὲν αὐτῷ προσήκοντος.*

Since, my lord prefect, the case is now clear on all points, as is the insulting behavior of my father against me, I now once more turn to you, providing a full account of the case in accordance with the decision of the royal scribe and acting *stratêgos*, and ask you to give written orders to the *stratêgos* that my provisions shall be paid on time and that he shall be restrained, who attacked me previously about the *katochê*, as if it was illegal, and now with the pretext of a law that does not apply to him at all.

The conflict between Dionysia and her father Chairemon had its origin in financial disputes – that much we can reliably deduce from Dionysia's one-sided account. The details are difficult to reconstruct from the poorly preserved first part of the petition. At the center of the controversy stands the *katochê* that Dionysia claims to have on family property, which is jeopardized by a loan her father has failed to repay. The so-called *κατοχή* is a specific, limited lien, which could be registered and restricts the owner's power of disposition without the consent of the holder of the lien. It could have been granted to Dionysia by inheritance or by dowry. Chairemon, however, denies the legality of Dionysia's *katochê* as well as the validity of its registration. When the dispute about the *katochê* could not be settled, Chairemon changes his strategy: He tries to dissolve the daughter's marriage to Horion. In his petition to the prefect Faustinianus from April/May 186 – which is preserved in Dionysia's petition – he justifies this step as follows (col. VI, ll. 12–20):

*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 τού⟨του⟩ παύσασθαι*

(l. *παύσεσθαι*) *αὐτὴν τῶν εἰς ἐμὲ ὕβρεων·* (...) *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' οὗτινος 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*||*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. ... 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 authority to take her unwillingly away from her husband's house, that I shall not be exposed to any violence by any of Horion's people or by Horion himself, who continuously threatens me with it. From the multitude of cases about these things I have attached only a few for your information. Year 26, Pachon.

Chairemon justifies his change of mind by placing the blame for the whole conflict on his son-in-law Horion, whom he claims to be the true instigator of his daughter's rebelliousness. By separating his daughter from her malevolent husband he expects her attacks on him to end. But this specious reasoning is easy to see through: The dissolution of Dionysia's marriage would also bring her dowry back into Chairemon's possession and accordingly also end the financial dispute between father and daughter – from which Chairemon would emerge victorious. He himself hints at this goal in his letter to the prefect Longaeus Rufus, when he asks to recover the property conveyed to Dionysia earlier.

The law that Chairemon cites to corroborate the legality of his action is of major interest to us. According to his statement it grants him the authority to take Dionysia away from her husband's house – even against her will. The text of the law unfortunately is not included in Dionysia's petition and has therefore not been handed down to us. There are only meager clues about its presumptive content: the law grants the father the *ἐξουσία* (a term with which Latin *potestas* was commonly rendered) –

meaning the power or authority – to dissolve his daughter's marriage. Chairemon's request reveals that this authority is a right that a father can exercise on his own without official intervention. Therefore Chairemon requests only that the prefect hinder possible violence by the husband, who obviously has prevented him from exercising his right thus far. The phrasing *ἀπάγω αὐτὴν ἐκ τῆς τοῦ ἀνδρὸς οἰκίας* might, moreover, not be accidental. It is very probable that the *ἀπάγειν*, literally the leading away of the daughter from her husband's house, was the formal act the father had to perform to legally end his daughter's marriage.

That a law of such tenor is not a fiction of Chairemon's but actually existed in Roman Egypt is confirmed by several references in the proceedings cited by Dionysia and in other papyri.[19] In one of the precedents cited by Dionysia, the law is qualified as *ὁ τῶν Αἰγυπτίων νόμος*.[20] Laws described as such are occasionally found in papyri from Roman Egypt,[21] but past scholarship has tried in vain to fill the gap in our sources and clarify beyond doubt what the expression means. Interpretations have varied considerably: Some believe that the 'law of the Egyptians' suggests a Roman code based on Egyptian law, to be applied to all Egyptians and Greeks in the *χώρα*.[22] Others consider it the Roman equivalent of the *νόμοι τῆς χώρας* in Ptolemaic times, i.e. a Greek translation and transcription of Egyptian laws.[23] Still others have regarded it as a general designation for all non-Roman laws, among which Greek law can also be assumed.[24] The content of the law on paternal

[19] Beside *P. Oxy*. II 237, esp. Col. VII mentions of the law are found in *P. Mil. Vogl.* IV 229 (140 AD) and *BGU* VI 1579 (after 212 AD); cf. for all citations N. Lewis, 'On Paternal Authority in Roman Egypt', *RIDA* 17 (1979), pp. 251–258, at pp. 252–253.

[20] *P. Oxy.* II 237, Col. VII l. 33.

[21] Cf. *P. Oxy.* IV 706 (73 or 113–117 AD), *P. Oxy.* XLII 3015 (after 117 AD), *P. Tebt.* II 488 (after 121–122 AD), SPP XX 4 (= *CPR* I 18; 124 AD) and *P. Oxy.* XII 1558 (267 AD).

[22] R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri. 332 BC – 640 AD*, Warszawa 1955 (2 ed.); P. J. Parsons, *P. Oxy.* XLII 3015, p. 54.

[23] H. J. Wolff, 'Faktoren der Rechtsbildung im hellenistisch-römischen Ägypten', *Zeitschrift der Savingy Stiftung für Rechtsgeschichte RA* 70 (1953), pp. 20–57, esp. 42–44.

[24] J. Mélèze Modrzejewski, 'La règle de droit dans l'Égypte romaine. État des questions et perspectives de recherches', [in:] *Proceedings of the XIth International Congress of Papyrology*, Toronto 1970, pp. 317–377, esp. 331–334.

authority makes Greek origin attractive, since Athenian law provided the father with extensive authority over his children.[25] From Pharaonic law we know of nothing comparable – but such an *argumentum e silentio* is indeed risky, given our fragmentary knowledge of Egyptian law. The protagonists of the case, Dionysia and Chairemon, an ex-gymnasiarch, are in all likelihood of Greek origin, and it seems unlikely that Chairemon would cite old Egyptian customs. But the argument in favor of the Greek origin of paternal *ἐξουσία* is weakened by the names of the protagonists of a case cited by Dionysia: Phlauesis, son of Ammounis, and his daughter Taeichekis, who requires an interpreter at the hearing. These litigants are certainly Egyptians and are very likely to cite indigenous Egyptian law.

It is thus impossible to determine the provenance of the law granting paternal authority to dissolve a daughter's marriage. Still less certain are the concrete circumstances the law requires for its application: Dionysia – while simultaneously denying the very existence of the law as such – alleges that it does not apply to her (col. VII, ll. 12–13):

> *οὐδεὶς γὰρ νόμος ἀκούσας γυναῖκας ἀπ' ἀνδρῶν ἀποσπᾶν ἐφείησιν, εἰ δὲ καὶ ἔστιν τις, ἀλλ' οὐ πρὸς τὰς || ἐξ ἐνγράφων γάμων γεγενημένας καὶ ἐνγράφως γεγενημένας* (l. *γεγαμημένας*)
>
> For no law permits anyone to drag wives unwillingly away from their husbands – but if there is such a law, then it is not for those who are born from marriage by written contract and who are married by written contract.

This statement provides numerous difficulties for interpretation. Even leaving aside the uncertainty about the accurate meaning of *ἄγραφος γάμος* and *ἔγγραφος γάμος*[26] by implying the literal sense of 'marriage

[25] Cf. N. Lewis, '*Aphairesis* in Athenian Law and Custom', [in:] *Symposion 1977. Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Chantilly, 1.–4. Juni 1977)*, Köln – Wien 1982, pp. 161–178.

[26] Cf. the clear overview of scientific opinions and problems with nevertheless indecisive conclusions from U. Yiftach-Firanko, *Marriage and Marital Arrangements. A History of the Greek Marriage Document in Egypt. 4th century* BCE *– 4th century* CE, München 2003, pp. 81–104.

without a written document' and 'marriage with a written document',[27] the latter part of the sentence is ambiguously formulated. Is the law in Dionysia's view only applicable when the father himself and the daughter were married 'without a written contract'? Or would one of these prerequisites suffice?[28] In other words, is only a daughter from a 'written' marriage, who herself is married with a written document, freed from her father's authority to dissolve her marriage? The two conditions, though similar in wording, do not seem to fit the same picture. That the documentation of the parents' marriage could influence a father's power over his children might be corroborated by *SPP* xx 4 (13 April 124 AD).[29] According to this text, the property of the son of an *ἄγραφος γάμος* is inherited by his father and the son could not appoint a third party as heir in his will.[30] A connection between the documentation of the father's marriage and his authority over his daughter is also drawn in the opinion of the ***nomikos*** Ulpius Dionysodorus, cited by Dionysia to back up her legal position (col. VIII, ll. 3–6):

> *Δ[ιον]υσία || ὑπὸ τοῦ πατρὸς ἐκδοθεῖσα [πρ]ὸς γάμον ἐν τῇ τοῦ π[α]τρὸς ἐξουσ[ίᾳ οὐ]κέτι γείνεται. καὶ γὰρ ε̣ἰ̣ ἡ μήτηρ α̣ὐ̣τ̣ῆ̣ς τῷ πατρὶ ἀγράφως || συνῴκησε̣ [κ]αὶ διὰ τοῦτο αὐτὴ δοκεῖ ἐξ ἀγράφων γάμων γεγενῆσθαι, τῷ ὑπὸ τοῦ πατρὸς αὐτὴν ἐκδόσθαι πρὸς γάμ̣ο̣ν οὐκέτι || ἐξ ἀγράφων γάμων ἐστίν.*

[27] For a defense of this simple interpretation without recourse to two different types of marriage (one of a higher and one of a lesser grade) see H. J. WOLFF, *Written and Unwritten Marriages in Hellenistic and Postclassical Roman Law*, Haverford 1939, esp. pp. 48–72. YIFTACH-FIRANKO, *Marriage* (cit. n. 26), pp. 81–104 basically shares this view while pointing out the difficulties arising from the petition of Dionysia as well as from *SPP* xx 4 and *P. Oxy.* II 267. Theses sources show that there was a legal difference between *agraphos gamos* and *engraphos gamos* that is not connected to the contents of the written marriage agreement itself.

[28] The latter is assumed by YIFTACH-FIRANKO, *Marriage* (cit. n. 26), p. 89 n. 35.

[29] *SPP* xx 4 = *CPR* I 18 = *MChr.* 84 = *Jur. Pap.* 89.

[30] ll. 9–13: *τοῦ νόμου καλοῦντος τοὺς πατέρας ἐπ[ὶ] τὰ[ς] κληρονομίας τῶν ἐξ ἀγράφων παίδων (...) οὐκ ἔχοντος ἐκείνου ἀπὸ τῶν νόμων ἐξουσίαν περιόντος πατρὸς εἰς ἄλλον τινὰ γράφειν δ[ια]θήκην.*

> Dionysia,[31] 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.

If we unravel the tortured grammar of this legal opinion, Dionysodorus seems to state that a father married *ἀγράφος* does have the *ἐξουσία* over his daughter, but it ends as soon as he gives her away in marriage. Emphasis clearly lies on the *ἔκδοσις ὑπὸ τοῦ πατρός*. Not every marriage ends his *ἐξουσία*, or else he could never exercise his authority to dissolve his daughter's marriage – only marriage by *ἔκδοσις*, the giving-away of the bride, by the father himself ends his *ἐξουσία*.[32] With an ***argumentum e contrario*** we could conclude that, if the act of giving away was performed by someone other than the father, he would still be able to dissolve his daughter's marriage.[33] If we carry this thought further, the intention of the law allowing a father to drag away his daughter from her husband would be the logical continuation of his power to give his daughter into marriage. It would then be applicable only if the father himself was not involved in the act of marriage, and it could not be abused as a loophole for double-dealing, greedy fathers to recover a dowry.

How could the legal opinion of Ulpius Dionysodorus[34] be favorable for Dionysia's petition? The ***ekdosis*** is neither mentioned by Dionysia nor

[31] Note that the Dionysia in Dionysodorus' opinion (dated 14 February 138 AD) is another woman, with whom Dionysia had not only her name but also her meddling father in common.

[32] For the *ἔκδοσις* denoting the act of marriage itself see YIFTACH-FIRANKO, ***Marriage*** (cit. n. 26), pp. 41–54.

[33] Cf. YIFTACH-FIRANKO, ***Marriage*** (cit. n. 26), p. 51 and the original development of this thought in U. YIFTACH-FIRANKO, 'Kontinuität und Zäsuren im ägyptischen Eherecht – Die Ekdosis als Eheschließungsmodalität in der Ptolemäer- und Kaiserzeit (4. Jhd. v. – 2. Jhd. n. Chr.)', [in:] A. THIER, G. PFEIFER & P. GRZIMEK, ***Kontinuitäten und Zäsuren in der Europäischen Rechtsgeschichte***, Frankfurt am Main 1999, pp. 49–62, at 59–62.

[34] Another indication of the importance of the *ἔκδοσις* performed by the father may be seen in Col. VII, ll. 28–29, where an advocate states that the father has no authority over the dowry or over a daughter given away in marriage: *τὸν πατέρα μήτε τῆς προικὸς μηδὲ τῆς παιδὸς τῆς ἐκδεδομένης ἐξουσίας ἔχειν*.

denied by her father. Her own reference to the law, naming two conditions for its inapplicability – namely the written paternal marriage and the written marriage of the daughter herself – tempts us to bring it into accordance with the opinion she cites. The *ekdosis*, though, is to our knowledge clearly distinguishable from the written marital agreement.[35] The same cannot be said of Dionysia herself. Did she confuse the *ekdosis* with the written documentation of a marriage? It seems plausible that the giving away of the bride in her times was no longer formally carried out but only noted down in the documentation of the marital provisions, which would make such confusion likely. Dionysia's rhetorical denial of any applicability of the said law leaves us with serious doubts about the legal credibility of her argument. She even contradicts herself by first denying the law's existence and then recognizing it in the same sentence. Her first statement, however, might be interpreted as her assessment of the precedents she cites in the following text, namely that the former law has already been rescinded.[36]

Let us now turn to the two precedents that suggest an invalidated law, which brings us back to the question of humanity and inhumanity of the law: the first case cited by Dionysia was heard by the prefect Flavius Titianus on 2 June 128 AD. The litigants are Antonius, son of Apollonius and Sempronius, his father-in-law. His wife, who in fact takes a leading part in the quarrel, is not even named in the minutes. The dispute already had a long history before ending up in Titianus' court. The situation is quite similar to Dionysia's case: Sempronius wanted to drag his daughter away from her husband Apollonius. A first trial was held before the *epistratêgos* Bassus, who delivered a ruling in favour of Apollonius – described in the minutes of the later trial as a judgment made out of compassion for the daughter, who was literally heartsick (col. VII, ll. 22-24):

[35] The *ekdosis* is often recorded in the document itself but is not indispensable. Its inclusion seems to depend foremost on regional practice; cf. YIFTACH, *Marriage* (cit. n. 26), p. 46 esp. n. 26, who shows the *ekdosis* clause to be employed regularly in Oxyrhynchos. See also YIFTACH-FIRANKO, *Marriage* (cit. n. 26), p. 89 n. 34 on the impossibility of reconciling the opinion of Dionysodorus and Dionysia's assertion.

[36] Presumed by YIFTACH-FIRANKO, *Marriage* (cit. n. 26), p. 87 n. 30.

*νοσησάσης δὲ ἐκείνης ὑπὸ λοίπης* (l. *λύπης*) *τὸν ἐπιστράτηγον Βάσσον* || *μεταπαθῶς ἀναστρα̣φ̣[έν]τα ἀποφαίνεται ὅτι οὐ δεῖ αὐτὸν κωλύεσθαι εἰ συνοικεῖν ἀλλήλοις θέλοιεν*

Since she fell ill from her grief, the *epistratêgos* Bassus – moved by sympathy – declared that he (= Antonius) may not be hindered if they wished to live together.

But this ruling did not end the dispute. Sempronius next turned to the prefect with a charge against Antonius *περὶ βίας*, for assault, while Antonius threatened to sue his father-in-law for incest with his daughter, *θυγατρομειξία*. Sempronius claimed that it was his lawful right to dissolve his daughter's marriage; Antonius objected that they should not be divorced by force. All this was produced at trial before the prefect Titianus. The prefect seems to have been unimpressed by the contentions of the litigants – indeed, his ruling dispenses with legal analysis entirely (col. VII, l. 29):

*Τιτιανός· διαφέρει παρὰ τίνι βούλεται εἶναι ἡ γεγαμημένη.*

Titianus: What matters is with whom the wife wishes to live.

The ruling follows the tenor of Bassus' previous decision. Both make no comment on the law of paternal authority nor do they explain whether the claim of the father was justified. In effect, the ruling amounts to a non-application of the law and the rejection of the father's authority, since the right of the wife to separate from her husband has never been questioned. The minutes of the trial make no reference to the reasons for the ruling. We might, however, gain insight into Titianus' reasoning through the second precedent cited by Dionysia: It is a trial about a similar case, held before the *epistratêgos* Paconius Felix on 14 October, 133 AD, in which the decision of Titianus was cited as authoritative (col. VII, ll. 29–39):

*ἐξ ὑπομ[νηματισ]μῶν* || *Πακωνίου Φήλικος ἐπιστρατήγου. (ἔτους) ιη θεοῦ Ἁδριανοῦ, Φαῶφι ιζ, ἐν̣ τῇ παρὰ ἄνω Σεβεννύτου, ἐπὶ τῶν κατὰ Φλα̣υ̣ή̣σ̣ι̣ο̣ς* || *Ἀμμούνιος ἐπὶ παρούσῃ Ταε̣ι̣χήκει θυγατρὶ αὐτοῦ πρὸς Ἥρωνα Πεταή-*

*σιος. Ἰσίδωρος ῥήτωρ ὑπὲρ Φλαυήσιος εἶπεν, τὸν οὖν αἰτιώμενον || ἀποσπάσαι βουλόμενον τ[ὴ]ν θυγατέρα αὐτοῦ συνοικοῦσαν τῷ ἀντιδίκῳ δεδικάσθαι ὑπογύως πρὸς αὐτὸν ἐπὶ τοῦ ἐ[πι]στρατήγου || καὶ ὑπερτεθεῖσθαι τὴν δίκην ὑμεῖν ἵνα ἀναγνωσθῇ ὁ τῶν Αἰγυπτίω[ν νό]μος. Σεουήρου καὶ Ἡλιοδώρου ῥητόρων ἀποκρειναμένων ||Τειτιανὸν τὸν ἡγεμονεύσαντα ὁμοίας ὑποθέσεως ἀκούσαντα [ἐξ] Αἰγυπτιακῶν προσώπων μὴ ἠκολουθηκέναι τῇ τοῦ νό||μου ἀπανθρωπίᾳ ἀλλὰ τ[ῇ] ἐπι[νοί]ᾳ τῆς παιδός, εἰ βούλεται παρὰ τ[ῷ ἀνδρὶ] μένειν, Πακώνιος Φῆλιξ· ἀναγνωσθήτο* (l. *ἀναγνωσθήτω*) *ὁ ν[ό]μ[ος. ἀ]να-|| γνωσθέντος Πακώνιος [Φῆ]λιξ· ἀνάγνωται* (l. *ἀνάγνωτε*) *καὶ τὸν Τειτιανοῦ ὑπομ[ν]ηματισμόν. Σεουήρου ῥήτορος ἀναγν[όντος], ἐπὶ τοῦ ιβ* (*ἔτους*) *Ἀ[δρια]νοῦ || Καίσαρος τοῦ κυρίου, Παῦν[ι] η, Πακώνιος Φῆλιξ· καθὼς ὁ κράτιστος Τ[ειτ]ιανὸ[ς] ἐκρεινεν, πεύσονται τῆς γυναικός· καὶ ἐκέλευ[σε]ν δι' [ἐρ]μη||νέως αὐτὴν ἐνεχθῆν[α]ι* (l. *ἐλεγχθῆναι*)*, τί βούλεται· εἰπούσης, παρὰ τῷ ἀνδρὶ μένειν, Π[α]κώνιος Φῆλιξ ἐκέλευσεν ὑπομνηματι[σ]θῆναι.*

From the minutes of the *epistratêgos* 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 epistrategus 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.

The *epistratêgos* essentially follows the decision of Titianus. Although the law of the Egyptians mentioned was definitely read during the trial, the judge does not address the issue of is applicability, neither in general nor in the present case. He simply complies with the wish of the wife as the advocates of her husband suggest.

Of particular interest are the grounds, which the same advocates attribute to Titianus' judgement: *μὴ ἠκολουθηκέναι τῇ τοῦ νόμου ἀπανθρωπίᾳ* – he did not follow the inhumanity of the law. In the view of the attorneys, the prefect did not apply the law – without denying its existence or its legal applicability to the case – merely because of its atrocity. To what extent can we take this assertion seriously? If a Roman judge recognizes the existence and validity of an Egyptian law but does not apply it because it is opposed to the principles of his own legal order, he would be applying a principle similar to *ordre public* in modern private international law:[37] the *lex causae* is not respected when it contravenes a fundamental principle of the *lex fori*. The principle in question would be the freedom of marriage in Roman law. The authority of a father to end his daughter's marriage, even against her will, granted to him by an 'Egyptian' law, is clearly contradictory to the Roman conception of marriage (see *supra*, part 2). By refusing to apply the law, the judge protects the fundamental principles of his own legal order.

Since all precedents cited by Dionysia come to the same conclusion[38] – rejecting the application of the Egyptian law cited by her father and following the wish of the daughter – one might assume, as perhaps Dionysia herself did, that the Roman judges wanted to override the 'inhuman' law in general. We should not forget, though, that we possess only the one-sided selection of precedents that support Dionysia's legal claims. If we trust Chairemon's statement at the end of his petition, he too could cite a number of cases as authorities for his legal position. Dionysia's legal situation might not have been as clear-cut as she leads us think – the true purpose of a petition was, after all, to persuade the reader. We cannot therefore conclude with certainty that Dionysia would ultimately have won the case.

To return to the *ἀπανθρωπία* given by the two attorneys as grounds for the non-application of the law: Is the inhumanity of the law – whether or

[37] I am obliged to Tom Walter (Munich) for calling my attention to this parallel (*CK*).

[38] The partly preserved minutes of a trial held before the *iuridicus* Umbrius (col. vii, ll. 39–43, continued in the lost upper part from Col. viii) clearly show his intention to decide similarly to Titianus; cf. Col. vii, ll. 43: *Οὔμβριος· χεῖρόν ἐστι ἀνδρὸς ἀφαι[ρεῖσθαι κτλ.*

not the judge in fact described the law as such – really the reason behind the decisions cited, or is it merely a rhetoric dodge to avoid dealing with an obviously complicated law? Contemporary parallels show at least that use of the term *ananthrôpeia* is not a mere coincidence but perfectly matches the parlance of the Roman jurists and the Emperor's chancellery.

## 4. INHUMANITY IN THE JURIDICAL SOURCES

As we have accented at the beginning of this paper the term *humanitas* and its derivatives (*e.g. humanior*, especially in the connection with *interpretatio*) appear numerous times in the corpus of the legal sources. These terms do have a clearly persuasive flavour especially while arguing that the suggested legal solution is better, more equitable than another.[39]

The counterpart expression, *inhumanum,* even if occurs therein much less frequently, was used recurrently in the literary sources, most notably by Seneca Philosophus and Cicero (as many as twenty-nine and fifty occurrences, respectively).[40] Among clearly rhetorical usage of the word in question in the works of the latter, there are three instances which seem to pave the way for the subsequent juridical application. Let us have a brief look at the way Cicero applies this word while recalling the case of the will of Publius Annius Asellus declared void by Verres during his praetorship.

The deceased instituted his only daughter as his sole heiress. Apparently his estate was not big enough to bar such a resolution on the

[39] See Palma, *Humanior interpretatio* (cit. n. 4), pp. 1–18 but cf. also Schulz, *The Principles* (cit. n. 4), p. 209, we would only abstain from his unfounded interpolation hesitations, for the reasons given above, n. 4.

[40] We are to argue that Gellius is not entirely right when he puts forward that Cicero used the word *humanitas* only in the meaning of *paideia*: cf. *Noctes Atticae*, XIII 17.2: *Sic igitur eo verbo* (sc. *humanitas – JU) veteres esse usos et cumprimis M. Varronem Marcumque Tullium omnes ferme libri declarant.* (That it is in this sense that our earlier writers have used the word, and in particular Marcus Varro and Marcus Tullius, almost all the literature shows, *Loeb*).

grounds of Lex Voconia excluding women from inheritance in the richest census classes. Yet Verres blackmailed the mother and the guardians of the girl, suggesting a bribe for not issuing an edict which would include her in the group of women who had not capacity to inherit. As the guardians were too scrupulous to do so, the edict was made. The advocate called the edict – a source of law after all – *inhumanum*, thus undermining its normative power (cf. II 1.105). In contrast to that shameful act of law, the father's will was deemed n o t to be improper, undutiful, inhumane (cf. II 1.107), *i.e.* made in accordance with the law. Such wording at Cicero's is a clear reference to the possibility to rescind an undutiful will by the praetor by granting to the heirs the *querela inofficiosi testamenti*.[41]

[41] Cic. *in Verrem* II 1 104–107: P. *Annius Asellus mortuus est C. Sacerdote praetore. Is cum haberet unicam filiam neque census esset, quod eum natura hortabatur, lex nulla prohibebat, fecit ut filiam bonis suis heredem institueret. Heres erat filia. Faciebant omnia cum pupilla, leges, aequitas, voluntas patris, edicta praetorum, consuetudo iuris eius quod erat tum cum Asellus est mortuus. 105. Iste praetor designatus — utrum admonitus an temptatus an, qua est ipse sagacitate in bis rebus, sine duce ullo, sine indice pervenerit ad hanc improbitatem, nescio: vos tantum hominis audaciam amentiamque cognoscite — appellat heredem L. Annium, qui erat institutus secundum filiam (non enim mihi persuadetur istum ab illo prius appellatum); dicit se posse ei condonare edicto hereditatem; docet hominem quid possit fieri. Illi bona res, huic vendibilis videbatur. Iste, tametsi singulari est audacia, tamen ad pupillae matrem submittebat; malebat pecuniam accipere, ne quid novi ediceret, quam ut hoc e d i c t u m t a m i m p r o b u m e t t a m i n h u m a n u m i n t e r p o n e r e t*. 106. *Tutores pecuniam praetori si pupillae nomine dedissent, grandem praesertim, quem ad modum in rationem inducerent, quem ad modum sine periculo suo dare possent, non videbant; simul et istum fore tam improbum non arbitrabantur; saepe appellati pernegaverunt. Iste ad arbitrium eius cui condonabat hereditatem ereptam a liberis quam aequum edictum conscripserit, quaeso, cognoscite. cum intellegam legem Voconiam. Quis umquam crederet mulierum adversarium Verrem futurum? an ideo aliquid contra mulieres fecit ne totum edictum ad Chelidonis arbitrium scriptum videretur? Cupiditati hominum ait se obviam ire. Quis potius non modo his temporibus, sed etiam apud maiores nostros? quis tam remotus fuit a cupiditate? Dic, quaeso, cetera; delectat enim me hominis gravitas, scientia iuris, praetoris auctoritas. Recita. Qui ab A. Postumio Q. Fulvio censoribus postve ea testamentum fecit fecerit. 107. 'Fecit fecerit'? quis umquam edixit isto modo? quis umquam eius rei fraudem aut periculum proposuit edicto, quae neque post edictum reprehendi neque ante edictum provideri potuit? Iure, legibus, auctoritate omnium qui consulebantur testamentum P. Annius fecerat non i m p r o b u m , n o n i n o f f i c i o s u m , n o n i n h u m a n u m : quodsi ita fecisset, tamen post illius mortem nihil de testamento illius novi iuris constitui oporteret. Voconia lex te videlicet delectabat. Imitatus esses ipsum illum C. Voconium, qui lege sua hereditatem ademit nulli neque virgini neque mulieri: sanxit in posterum, qui post eos censores census esset, ne quis heredem virginem neve mulierem faceret.*

Just on a margin one may observe that in these and the following paragraphs Cicero

Similarly, commenting the *Law of Twelve Tables* in *de re publica*, Cicero declares its provision prohibiting marriages between patricians and plebeians most inhumane (*inhumanissum*).

We may observe therefore that such an epithet in reference to a legal act is aimed at subverting its legally binding force. It would be too far-fetched to state that in such a way the orator deprived the legal acts of their legality. After all, they had been both revoked long before (Verres' Edict had simply been abolished through not being repeated by his successors in office, the ban on mixed marriages was lifted by *lex Canuleia*), but it is fair to say that what he wanted to do was to give an almost legal justification of their nullification.

As we suspect that *apanthrôpia* in the Dionysia papyrus is not a mere rhetoric either, but has an immanent legal meaning, we shall now examine all the juristic sources mentioning inhumanity with the aim of establishing the sense of this expression. The most usual combination among all the instances would be *satis inhumanus est* or *valde inhumanus est*. *Prima facie* it seems that this expression is sometimes used when a well-established rule needs to be abolished. We shall examine some of the said texts, especially the ones dating from the time-span corresponding to the Dionysia cases.

We shall proceed in the chronological order, commencing from a decision of Hadrian cited by Callistratus. The text concerns a certain, seemingly well-established, practice of the imperial treasury in letting the public estates to individuals. Apparently when the period of lease expired the imperial treasury forced the tenant to remain on the estate and to pay the canon until a new lessee at the same terms could be found.[42]

defends the principle of non-retroactivity of law, which in modern times would be expressed by the maxim *lex retro non agit*. Cf. W. Wołodkiewicz, '*Lex retro non agit*. Un brocardo nella giurisprudenza polacca', [in]: Iuris Vincula. *Studi in onore di Mario Talamanca*, Napoli 2001, pp. 465–477.

[42] Further on this fragment see Palma, *Humanior interpretatio* (cit. n. 4), pp. 163–165, for the literature see *ibidem*, nt. 242.

> D. 49.14.3.6 Callistratus 3 *de iure fisci*): Cum quinquennium, in quo quis pro publico conductore se obligavit, excessit, sequentis temporis nomine non tenetur: idque principalibus rescriptis exprimitur. divus etiam Hadrianus in haec verba rescripsit: 'Valde inhumanus mos est iste, quo retinentur conductores vectigalium publicorum et agrorum, si tantidem locari non possint. nam et facilius invenientur conductores, si scierint fore ut, si peracto lustro discedere voluerint, non teneantur.'
>
> Callistratus, *Rights of Imperial Treasury* book 3: when the five-year period expired for which someone had obliged himself as a public tenant, he shall not be obliged for the subsequent period: and so is stated in the imperial rescripts. And thus the divine Hadrian answered to a juridical inquiry in these words 'This custom is obviously inhuman, by which the tenants of the public taxes and fields are kept [in the obligation], if they cannot be rented for the same amount again. Just so it is easier to find tenants, if they know that they will not be held liable, should they want to leave after the five years period.

*Mos* in the cited text may just mean 'practice' (and such is the translation of Watson's team in the English version of the *Digest*), but it also has got a distinctly normative flavour. This word in juridical texts often indicates customary law, a norm that was never formally introduced but which binding force dwells in its long-standing and well-established application. Thus the Hadrianic ruling which deemed the conduct of the treasury to be inhumane abolished such custom. Should we prefer to read *mos* as merely *practice,* we may still notice that the imperial rescript strongly opposed it – and aided by a further practical justification – prevented it from turning into legal norm.

The next text comes from the works of Pomponius, a jurist whose career started under Hadrian and who was still active until the times of Marcus Aurelius.

> D. 13.7.6 pr. (Pomponius libro 35 *ad Sabinum*): Quamvis convenerit, ut fundum pigneraticium tibi vendere liceret, nihilo magis cogendus es vendere, licet solvendo non sit is qui pignus dederit, quia tua causa id caveatur. Sed Atilicinus ex causa cogendum creditorem esse ad vendendum dicit: quid enim si multo minus sit quod debeatur et hodie pluris venire possit pignus quam postea? Melius autem est dici eum, qui dederit pignus, posse vendere

> et accepta pecunia solvere id quod debeatur, ita tamen, ut creditor necessitatem habeat ostendere rem pigneratam, si mobilis sit, prius idonea cautela a debitore pro indemnitate ei praestanda. Invitum enim creditorem cogi vendere satis inhumanum est.
>
> Pomponius, *Commentary on Sabinus* book 35: Even if it was agreed that you would be allowed to sell the pledged estate, you cannot be compelled to sell it, regardless of the pledgor's insolvency, because this agreement secures your position. Yet, Atilicinus having considered a case [submitted to his judgment) says that the creditor may be compelled to sell: for what if the value of the debt is much less and the pledge could be sold today for more than later? It is better to say therefore, that the pledgor may be able to sell the pledge and having received the money, pay off what he owed. And so the creditor shall have to display the pledged thing – if it is movable – under the condition that the debtor provides first a proper guarantee for indemnifying him. [This all], since it is inhumane enough to make the creditor sell against his will.

Before we proceed with the interpretation of this fragment we have to put it in a broader textual context. Luckily, for the scope of this article it is not necessary to profoundly explore the complex problem of the original structure of the case solved, hence only a short outline of the controversy shall be offered. Since Otto Lenel the scholarship almost unanimously had read this text as formerly regarding *fiducia* and not an ordinary pledge.[43] Thus, the legal issue discussed in the fragment would have originally concerned the interpretation of a *pactum de vendenda*

[43] *Palingenesia Iuris Civilis* II Sp. 146 nt. 2. LENEL classified as formerly regarding *fiducia* all fragments of the 35th book of Pomponius' *Commentary on Sabinus.* His attribution was based on an out-of-the-blue appearance of *eam* in D. 13.7.8.3, grammatically concordant with *fiducia* – the most archaic real security under Roman law which consisted in transfer of ownership of the object given as a security to the creditor – and not with *pignus*. As *fiducia* practically disappeared in the post-classical times the Justinianic compilers replaced any obsolete traces of it by references to contractual pledge by the Justinianic compilers. See further A. BURDESE, Lex commissoria *e* ius vendendi *nella* fiducia *e* pignus, Torino 1949, p. 34–38, in part. 34; PALMA, *Humanior interpretatio* (cit. n. 4), pp. 161–163, as well as B. NOORDRAVEN, *Die Fiduzia im römischen Recht*, Amsterdam 1999, pp. 19–21 and esp. footnote 32.

*fiducia*.[44] This view has recently been challenged by Bert Noordraven who has quite convincingly shown that the Pomponian discourse must have dealt with pledge from the very beginning.[45] In fact, if we read properly the first part of the text which tells us that the pact was made in the interest of the creditor, we must deduct that the legal transaction in question was an ordinary pledge. A *pactum de vendenda fiducia* would have been made in favour of the debtor: it secured that the surplus of the selling-price of *fiducia* over the sum owed (*hyperocha*) would be returned to the debtor. And now we may proceed with examining of the fragment.

It presents a controversy between two jurists over the interpretation of a *pactum de vendendo*, an agreement allowing the pledgee to sell the pledge. Atilicinius, a disciple of Proculus, held that this right of the creditor became his duty, should there be justified reasons to believe that the value of the pledge would diminish in time – and hence a delay of its selling would turn to the detriment of the debtor. Pomponius disagreed with this opinion observing that such a *pactum* safeguarded the interests of the creditor and not of the debtor. He advised a different procedure: the creditor would have to – having received a proper caution from the debtor – return the pledge to the debtor, who subsequently selling it would be able to pay off what he had owed. The later jurist gave an ultimate justification of his guidance: the solution adopted by Atilicinus was inhumane.

For our case it is important now to challenge the opinion of Burdese who – repeating the opinions of the earlier scholars (cf. *Ind. Int. a.h.l.*) expelled the frase *ita tamen – inhumanum est* as unclassical, without, however, giving any proper justification for such a distrust to the text.[46] We may only guess that the meticulousness of the *modus operandi* suggested in

[44] For a tentative reconstruction of the text in this key with critics of the previous attempts see Burdese, Lex commissoria (cit. n. 43), p. 34–38, in part. 34. A necessity of a special agreement allowing the sale of the object given in *fiducia* and securing surplus over the owed sum to be returned to the debtor will not surprise us, if we recall how much *fiducia* assimilated with *pignus* in the period of classical law (see Burdese, *ibidem*, pp. 25–30).

[45] Noordraven, *Die Fiduzia* (cit. n. 43), pp. 22–24.

[46] See Burdese, Lex commissoria (cit. n. 43), p. 34. *Contra* Palma, *loc. cit* (cit. n. 4).

the text (*ita tamen, ut creditor necessitatem habeat ostendere rem pigneratam, si mobilis sit, prius idonea cautela a debitore pro indemnitate ei praestanda*) sounded too Justinianic in Burdese's ears. It does however proceed harmonically from the previous reasoning.[47] The final clause *invitum enim creditorem cogi vendere satis inhumanum est* – clearly the most important for us here – was obviously suspected to be of Tribonian's brand. But neither *humanum* nor *inhumanum* contrary to the common prejudice of the Era of *Interpolationenjagd* indicate Justinianic interventions in the classical texts. Quite the contrary: both of these words belong to the legal *lexica* of the Imperial Chancery of the second century AD. Dionysia's papyrus proves that this word was in use much earlier than in the post-classical period. Neither is there a reason to believe that round, seemingly redundant, phrases cannot have been written by the classical jurists. Therefore we would opt for the classicity of the final part of text. The expression *satis inhumanum est* ... was used by Pomponius in a very particular scope: viz. in order to circumscribe a previous former judicial decision, which had created a binding precedent.

We may observe a very similar application of the expression *satis inhumanum est* in our next text, an excerpt from the works of Cervidius Scaevola, a member of the *consilium* of Marcus Aurelius. The 20th book of his *Digest* presented various cases related to trusts and bequests that the jurist had been consulted about.

> D. 32.39 pr. (Scaevola, 20 *digestorum*) 'Pamphilo liberto hoc amplius, quam codicillis reliqui, dari volo centum. scio omnia, quae tibi, Pamphile, relinquo, ad filios meos perventura, cum affectionem tuam circa eos bene perspectam habeo'. quaero, an verbis supra scriptis Pamphili fidei commisit, ut post mortem filiis defuncti centum restituat. respondit secundum ea

[47] We leave open the question how the creditor would be compelled to give the object back to the debtor: it may have been achieved through an *actio ad exhibendum* (so PALMA, *loc. cit.*) or simply, by means of *rei vindicatio* – the creditor would not be able to defend himself by *exceptio doli* as he had received a proper guarantee (*cautio pro indemnitate ei praestanda*) – or – not less likely – through *actio pigneraticia in personam* (whereby the *proper cautio* would meet one of the positive requisites of the formula – *eove nomine satisfactum esse* – and thus allow the judge to condemn the pledgee in favour of the pledger, see O. LENEL, *Das* Edictum perpetuum, Leipzig 1927 (3 ed.), p. 254.

> quae proponerentur non videri quidem, quantum ad verba testatoris pertinet, fidei commissum Pamphili, ut centum restitueret: sed cum sententiam defuncti a liberto decipi s a t i s i n h u m a n u m e s t, centum ei relictos filiis testatoris debere restitui, quia in simili specie et imperator noster divus Marcus hoc constituit.
>
> Scaevola, *Digest* book 20: 'I want one hundred to be given to Pamphilus, my freedman, over what I left in codicils. I know that everything that I leave you, my Pamphilus, will be turned over to my children, as I have well present your affection towards them'. Question: did he impose by the above-written words a *fideicommissum* by which virtue Pamphilus would have to restore one hundred after his death to the children of the deceased? He replied that in the way the case had been put and in regard to the testator's words it does not seem to be the *fideicommissum* to Pamphilus that he should restore one hundred. As it would be, however, truly inhumane that the freedman should betray the plan of the deceased, he should restore to the testator's children the hundred left to him, [moreover] given that in a similar case also our emperor divine Marcus decided the same.

The testator left to his freedman Pamphilus hundred over some other things assigned to him in the codicil. The former master was certain that everything he designed to be given to his former slave, would eventually become property of his children – as he knew well the affection Pamphilus had for them, and he expressed this conviction in a short *addendum* to Pamphilus' *fideicommissum*. The question arose whether the master's belief should be interpreted in terms of a trust in favour of the children, thus obliging Pamphilus to transfer everything he got to his former master's offspring. At first Scaevola responded negatively: no matter how informal the *fideicommissum* had been at the moment of the creation of this legal figure, it apparently had become fairly regulated by the times of Marcus Aurelius as far as its form was concerned.[48] Such an answer, however, in accordance to the strict legal reasoning led to the disregard of the testator's last will. And thus this prior solution had to be rejected. Scaevola decided therefore that the money originally left to the freedman

[48] Cf. *PSent*. 4.1.6: *Fideicommittere his verbis possumus rogo, peto, volo, mando, deprecor, cupio, iniungo. Desidero quoque et impero verba utile faciunt fideicommissum. Relinquo vero et commendo nullam fideicommissi pariunt actionem.*

should be restored to the testator's children. Again *satis inhumanum est* was used to part from strict legal rules and to justify a new, fairer, solution.[49] This broad interpretation, admitting new words creating a *fideicommissum* was backed by a prior decision of Marcus Aurelius in a similar case – perhaps inspired by the very same Scaevola.[50]

We shall conclude this brief study of the use of the expression *inhumanum est* in the classical times by reading an amusing imperial decision of Septimus Severus and Caracalla.[51] It is referred to, being characterized 'most elegant', in Ulpian's monograph on the office of the proconsul.[52]

> D. 1.16.6.3 (Ulpianus 1 *de officio proconsulis*): Non vero in totum *xeniis* abstinere debebit proconsul, sed modum adicere, ut neque morose in totum abstineat neque avare modum xeniorum excedat. quam rem divus Severus et imperator Antoninus elegantissime epistula sunt moderati, cuius epistulae verba haec sunt: 'Quantum ad *xenia* pertinet, audi quid sentimus: vetus proverbium est: *οὔτε πάντα οὔτε πάντοτε οὔτε παρὰ πάντων*. nam valde inhumanum est a nemine accipere, sed passim vilissimum est et omnia avarissimum.' et quod mandatis continetur, ne donum vel munus ipse proconsul vel qui in alio officio erit accipiat ematve quid nisi victus

[49] See Palma, *Humanior interpretatio* (cit. n. 4), p. 166–168. For Herrenius Modestinus 'inhumane' provided an argument not to punish the heir for not having fulfilled the testator's wish to have his ashes thrown in to the sea, and to decide that the strict rules governing the appointment of an heir under a condition should not be applied in this particular case (cf. D. 28.7.27 pr. – Modestinus, 8 *responsorum* with Mommsen's amelioration of the text; Palma, *Humanior interpretatio*, pp. 168–169). Another case of non-application of strict procedural rules seems to be discussed in D. 6.1.6 (Paulus, 6 *ad edictum*) where the plaintiff's duty to meticulously describe the qualities of the object claimed by *rei vindicatio* is deemed to be inhumane.

[50] D. 31.67.10 (Papinianus, 19 *quaestionum*) and Palma, *Humanior interpretatio* (cit. n. 4), pp. 166–167.

[51] There is one more classical text using this expression, it seems however that its application is somewhat different, merely rhetorical: cf. D. 3.2.6.3 (Ulpianus, 6 *ad edictum*) and Palma, *Humanior interpretatio* (cit. n. 4), pp. 172–173.

[52] On the duties of the proconsul, M. Talamanca, 'Gli ordinamenti provinciali nella prospettiva dei giuristi tardoclassici', [in:] G. G. Archi, *Istituzioni giuridiche e realtà politiche nel tardo impero (III–V sec. d.C.). Atti di un incontro tra storici e giuristi, Firenze, 2–4 maggio 1974*, Milano 1976, pp. 128 ss., on *xenia*, p. 138 n. 125.

> cottidiani causa, ad *xeniola* non pertinet, sed ad ea quae edulium excedant usum. sed nec *xenia* producenda sunt ad munerum qualitatem.
>
> Ulpian, *on the office of the proconsul* book 1: Truly, a proconsul ought not to abstain from all gifts of hospitality, but to apply some moderation, so that he neither overanxiously rejects all, nor greedily exceeds the measure of gifts. Divine Severus and emperor Antoninus moderated in the most elegant way in a letter, which words are as following: 'as it regards gifts of hospitality, listen what we think: the old proverb says "neither everything, nor always, nor from everyone". As it would be truly inhumane not to accept from anyone; but to take from everywhere is cheapest [behaviour] and to take everything is greediest'. And what is regulated by mandates, that the same consul or anyone else in office shall not receive or buy neither gifts or donations unless they are food for everyday use, does not regard little gifts of hospitality, only these that exceed the use of food. Gifts of hospitality, however, are not to be made extent of obligatory donations.

The emperors decide that as far as hospitality gifts (*xenia*) are concerned one should follow the old proverb: 'neither everything, nor always, nor from everyone'; but it would be truly inhumane not to accept from anyone, provided that that some modesty limits are kept. In such a way, Ulpian explains, the general ban on accepting gifts by the provincial officials from their subjects contained in the imperial mandates is mitigated. One cannot help recalling here the passage of Aulus Gellius cited at the beginning of this article and the meaning the learned antiquarian ascribed to the word *humanitas*: proper education. It would be uncivil then to reject all the courtesies presented by the inhabitants of the provinces. And so it is not the norm itself which is the subject of the criticism, but rather its very strict application. The argument of inhumanity – *valde inhumanum est* – gives way to exceptions or – to put it in other words – justifies a restrictive interpretation of the firm rule of law.

For the sake of making our case definite, we shall now briefly analyze just one example of Justinian's constitutions, as four centuries after Dionysia the projected function of *inhumanitas* in the argumentative juridical discourse became even clearer. One should not object the use of such late sources in this research as anachronistic. Not only may the well-known classifying tendencies of Justinian justify this step, it is further proven rea-

sonable by numerous references in his constitutions to the legislation of the Adoptive Dynasty (see, *e.g. CJ*. 5.17.12 with indication of the most philosophic emperor Marcus [Aurelius]), which make stylistic borrowings in argumentation from the writings of these times quite probable.[53] In the text in question the Emperor derogates a norm introduced in the Augustean matrimonial legislation which apparently accepted the appointment of wives as heiresses under the condition of their remaining single. In order to obtain the inheritance the widow had to promise she would return the estate to the legitimate heirs, should she marry again (the so-called *cautio Muciana*). Justinian abolished this rule declaring that it was inhumane that the same laws that punished perjury opened ways to it:

> *CJ*. 6.40.2.2: Iustinianus A. Iuliano PP.: Tale igitur iuramentum conquiescat et lex Iulia miscella cedat cum Muciana cautione super hoc introducta, a re publica separata. augeri etenim magis nostram rem publicam et multis hominibus progenitis frequentari quam impiis periuriis adfici volumus, cum satis esse inhumanum videtur per leges, quae periuria puniunt, viam periuriis aperiri. (d. x k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.).
>
> Emperor Justinian to Julian, the Praetorian Prefect: Such an oath therefore is repealed and Julian Law on various matters is revoked together with the Mucian caution introduced for this purpose, and severed from the republic. As we want our state to grow and to be inhabited by a numerous people begotten, rather than to be wronged by impious perjuries, as it seems to be inhumanly enough to open way to perjury by the laws that punish perjury (19 February 531 AD).

In a similar way Justinian justified abolition of the *lex Fufia Caninia* which in the times of Augustus had introduced limitations on testamentary

[53] It does not mean that the use of *inhumanum* disappeared from the legislative discourse in the meantime; for this instance, read a disposition of Constantine which provided an interesting exception to the rule *ignorantia iuris nocet*. Notwithstanding the fact that the donation made to the wife younger than twenty-five years on the occasion of marriage was not registered (the duty of registration of bridal gifts prevented subsequent circumvention of the ban of gifts between husband and wife), it was still considered valid, and the wife would keep it after the marriage was dissolved.

manumissions. The norm would be inhumane because it deprived the one who was about to die of the faculty he had during his life, i.e. to manumit without any limits.[54]

Time for a brief sum-up: we think we have proven that *inhumanum* in juridical parlance of the classical times, contemporary to the cases cited by Dionysia was used by the jurists and the imperial chancery to point out that a formerly binding rule had to be circumscribed if not entirely abolished. This lexical custom is actually perceptible already in the literary works of Marcus Tullius Cicero. Severus and Heliodorus while giving grounds of Titianus' verdict knew very well what they were doing. Their statement that the former prefect deemed the law allowing fathers to take away the unwilling daughters from the house of their husbands to be inhumane was not pure rhetoric. Being well-educated in legal matters they may have known the current use of *inhumanum* in legal reasoning of the imperial chancery and of the jurists in the second century AD. The legal councilors hoped that also Paconius Felix would see the rule of the law of the Egyptians – whatever is to be understood under this expression

[54] Cf. *e.g.* I. 1.7 pr.: *Lege Fufia Caninia certus modus constitutus erat in servis testamento manumittendis. quam quasi libertatibus impedientem et quodammodo invidam tollendam esse censuimus, cum satis fuerat inhumanum vivos quidem licentiam habere totam suam familiam libertate donare, nisi alia causa impediat libertati, morientibus autem huiusmodi licentiam adimere*. See as well I. 2.9.1, in which Justinian boasts having abolished the rule that everything that was acquired by *filii in potestate* became exclusive property of the *pater familias;* and immediately following I 2.9.2: a change of the former laws allowing pater to keep ⅓ of the son's *peculium* upon his emancipation. Other instances: I. 4.6.40 referring the regime of execution of upon the estate acquired by the insolvent debtor after his bankruptcy; *CJ*. 3.28.34 pr., where Justinian opposes the 'inhuman' opinions of 'some' jurists – and these had normative force, we have to remember – denying a grandson the *querela inofficiosi testamenti* in case in which his grandfather had disinherited his father and the latter was not able to proceed with the *querela* against the will in question.

– as abolished, just like deeming a legal principle inhumane practically overturned it in the native Roman environment. We have an ulterior confirmation of this tendency. In a letter directed to the prefect Ramnius Martialis, the emperor Hadrian decides that the illegitimate children of the soldiers could petition for the paternal estate and obtain the ***bonorum possessio*** of it (*BGU* I 140, ll. 10–28 = *FIRA* I 78 = *MChr.* 373 = *Sel. Pap.* II 213, 119 AD).

> *ἐπί[σ]ταμαι, Ῥάμμιέ μου, τ[ο]ύτους, ο[ὕ]ς οἱ || γονεῖς αὐτῶν τῷ τῆς στρατείας ἀνεί||λαντο χρόνῳ τὴν πρὸς τὰ πατρικὰ || [ὑπάρ]χοντα πρόσοδον κεκωλῦσθαι, || κ[αὶ τ]οῦτο οὐκ ἐδόκει σκληρὸν ϵ[ἶ]ναι || [τὸ ἐν]αντίον αὐτῶν τῆς στρατιω[τι]κῆ[ς] || [διδα]χῆς πεποιηκότων. ἥδιστα δὲ || αὐτὸς προείεναι* (l. *προίεμαι*) *τὰς ἀφορμὰς δι' ὧν || τὸ αὐστηρότερον ὑπὸ τῶν πρὸ ἐμοῦ || Αὐτοκρατόρων σταθὲν φιλανθρωπό||τερ[ο]ν ἑρμηνεύω. ὅνπερ τοιγαροῦν || τ[ρόπ]ον οὔκ εἰσιν νόμιμοι κληρο||[νόμ]οι τῶν ἑαυτῶν πατέρων οἱ τῷ || [τ]ῆς στρατε[ί]ας χρόνῳ ἀναλ[η]μφθέν||τες, ὅμως κατ[ο]χὴ[ν] ὑ[πα]ρχόντων || ἐξ ἐκείνου τοῦ μέ[ρ]ους τοῦ διατάγμα||τος, οὗ καὶ τοῖς πρὸς [γ]ένους συνγενέσι || δίδοται, αἰτεῖσθαι δύνασθαι καὶ αὐτοὺς κρε[ίν]ω.*
>
> I know, my dear Rammius, that persons whom their parents in the period of their military service acknowledged have been debarred from succeeding to theirs fathers' property, and this measure did not appear to be harsh as their action was contrary to the military discipline. But for my own part I have much pleasure in enunciating a principle which allows me to interpret more humanly the rather strict rule established by the emperors before me. For although those who were thus acknowledged in the period of military service are not legitimate heirs of their fathers, nevertheless I decide that they also are able to claim possession of the estate through that clause of edict which gives this right to kinsmen by birth. (trans. by A. S. Hunt & C. C. Edgar, *Loeb*, with tiny alterations).

In doing so the emperor put forward that he favours the more humane interpretation of the law which barred illegitimate children from their fathers' estate. This is, however, an euphemism. Hadrian does not interpret, he radically changes the law, opening a new possibility to claim inheritance together with the *cognati*, in the 3rd class of the edict.

We may conclude recalling that the traditional and conservative Roman jurisprudence – by its character hesitant and resistant to any revolutionary changes abrogates the well-rooted norms not directly, but somewhat softly by limiting their applications or granting exceptions. And such was the function of *humanum* – *inhumanum* in the legal sources.

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