

Guardianship in Ancient Societies: Concluding Remarks

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The papers collected in this volume represent a valuable attempt to provide a cross-cultural survey on the topic of legal incapacity in a broad-ranging variety of ancient societies, from Old Babylonia and Late Bronze Age Syria to the late Roman Empire and fifth-century Armenia, to Jewish law, and explore whether, and to what extent, guardianship was a characteristic feature of those societies and what were the prevailing models and the specific forms shaping it from an institutional point of view.

As is pointed out in many papers, unlike what we are accustomed to in the contemporary world, at least in Western countries, in ancient societies, where life expectancy was low and famine and wars were endemic, the protection of minor children and, to a lesser extent depending on place and time, of women often became a matter of public concern and required the development of legal principles and practical regulations to enforce control over the activity of guardians and prevent abuse against those they were meant to take care of.

The significance of the issue is highlighted by the sheer amount of the documentation: in Athenian judicial oratory λόγοι ἐπιτροπικοί were recognized as a distinct, well-defined subgenre,¹ while, as emphasised in her chap-

¹ HARRISON 1968, 96-97 n. 1.

ter by E. Jakab, books 26 and 27 of the *Digest* testify in quantitative terms to the central role of *tutela* in the everyday life of the Roman Empire and to the ever growing body of legislation and jurisprudence that was dedicated to it. Likewise, under the influence of the Greek and Roman model, all legal, religious and economic problems arising from guardianship were intensively discussed in Talmudic literature. But already in the Code of Hammurabi a widowed mother could remarry only with the consent of the court, while an inventory of the estate of the deceased had to be drafted.

Of the fifteen chapters, which reflect a plurality of approaches and methodologies, after N. Cohen's introductory paper providing an insight into the questions modern legislation on guardianship has to address while adapting it to the quickly changing needs of contemporary society, three chapters offer an overview of guardianship (or its absence) in Egypt, in Greece and in Rome (Depauw, Maffi, Jakab) and six specifically focus on the guardianship of minors (Fijałkowska, Thür, Chevreau, Kruse, Gagliardi, Radzyner). D. Kaltsas and P. du Plessis, moreover, respectively look into Ptolemaic legislation on the *κυρίαία* of women and perpetual guardianship of women in Gaius and Roman law, whereas E. Cohen deals with the legal incapacity of slaves. On a different plane, K. Buraselis and A. Mardirossian analyse the significance of royal guardianship in the Macedonian and Hellenistic dynastic monarchies and the role of tutorship in creating political and social ties between princely families and clans in Arsacid Armenia. In his stimulating contribution, K. Buraselis in particular shows that the vocabulary of «regency» was drawn from the terminology of guardianship in the private sphere and that, the kingdom being conceived as an *oikos*,² even the role of the king could be presented in early Hellenistic literature as a kind of guardianship of the state. Interestingly, the earliest attestation of this linguistic use I am aware of is in Her. 5.30.2 referring to Aristagoras of Miletus, τῆς Μιλήτου ἐπίτροπος, in the *logos* about the Ionian revolt.

Several threads connecting the different chapters emerge. I would like to single out five issues as topics of possible future discussion.

The *first*, concerning in particular the Graeco-Roman world, is the importance of institutional mechanisms. They have also been singled out by U. Yiftach in his *Introduction*. In fourth-century Athens, as reflected above all by the speeches of the orators, the guardianship of minors was regulated by an articulated body of laws: ἐπίτροποι could be appointed by the father (*inter vivos* or by

² On this point see also FARAGUNA 1998.

will) or as the next of kin or, should there not be legitimate claimants, by the archon – in the same way as in Roman law it is possible to distinguish between *tutela testamentaria*, *legitima* and *dativa*, and in Talmudic literature a person might become *epitropos* either by appointment by the father or by the court (as well as «through performance of an action») –, and the guardian had to be officially registered. He had to provide for the ward’s maintenance and education, represent him legally, manage his property either by leasing it out through the archon against adequate real security (the modalities of the auction are discussed by G. Thür) or administering it himself with profit and loss being charged to the ward, and render the accounts once his function expired. As emphasised in the chapters by Thür and Maffi, many procedural and institutional details are illuminated by Hypereides’ recently published long fragment of the speech *Against Timandros*.³ A set of actions was moreover meant to protect the ward’s person and property. The papers of E. Chevreau and E. Jakab demonstrate that the same matters, the appointment of guardians, the offering of adequate security, the obligation to present the accounts, the risk of disputes arising from the guardianship and rules concerning exemption, were extensively dealt with, although often with different solutions, in Roman classical law. (A. Radzyner shows to the contrary that in Jewish law the «function of the *epitropos* relates mainly to managing the assets of the wards, and not to raising or to educating them» [p. 247]). But, in a different geographical context and within a different legal tradition, registration of the appointed guardian at least in some, though not in all cases (Kruse notes that «if there was a male person available who was willing to take care of the wards and to assume the role as head of the family it was not necessary to appoint a guardian for these children» [p. 179]), and direct involvement of, and control by, the local authorities also applied in Roman Egypt, where, to quote T. Kruse, leaving aside the general competence of the *praefectus* as «the responsible authority for the appointment (of guardians) of minors in the provinces» (and not only in the case of Roman citizens but also in that of *peregrini*), «the local officials», when prompted or informed, «undoubtedly possessed quite far ranging competences and possibilities to control guardianships of minors» (p. 186).

A *second* strand revolves around historical development. On a long time frame it emerges again in Egypt where, if I have interpreted Table 1 in M. Depauw’s chapter correctly, Greek and Roman rule in the course of time gradually led to a loss of independence in legal matters for women who more and more had to rely on their *κύριος* (significantly not mentioned in Demotic contracts). A si-

³ HORVATH 2014, 184-188.

milar trend can be detected in P. Eleph. Wagner 1, dated to 241/0 BCE, where, in D. Kaltsas' reading, the father's (or relatives' or possibly legal guardian's) role in giving women in marriage was reaffirmed against alternative practices such as self-ἔκδοσις, reflecting «the change in sociological conditions from the ancient *polis* to the kingdom of the Ptolemies» (p.158). Similarly, evolution is even clearer in the case of Roman *tutela*. As stressed by E. Chevreau, whose analysis from the view angle of *excusationes tutelae* has much broader implications, starting from the Principate guardianship began to be perceived not as a *potestas* designed to preserve the family's property but as a charge (*munus, officium*) meant to safeguard the interest of the ward entailing increasing responsibilities and public control and from which it became more and more difficult to be exempted. L. Gagliardi in turn has shown that starting from the second century CE (and not only after 390 CE, as is often held), contrary to Roman legal tradition, lacking testamentary or legitimate guardians, the mother herself could apply to the emperor to be appointed as guardian of her children.

A *third* point can be identified in the gap between legal norms and social practices. A case in point is provided by Greek marriage contracts in Ptolemaic Egypt, as described by D. Kaltsas. Despite the need to be represented by a κύριος, the bride's participation in both forms of contracts – formal declaration of the “handing over” (*ekdosis*) of the bride; receipt for the dowry addressed to the person who was giving it – could become remarkably active and women could perform their own *ekdosis* themselves or pay their own dowry. I incidentally note that similar developments can be observed also in early Hellenistic Greece where not rarely women appear to be in control of large sums of money and transact financial operations on their own having the κύριος involved only when his presence was strictly necessary from a legal point of view. A striking example is offered by a honorific decree of Orchomenos in Boeotia collecting a dossier of documents concerning Nikareta, a rich lady from Thespies who had advanced a public loan to the *polis* of Orchomenos. When the city defaulted she never gave up her claims and personally filed five protests until, after extended negotiations, an agreement (and contract) was reached and fourteen citizens of Orchomenos offered personal guarantee that the loan would be reimbursed, this time however παρόντος αὐτῆι κυρίου τοῦ ἀνδρός Δεξιππου Εὐνομίδου (*IG VII 3172, B, ll. 2-4; cf. 49-51*).⁴ In the same manner, in the late fourth-century register of sales from Tenos, where most of the recorded sales are in fact credit transactions spanning from 100 to

⁴ MIGEOTTE 1999.

8000 drachmai, women often appear both as «vendors» and as «purchasers» of real properties and their *κύριος* is mentioned only in 9 cases out of 24 (IG XII 5, 872).⁵ The development in legal systems of mechanisms to adapt traditional juridical principles to changed societal reality is also the focus of E. Cohen's paper. He demonstrates how, despite their complete legal incapacity, slaves, and especially some categories of slaves such as those who dwelt separately from their owners, could operate businesses independently of their masters⁶ and, for instance, overcome their inability to foreclose on land and buildings by using Athenian citizens as agents.

A *fourth* connecting thread lies in the ultimate objectives underlying the different forms of guardianship in the societies considered. Concerning the widow installed as “father and mother” of the household L. Fijałkowska observes that «the title of “father and mother” is primarily connected with the intention to keep the estate undivided, thus securing the support of the widow... and does not automatically mean that she becomes guardian of the children» (p. 34-35). T. Kruse on his part underlines that the administrative control of guardianship in Roman Egypt was intended to «secure the smooth running of economic activity concerning the property of the minors rather than any concern for the minors' own well-being [p. 181]» (similarly Radzyner in his chapter on guardianship in Talmudic literature argues that «all the activities indeed relate to managing the orphans' property and their finances in their best interests» [p. 260]). A relevant example of how public interest in legal issues could be intended to guarantee public order is provided by a second-century CE document where the appointment of a guardian was petitioned by one of the *creditors* of the deceased father (and not by the family) (P.Ryl. II 121, ll. 8-12). As for Greece and Rome, the guardianship of minors was first of all conceived as a device to ensure the protection of their persons and, above all, property, with some different nuances. In Athens, for instance, both adoption and guardianship were primarily a means to keep the number of *oikoi* stable and to prevent them from becoming *ἔρημοι*, a theme often featuring in Isaeus' judicial speeches.⁷

⁵ ÉTIENNE 1990, esp. 11-50; FARAGUNA (forthcoming).

⁶ On the discussed meaning of *χωρὶς οἰκοῦντες* in Athens see most recently CANEVARO & LEWIS 2014, who make a distinction between slaves who «dwell in separate residences from their owners and more-or-less ran their own affairs» and *χωρὶς οἰκοῦντες*, manumitted slaves who had been freed from any obligations towards their former masters (as opposed to those still subject to *παράμονή-οbligations*).

⁷ FERRUCCI 1998, 188-200.

My *fifth* point concerns the interaction between different legal cultures and, so to speak, the question of cultural transfers which has been raised in several papers, although with some important exceptions (namely royal *epitropeia* in Macedonia and the Hellenistic kingdoms), almost invariably with an open-ended, if not negative answer. L. Fijałkowska has noted that the widow installed as «father and mother of the estate» in Late Bronze Age Syria shows striking similarities with the «fatherly authority» with which a woman could be entrusted in contemporary documents from Nuzi, a city located east of the Tigris river, and wonders whether this is «just a coincidence, or a result of reception or exchange» (p. 41). Another obvious region where this phenomenon can be observed is Ptolemaic (and Roman) Egypt. Here, in Egyptian tradition «women had the right to appear as parties in contract without a guardian, probably already from the Old Kingdom onwards», but, in M. Depauw's words, «in some contexts», such as land transactions, contracts and the courts, «and perhaps more in later periods under Greek influence, women in fact may not have done the dirty job themselves but relied on men» (p. 51). Literacy, though important, does not seem to be the decisive factor in this respect. Furthermore, the problem features prominently in the papers on law in Rome and the Eastern provinces by E. Jakab and L. Gagliardi. The latter raises the question whether the institutions of the *epakolouthetria* (ἐπακολουθήτρια) attested in documents on papyrus from ca. 130 to the end of the third century CE and the mother acting as administrator of her children alongside the guardian in Rome were in some way connected as for their origin but concludes that they must have been independent, albeit similar developments whose rationale can be explained with the specific contexts of the two legal, and social, systems. Likewise, E. Jakab underlines the inherent contradiction between the tendency in Roman provincial administration to endorse local legal principles in family matters and the fundamental rule in Roman law that *tutela* (with the exceptions illustrated by L. Gagliardi) *plerumque virile officium est*. How flexible was the boundary line beyond which the basic tenets of Roman law could not be renounced was a matter of controversy, although whether the individuals concerned were *cives Romani* or *peregrini* was of course one of the decisive criteria.

We thus inevitably come to the crucial question underlying the objectives of the *Legal Documents in Ancient Societies* series. The aim of our research group is to investigate the legal and administrative systems in a variety of societies and civilizations of the ancient world through a document-based approach *in a comparative perspective*. We therefore have to assess and discuss whether such approach has turned out to be profitable also with regard to the topic of

guardianship. The main question is whether guardianship was an institution that can be found in all ancient legal cultures or whether it is primarily a product of the Graeco-Roman world. In the latter case the usefulness of our comparative approach will for once mainly lie in an analysis *per differentiam* and we shall have to try to explain the reasons for such differences and diversity.

As a matter of fact, the two papers specifically focusing on the Ancient Near East and Egypt have provided little evidence for guardianship in those cultures. In the fourteenth-century Syrian tablets from Emar and Ekalte the widow installed as “father and mother” of the estate was hardly a guardian, while the norm, as can be inferred from wills, seems to have been that at the premature death of a man his widow more or less automatically became guardian of the children and administrator of the husband’s estate. Apart from some specific provisions, guardianship is not regulated in the Laws of Eshnunna or the Code of Hammurabi. The same picture emerges from Egypt where women did not need a male guardian to represent them legally and could act as guardians of their minor children (with some limitations until the *Constitutio Antoniniana*, as argued by L. Gagliardi) and where the oldest daughter could take the role of heir in case there were no sons. In both cases, this might be connected with the nature of the sources that have come down to us, but, especially in the case of Egypt, in the light of the rich available documentation that offers a fairly coherent picture over a long span of time it is rather improbable. The inescapable conclusion seems therefore to be that there was no need to appoint guardians because women had legal capacity and could act in their own right.

The next step would be to offer some possible explanations for such societal reality. During the meeting held in Jerusalem S. Demare-Lafont pointed out that as far as women are concerned there is a strong contradiction between the patriarchal nature of Ancient Near Eastern societies and their acceptance of women’s legal capacity as a rule and suggested that it had to do with the transmission of the estate within the family. As for orphans she stressed that guardianship could be made unnecessary by adoption or *de facto* upbringing by some relatives.

I am not obviously competent enough about the ancient Near Eastern documentation and social structure and I would never dare to attempt to suggest an alternative hypothesis but my impression is that the patriarchal organization of society hardly distinguishes the Ancient Near East from other Mediterranean societies. Family and property law in Greece, especially in Athens, where the estate could only be controlled by males, were precisely designed to guarantee the continuation of the existence of the *oikos* throughout the generations and the transmission of the family estate from father to son(s), or to grandson(s) via the *epikleros*. Legal institutions such as guardianship, adoption (which

again was controlled by the *polis* through the archon) and the *epikleros* (or *patrouchos/patroiokos*) were clearly functional to this aim. In this respect, it needs to be stressed, as U. Yiftach does in his *Introduction*, that the earliest attestation of guardianship takes us to the origins of Greek society, as it is to be found in the *Odyssey* with reference to Mentor, to whom Odysseus, “on leaving, had entrusted (ἐπέτρεπεν) his whole house” and who had to be obeyed and to keep all things safe (Hom. *Od.* 2.225-227: Μέντωρ ὅς ὁ Ὀδυσῆος ἀμύμονος ἦεν ἑταῖρος, καὶ οἱ ἰὼν ἐν νηυσὶν ἐπέτρεπεν οἶκον ἅπαντα, πείθεσθαί τε γέροντι καὶ ἔμπεδα πάντα φυλάσσειν). My own guess, as a Greek historian, is that what made the Greek (and Roman) world different was not a merely economic and/or social factor but a political one, namely the notion of «citizenship», *politeia*, which emerged in Greece probably already in the seventh century BCE,⁸ with all the legal privileges attached to it, ἔγκλησις, i.e. the legal ability to own immovable properties, first of all. The city for this reason came to exert strict control on its *politai*, among other things with a view to preserving their number and making the political system viable. It is thus not surprising that, in Aristotle’s view, Sparta provided a textbook example of a dysfunctional *polis* as in the course of time land came to be concentrated in a limited number of hands to the point that the total number of citizens had plummeted from 10.000 at the beginning of the fifth century to 1200, and women, who for some disputed legal and social mechanisms controlled almost two fifth of the land, significantly contributed to this process (Arist. *Pol.* 1270a15-39).⁹ Guardianship, in other words the protection of the property held by women and minor children, was therefore one of the legal tools that made it possible to counter such undesired developments.

If this is correct, a new problem arises, for we have to account also for the case of Egypt, where first the Macedonian and then the Roman rulers took great pain to regulate guardianship. During the discussion at the meeting (and in his *Foreword*), U. Yiftach pointed out that few areas of the administration in Egypt were as closely scrutinised as guardianship. Was this due to the continuing existence of *polis* institutions outside the framework of the *polis* or to some other factor? Was Egypt an exception or does the same phenomenon occur also in other provinces of the Eastern Roman empire? I am obviously not able here to offer an answer to these far-reaching questions and, while once more pointing to the fruitfulness of the cross-cultural, cross-interdisciplinary approach of *Legal Documents in Ancient Societies*, I leave the matter for others to consider in the future.

⁸ DAVIES 2004; cf. also FARAGUNA 2015.

⁹ HODKINSON 2000, 65-112; 2004.

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