

# The Evolution of Roman Guardianship through the Mechanism of *excusatio tutelae*

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## ABSTRACT

*Designed as closely related to patria potestas, guardianship was formally understood as an aspect of potestas and a right exercised in the interest of the protected person until she or he reached puberty. Starting from the Principate, the initial approach to guardianship and to the role of the guardian starts to change. Guardianship potestas tended to shift into a guardianship similar to a charge (munus). Imperial policy then tended to harmonize the three types of guardianship following the model of the guardianship by magisterial appointment, in other words the idea was to coerce the guardian and in particular the testamentary guardian into making difficult for him to avoid the burden, accepting it and managing it efficiently. The purpose of this paper is not to analyse Marcus Aurelius' generalisation (followed through by successive emperors) of the system of excuses, extended it to all types of guardianship, and forcing guardians to accept the office. This contribution rather focuses on the search for the correct balance between the wards' interests and the guardians' capacity to carry out his mandate effectively and efficiently. This is what we can deduct from a study of the rich casuistic dealing with the excuse grounds and from the shift of guardianship towards the category of civilian charges.*

Guardianship was originally created to protect persons lacking practical and legal experience because of their age, their sex or their mental condition. In Roman law, this protection applied only to the property and did not concern the physical custody of the people concerned.

Historically, Roman guardianship was created and shaped in the framework of the so-called agnatic family, a civil kinship system in which all members were under the control of the *paterfamilias* or would have been under such control if he had been alive.

At the death of the *paterfamilias*, all those under his power (children or spouses) became *sui iuris*, meaning they acquired a full legal capacity. The emergence of guardianship for young children (belonging to the legal category of underage) was justified by weakness due to age; perpetual guardianship of women on the other hand was explained by the «weaker sex» assumption. Closely related to *patria potestas*, guardianship was formally understood as an aspect of the *potestas* and a right exercised in the interest of the protected person until she or he reached puberty (twelve years for girls, fourteen for boys).

Such is for example the definition given by the jurist Servius Sulpicius and quoted by Paulus (38 *ad ed.*) in D. 26.1.1 pr-1:

Tutela est, ut Servius definit, vis ac potestas in capite libero ad tuendum eum, qui propter aetatem sua sponte se defendere nequit, iure civili data ac permessa. 1. Tutores autem sunt qui eam vim ac potestatem habent, exque re ipsa nomen ceperunt: itaque appellantur tutores quasi tutores atque defensores, sicut aeditui dicuntur qui aedes tuentur.<sup>1</sup>

In Rome there existed three types of guardianship: the testamentary guardianship (*testamentaria tutela*), the statutory guardianship (*legitima tutela*), and guardianship by magisterial appointment (*dativa tutela*). The first two were older and the third one was created more recently. It was an alternative nomination mechanism intended to compensate the absence of the other two. As a matter of fact, the *lex Atilia* (186 BC) provided for the nomination of a guardian—by the Urban praetor with the assistance of several tribunes of the Plebs—if nobody had been nominated by will or if there were no civil parents or no former master in the case of freedmen. This law covered Rome and Italy and another one (*lex Iulia Titia*) organized the nomination of a magisterial

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<sup>1</sup> “Tutelage is, as Servius defines it, force and power granted and all owed by the civil law over a free person, for the protection of one who, on account of his age, is unable to protect himself of his own accord. 1 – So tutors are those who have this force and power, and take their name from the office itself; therefore, they are called ‘tutors’, that is, *tutores* – protectors – and defenders, just as sacristans are called *aeditui* because they protect a temple or *aedes*”. In this article, we use the English translation of the Digest by A. Watson (See WATSON 2008).

appointed guardian in Roman provinces according to similar principles. The aim of such dispositions was to make sure that the estate of the ward or of the woman would not be left without protection and supervision; such was the situation before the empire.

Starting from the Principate, the initial approach to guardianship and to the role of the guardian started to change. Guardianship conceived as a *potestas* gradually turned into a charge (*munus*). The interest of the ward became the priority, which had consequences on the vision of the role of the guardian itself. This evolution took place in the context of an increasing interference of the Emperor in family privacy, starting with the Augustan reform of family law aiming at moralising the Roman family (and at fighting degeneration).

In the field of guardianship, imperial policy thus tended to harmonize the three types of guardianship according to the model of guardianship by magisterial appointment. In other words, the goal was to compel the guardian, especially the testamentary guardian, to accept this duty and to fulfil it accurately. It is in this context that Marcus Aurelius established the ward praetor (*praetor tutelaris*) who dealt with the affairs of underage (appointment and supervision of guardianship).

In order to illustrate the reinforcement of the tutor's burden, I have chosen to study the question from the perspective of the *excusationes tutelae*, which were originally created in the context of the *dativa tutela*. This paper will focus on guardianship granted to minors under the age of puberty and *alieni iuris*. Women's guardianship will not be discussed because it evolved in a specific way and was not directly affected by the development of excuses used by tutors to avoid this burden.

As early as Claudius and more significantly with Marcus Aurelius, the *abdicatio tutelae*<sup>2</sup> was gradually replaced by a broadening of the excuse system, which eventually applied to any type of guardian.<sup>3</sup> In other words, the testamentary tutor who was traditionally able to refuse the duty for which he had been called no longer enjoyed that discretionary decision. The nature of the sources dealing with this aspect (i.e. rescripts of the emperor and *libri singulares de excusationibus tutelarum* drafted for the practitioners by the jurists of the Imperial council) is an indication of the importance imperial legislation dealing with the appointment and management of minors' guardianship.

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<sup>2</sup> Traces can be found in Cicero's letters (*Att.* 6.1.4) and during Augustus' reign (*BGU* IV 1113; WILCKEN-MITTEIS 1912, II, 2, n. 169). See BONFANTE 1963, 583-584; AMELOTI 1966, 145-146.

<sup>3</sup> See VIARENGO 1996.

Moreover the rich diversity of casuistry developed around *excusationes tutelae* illustrates the inclination of emperors to develop a well-balanced vision of guardianship.

I will develop the two following points: the evolution of guardianship and the cases of excuses.

## 1. A PRIVATE OFFICE TURNING INTO A LEGALLY BINDING MECHANISM

Masurius Sabinus in his treatise on civil law wrote:

In officiis apud maiores ita observatum est: primum tutelae, deinde hospiti, deinde clienti, tum cognato, postea adfini. Aequa causa feminae viris potiores habitae pupillarisque tutela muliebri praelata. Etiam adversus quem adfuissent, eius filiis tutores relictis in eadem causa pupillo aderant.<sup>4</sup>

This text emphasizes the importance of the role of guardians, called *officium* by the famous jurist of the early Principate, who placed them under the high protection of *mores*. In such a context, the unjustified refusal of the guardian to undertake the office assigned by will or by way of agnatic relationship, would provoke social reprobation. Regarding statutory guardianship, Pasquale Voci rightly pointed out that it was not a matter of choice because it was intrinsically linked to the agnatic relationship and was based on the natural solidarity between members of the same family.<sup>5</sup>

The testamentary guardian could refuse guardianship (*abdicatio tutelae*), as shown by the phrase *si volet* included in the appointment of the guardian.<sup>6</sup> Testators generally added rewards and gifts for the tutor appointed by will and they also provided for a clause of reversion of gifts with regards to cases in which the tutor would quit his tutorship.<sup>7</sup>

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<sup>4</sup> Gel. 5.13.5: “In the matter of obligations our forefathers observed the following order: first to a ward, then to a guest, then to a client, next to a blood relation, finally to a relation by marriage. Other things being equal, women were given preference to men, but a ward, who was under age took precedence of one who was a grown woman. Also those who were appointed by will to be guardians of the sons of a man against whom they had appeared in court, appeared for the ward in the same case” (English translation by C. Rolfe, see ROLFE 1961). See also I. 1.13.1-2.

<sup>5</sup> VOCI 1960, 66.

<sup>6</sup> Africanus (8 *quast.*) D. 26.2.23.

<sup>7</sup> Paulus (9 *Resp.*) D. 27.1.36 pr.: *Amicissimos quidem et fidelissimos parentes liberis tutores eligere solere et ideo ad suscipiendum onus tutelae etiam honore legati eos persequi ...* (“Parents usually choose tutors for their children among their most faithful friends and then urge them to take on the burden of tutelage by rewarding them with a legacy ...”).

Both testamentary and statutory guardianships were designed as offices. Therefore it was difficult to avoid them without facing moral and social opprobrium.

The situation was different for the *tutela dativa*, which was a sort of expedient created by law in order to make up for the lack of either testamentary or legal guardian; it could not be avoided without an agreement of the magistrate and for exceptional reasons making it absolutely impossible to manage the guardianship. Obviously, this kind of guardian did not enjoy the *abdicatio tutelae* and had to justify to the urban praetor and the tribunes the personal or material reasons that prevented him from managing the ward's property. As a matter of fact, this private office ordered by the magistrate became gradually legally binding.

In practice, guardians probably paid little attention to the management and protection of their ward's property. This might explain why careless guardians faced increasing responsibility under imperial law and especially after Claudius. Two fragments by Ulpian provide a better understanding of the situation. The first one seems to deal with the negligence of the *dativus tutor*.<sup>8</sup> The jurist has in mind the situation of a guardian appointed by a magistrate, who did not give excuses within the legal period and did not engage in the process of management. Consuls decided that he would bear the risks of the failure to manage. The fact that consuls are mentioned implies that Ulpian may have referred to the state of the law in Claudius' time. In fact the Emperor had deprived the praetor and the tribunes of the nomination of guardians and transferred it to the consuls. The text should be studied in connection with another fragment of the Severan jurist in which he explains that an *actio tutelae directa* cannot be brought against the guardian who has failed to manage a ward's property. This is why the praetor delivers an *actio utilis* against one who has failed to manage the pupil's property.<sup>9</sup>

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<sup>8</sup> *Vaticana Fragmenta* 155: Item. Igitur observandum deinceps erit, ut qui tutor datus sit, si quas habere se causas excusationis arbitrabitur, adeat ex more. Nec in infinitum captiosi silentii tempus, per quod res interfrigescat, concessum sibi credant: hi qui Romae vel intra centesimum fuerint, sciant in proximis diebus quinquaginta se excusationis causas allegare debere aut capessere administrationem; ac nisi id fecerint, in ea causa fore, in qua sunt, de quibus consules amplissimi decreverunt periculo suo eos cessare.

<sup>9</sup> Ulpianus (79 *ad edictum*) D. 46.6.4.3: Sed enim qui non gessit, omnino non tenebitur: nam nec actio tutelae eum qui non gessit tenet, sed utili actione conveniendus est, quia suo periculo cessavit: et tamen ex stipulatu actione neque ipse neque fideiussores eius tenebuntur. compellendus igitur erit ad administrationem propterea, ut stipulatione quoque ista possit teneri ("One who does not administer will in no way be liable; for the action on tutelage does not lie against a non administrator; but he is to be proceeded against by an *actio utilis*; for it is at his own peril that he failed to act; nevertheless, neither he nor his sureties are suitable by the action on the stipulation. Hence, he will have to be compelled to assume administration so that he too can be liable on the stipulation").

This imperial provision focuses on the careless guardian who did not keep his promise to maintain the ward's property intact (*satisfactio rem pupilli salvam fore*); such a promise was made mandatory by Emperor Claudius for statutory guardians or guardians appointed without inquiry and in case of multiple tutors.<sup>10</sup>

Starting with the reign of Claudius, a strong concern for protection of the minor's estate integrity against the careless guardian developed. This explains the growing tendency of guardians trying to escape the heavy and onerous burden of guardianship. They had to manage the property with due diligence and to prepay some expenses. Besides, if a dispute arose during or at the end of the guardianship, the guardian could be sentenced to pay damages and had to suffer *infamia* resulting from the *actio tutelae*.

For example, Modestinus in his treatise on excuses (which of course belongs to a later period) mentions the binding character of being appointed as a guardian. In fact, the *de cuius* had appointed his worst enemy as a guardian for his underage son in order to overwhelm him with management charges and financial losses.<sup>11</sup>

It would be far-fetched to think that all inactive guardians acted in bad faith. The situation became more difficult for all types of guardians. It seems that around the second century, testamentary guardians had to appear before the magistrate in Rome or in the provinces in order to be exempted from their duty. The *abdicatio tutelae* seems to have been gradually absorbed by the system of *excusationes*.<sup>12</sup> Actually, once appointed, the guardian could hardly avoid his office. Inactivity then became a way to elude the management of guardianship while showing one's willingness not to assume the role of guardian.

Marcus Aurelius is generally considered as the one responsible for creating the system of excuses. It originally had been restricted to guardianship by magisterial appointment and had been extended to all types of guardianships. Guardianship of the underage was made compulsory except if the guardian could raise an excuse. Some indication of the content of the imperial provision can be derived from a passage of the fourth book of Modestinus' treatise on excuses. According to the *Oratio principis* of Marcus Aurelius, a person who had been appointed as a guardian in the city where he resided or within a 100 miles-area, was given a period of 50 days to present his excuses before the *praetor tutelaris*. Beyond 100 miles from the place of nomination, he was

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<sup>10</sup> See for example I. 1.24.

<sup>11</sup> Modestinus (2 *excusationum*) D. 27.1.6.17.

<sup>12</sup> AMELOTTI 1966, 146.

given 30 days, with an additional day to travel 20 miles.<sup>13</sup> This time period was counted in continuing days from the moment the guardian was informed of its nomination.<sup>14</sup> Besides, the text states that if the praetorian *decretum* denied the exemption, the guardian could appeal against it. This derives from a constitution by Alexander Severus:

C. 5.62.6 pr-1: Quinquaginta dies, qui praefiniti sunt ad professionem excusationis his qui tutores seu curatores dati sunt, ex eo die cedere, ex quo decretum praetoris aut testamentum parentis notum factum erit ei qui ad munus vocatus fuerit, ipsa constitutio quae hoc induxit sanxit. 1. Sed si quis in eius temporis computatione ab eo cuius de ea re notio fuit iniuriam passus non provocavit, adquiescere rebus iudicatis debet. Alex. a. Maximo. <a 224 pp. iiii non. mai. Iuliano et Crispino cons.>.<sup>15</sup>

This text points out that one who had been appointed as a guardian had to show a steady will to give excuse before the competent magistrate.

A rescript of Septimius Severus and Caracalla helps to specify the stages of the *excusatio* procedure. Although there is no explicit reference to Marcus Aurelius' provision, the individual case can be linked to this Emperor's decision.

The rescript given by both Septimius Severus and Caracalla provided that the waiver from guardianship is not automatic, even though there is a ground for exemption.

C. 5.62.3: Excusationis quidem tuae, si ingenuus libertino tutor datus es, certa causa est. sed cum te praeses provinciae audiendum non putaverit propter praescriptionem, quasi tardius adires, nec a decreto provocaveris, intellegis parendum esse sententiae. Sev. et Ant. aa. Crispino. <a 206 pp. id. mart. Albino et Aemiliano cons.>.<sup>16</sup>

<sup>13</sup> Modestinus (4 *excusationum*) D. 27.1.13.2.

<sup>14</sup> Modestinus (4 *excusationum*) D. 27.1.13.9.

<sup>15</sup> C. 5.62.6: "That the period of fifty days fixed for giving an excuse by those who are appointed as guardians or curators commences to run from the time that the order of the praetor or the testament of the parent will be made known to the persons called to perform that duty, is stated by the same constitution which fixed the time of fifty days. 1. And if anyone injured by the decree of the praetor who had jurisdiction in the matter does not appeal from him within that time, the decree must be obeyed. Promulgated on 5 May 224". It must be noted that this imperial constitution seems to be in the continuity of the preceding text in which the same Emperor refers to Marcus Aurelius's *Oratio* which would have denied freedmen (when appointed guardians of their *patronus*) the benefit of any type of excuse. See also a rescript by Diocletian and Maximian (C. 5.62.18), which refers to the legal time period for the excuse procedure set up by Marcus Aurelius.

<sup>16</sup> C. 5.62.3: "If you were appointed as guardian for a freedman, but you are a free born person, you have a good excuse (for not acting). But since the provincial governor of the province thought that he should refuse to listen to you because the time for giving an excuse had expired when you went before him, and you did not appeal from that order, you know that the decision must be obeyed. Promulgated on 15 March 206".

In that case, a free man was appointed as guardian of a freedman. He did not even start to administer the guardianship because he probably knew that this was a cause for exemption. He therefore decided not to appear before the provincial governor in order to be excused from the guardianship within the legal period. In such case, he was no longer allowed to submit his reasons for excuse and had to assume the burden and management of guardianship. He was probably compelled to bear also the potential consequences of his failure to act (*periculo suo cessare*). Exemption of guardianship was not automatic, even though there was ground for exemption.

Guardianship, whatever its form, had become a mandatory function. Only a *iusta causa* submitted to the *praetor tutelaris* in Rome or to the provincial governor, and a decree issued by the magistrate, could exempt the appointed guardian from his obligation.

Originally, accepting the burden of guardianship was a duty placed under the control of the *mores*; under the Empire, guardianship became a legally binding private charge. Legal sources show that on both terminological and substantial levels, guardianship and public charges had moved closer. The *tutela* was called *munus*,<sup>17</sup> *onus*<sup>18</sup> and *officium*. This shift in terminology is made clear in a text by Modestinus.

Modestinus (2 excus.) D. 27.1.6.15: Tutela non est rei publicae munus nec quod ad impensam pertinet, sed civile: nec provinciale videtur tutelam administrare.<sup>19</sup>

Guardianship was not a public charge but derived from civil law because the guardian received no compensation. The jurist means that management is nevertheless mandatory throughout the empire. The link established between guardianship as a private office and *rei publicae munus* was intended to reinforce its mandatory character and to justify the system of excuses.<sup>20</sup>

Marcus Aurelius generalized the system of excuses to all types of guardianship, and successive emperors extended it. Yet our contention is that it was not a deliberate attempt to force the guardians to accept the office, but rather a way to strike a balance between the ward's interests and the guardian's ca-

<sup>17</sup> See for example: Alexander Severus C. 5.62.8; Gordianus C. 5.62.12.

<sup>18</sup> For example: Alexander Severus C. 5.62.10.

<sup>19</sup> Modestinus (2 excus.) D. 27.1.6.15: "Tutelage is neither a public nor a remunerated charge, but a private one; nor is it considered a provincial charge to administer a tutelage". Concerning the authenticity of the fragment mentioned in Latin in a piece written by Modestinus in Greek (Παράδειγμα ἐπιτροπῆς): GERMINO 2007; MASIELLO 1983, 9, 38-41; GUZMÁN BRITO 1976, 174; VIARENGO 1996, 142.

<sup>20</sup> On this point: GRELLE 1961, esp. 328-329.



capacity to effectively and efficiently assume his function. This is what emerges from a study of the rich casuistic material about the grounds for excuse.

## 2. THE CASUISTRY OF EXCUSES: A REFLECTION ON A WELL-BALANCED VISION OF GUARDIANSHIP

The subject is well documented and occupies a prominent place in the major sources of Roman law (*Vaticana Fragmenta*, Theodosian Code, Justinian Code and Institutes etc.).

Two types of sources specifically deal with *excusatio tutelae*.

First there are imperial constitutions. Numerous rescripts, letters, and constitutions of the emperor from the second century AD onwards deal with excuses in the field of guardianship. Emperors gave their opinions in rescripts and usually referred to their predecessors' decisions (especially to those of Marcus Aurelius). *Excusatio tutelae* was thus a recurrent and controversial issue, addressed by emperors on a case-by-case basis.

The second type of sources is treatises on excuses written by the most famous jurists of the Severan dynasty, namely Paul, Ulpian and Modestinus.

Paul is the author of a *Liber singularis de officio praetoris tutelaris*, the second edition of which was published between 203 and 211 with the title *Editio secunda de iurisdictione tutelari*. The topic is identical to the *Liber singularis de excusationibus tutelarum* written during the reign of Septimius Severus and Caracalla.<sup>21</sup> There is also the *De excusationibus liber singularis* written by Ulpian, probably between 199 and 211.<sup>22</sup> Finally, Modestinus wrote a *De excusationibus* in six volumes, probably after 215, under Emperor Alexander Severus and was largely influenced by the works of Paul and Ulpian to which he referred.<sup>23</sup>

All of them belong to the larger category of practical treatises dealing with the *officia* of the magistrates and written by jurists under the Severan emperors.<sup>24</sup> They aimed at guiding practitioners in the intricacies of the procedure of excuses for guardianship. For example, Modestinus informs the reader that his work was intended to explain the complex character of this procedure to

<sup>21</sup> LENEL 1889, II, 850-856.

<sup>22</sup> LENEL 1889, II, 1798-1845.

<sup>23</sup> LENEL 1889, I, 54-69.

<sup>24</sup> See SCHULTZ 1946, 242-252; MASIELLO 1983, 12-16; MAROTTA 2004.

a certain Egnatius Dexter.<sup>25</sup> These works are full of references to the imperial legislation and, to a lesser degree, to Jurisprudence.

Let us now examine the different types of excuses developed in imperial provisions that endeavour to reconcile the minor's interests and the situation of the guardian. These *excusationes* can be divided into two main groups: those resulting from the guardian's physical or material incapacity and those deriving from pure privilege.

## 2.1. EXCUSES RESULTING FROM THE GUARDIAN'S PHYSICAL OR MATERIAL INCAPACITY

Guardianship was a temporary office that ended with the puberty of the ward<sup>26</sup>. This is why emperors granted a just cause of excuse to the guardian who was appointed in the same will first as a guardian and then as a curator, once the minor had reached puberty. In such case the guardian was excused from curatorship.<sup>27</sup>

Usually the presentation of excuses took place as soon as the guardian was informed or knew about his nomination, provided that he did not start managing the estate; if he did, he was no longer allowed to present his excuses.<sup>28</sup> The same is true if the appointed guardian had promised the father's ward during his lifetime that he would accept this burden.<sup>29</sup>

When they granted excuses, emperors took into account the physical and material impossibility for the guardian to accomplish that management. Such was the case for example in the following situations: old age (over 70 years),<sup>30</sup> hostility between the minor's father and the guardian,<sup>31</sup> lack of business experience and extreme poverty,<sup>32</sup> number of children,<sup>33</sup> number of already exist-

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<sup>25</sup> Modestinus (1 *exc.*) D. 27.1.1 pr.

<sup>26</sup> According to Gaius (1.168), the non-transferability of the ward's guardianship relied on the fact that it was a temporary office which ended when the male ward reached the age of puberty, as opposed to legal guardianship of women which lasted during their lifetime and could therefore be transferred for a profit.

<sup>27</sup> For instance: Imp. Diocletian and Maximian in C. 5.62.20.

<sup>28</sup> Modestinus (4 *exc.*) D. 27.1.13.12.

<sup>29</sup> Modestinus (6 *exc.*) D. 27.1.15.1.

<sup>30</sup> For instance: Mod. (2 *exc.*) D. 27.1.2 pr ; Philippus C. 5.67.1.

<sup>31</sup> Mod. (2 *exc.*) D. 27.1.6.17.

<sup>32</sup> For example: a rescript by Septimius Severus and Caracalla quoted by Ulpian (*liber sing. exc.*) D. 27.1.7; Mod. (2 *exc.*) D. 27.1.6.19.

<sup>33</sup> For example: a rescript by Septimius Severus and Caracalla C. 5.66.1.

ing guardianships,<sup>34</sup> nomination in a province far from the guardian's place of residence,<sup>35</sup> etc.

If someone acting in good faith raised an issue about the status of the *pupillus*, he should be granted exemption of guardianship.<sup>36</sup> Similarly in the case of a dispute about inheritance between an uncle designated as guardian in the will and the ward, the uncle should receive an exemption.<sup>37</sup> By contrast, if the dispute about inheritance did not involve all of the ward's property, the excuse had no just reason.<sup>38</sup>

Circumstances could change during the management, making it impossible to administer the ward's property. Emperors allowed the guardian to produce an excuse (*excusatio a suscepta tutela*) in case of absence *rei publicae causa*,<sup>39</sup> serious illness or insanity crisis. But this sort of excuse was granted for a limited time. The guardian was suspended during his absence and one year after his return,<sup>40</sup> or until he recovered; during the period of insanity a curator could be nominated.<sup>41</sup>

These rescripts show that emperors tried to find a just balance between the financial interests of the ward, especially the unitary and continuous management of his property by the same person, and major impediments preventing the guardian from performing his duties.

## 2.2. EXCUSES DERIVING FROM PURE PRIVILEGE OR IMMUNITIES

In this second category, the link between this type of excuse and the concern for protection of the ward's interests is not immediately clear. Excuse appears rather as a pure privilege given by the Emperor to the appointed person. In a way it reflects the generalization of excuses to any type of guardian.

The grounds for exemption based on privilege are numerous and the treatises on excuses listed them carefully (Paul, Callistratus, Ulpian, Modestinus). The persons enjoying this kind of privileges were for example: veterans,<sup>42</sup>

<sup>34</sup> For example: a rescript by Septimius Severus and Caracalla C. 5.69.1.

<sup>35</sup> A rescript by Septimius Severus and Caracalla quoted by Modestinus (2 *exc.*) D. 27.1.10.4.

<sup>36</sup> A rescript by Marcus Aurelius and Lucius Verus quoted by Modestinus (2 *exc.*) D. 27.1.6.18.

<sup>37</sup> Iulianus (20 *Dig.*) D. 27.1.20.

<sup>38</sup> Marcianus (2 *inst.*) D. 27.1.21pr.

<sup>39</sup> Gordianus C. 5.64.1.

<sup>40</sup> Gordianus C. 5.64.2.

<sup>41</sup> Paul (*lib. sing. exc. tut.*) D. 27.1.11; Modestinus (3 *exc.*) D. 27.1.10.8 and D. 27.1.12pr.

<sup>42</sup> See Caracalla C. 5.65.1; Mod. (3 *exc.*) D. 27.1.8pr, 2-6; Gordianus C. 5.65.2.

members of the praetorian guard,<sup>43</sup> members of the *fabrorum* corporation,<sup>44</sup> philosophers, grammarians, teachers of rhetoric, doctors,<sup>45</sup> law professors teaching in Rome,<sup>46</sup> athletes who had won a prize in the sacred games,<sup>47</sup> provincial priests (in particular those of Asia, Bithynia and Cappadocia),<sup>48</sup> some municipal magistrates<sup>49</sup> etc.

Emperors granted them on a case-by-case basis to certain categories of persons, which points to the existence of a *munus*. In other words, it raises the question of guardianship as a charge in the legal sense of the word.

From the point of view of the appointed guardians, it was a charge very similar to other *munera*, as shown by imperial rescripts. These sources display the constant interactions between emperors and people regarding the distribution of offices among provincial cities.<sup>50</sup> Citizens asked for tax reliefs and presented petitions, as can be seen from the several following examples.

Marcus Aurelius replied by rescript that an aedile could be appointed as a guardian, although aedileship entailed exemption from private charges.<sup>51</sup>

Likewise, Alexander Severus replied that colonists were not excused from civilian charges, therefore not from guardianship either.<sup>52</sup>

Gordianus mentions the case of someone who accepted guardianship although he could have availed himself of an excuse without losing his privilege.<sup>53</sup>

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<sup>43</sup> Ulp. (*lib. sing. off. praet. tut.*) D. 27.1.9.

<sup>44</sup> Callistratus (4 *cogn.*) D. 27.1.17.2.

<sup>45</sup> Modestinus (2 *exc.*) D. 27.1.6.1-11, 16. For further details, you may refer to NUTTON 1971; GERMINO 2007.

<sup>46</sup> Modestinus (2 *exc.*) D. 27.1.6.12.

<sup>47</sup> Modestinus (2 *exc.*) D. 27.1.6.14.

<sup>48</sup> Modestinus (2 *exc.*) D. 27.1.6.13.

<sup>49</sup> Modestinus (2 *exc.*) D. 27.1.6.16.

<sup>50</sup> On this point see: MILLAR 1983; FELICI 2006; JASCHKE 2006.

<sup>51</sup> Callistratus (4 *de cogn.*) D. 27.1.17.4: Is qui aedilitate fungitur potest tutor dari: nam aedilitas inter eos magistratus habetur qui privatis muneribus excusati sunt secundum divi Marci rescriptum (“Someone serving as aedile can be appointed tutor, although the aedileship is one of those magistratures which provide exemption from private *munera*, according to a rescript of the deified Marcus”).

<sup>52</sup> C. 5.62.8: Coloni (id est conductores) praediorum ad fiscum pertinentium hoc nomine excusationem a muneribus civilibus non habent ideoque iniunctae tutelae munere fungi debent. Alex. a. Maximo. <a 225 pp. iiii k. febr. Fusco et Dextro cons.> (“Colonists, that is to say, tenants of fiscal estates are not on that account exempt from civic duties, and they must, accordingly, perform the duty of managing a guardianship to which they may be called. Promulgated on 29 January 225”).

<sup>53</sup> C. 5.62.12: Voluntaria tutelae munera privilegiis nihil derogant. Gord. a. Valentino. <a 238 pp. xi k. nov. Pio et Pontiano cons.> (“A voluntary management of a guardianship does not abrogate any privileges. Promulgated on 22 October 238”).

Legally speaking, both emperors and jurisprudence classified guardianship in the category of civilian charges, probably as early as the end of the second century, in the context of a reassessment of the category of *munera* by the Roman jurisprudence<sup>54</sup>.

The classification of *munera civilia* organized by Hermogenianus illustrates the legal situation of late classical law in this field. According to him, *munera civilia* were attached either to the property or to the person. Guardianship is classified with personal charges (*Aeque personale munus est tutela*),<sup>55</sup> defined as follows:

Illud tenendum est generaliter personale quidem munus esse, quod corporibus labore cum sollicitudine animi ac vigilantia sollemniter exitit, patrimonii vero, in quo sumptus maxime postulator.<sup>56</sup>

This definition is similar to the one given by Modestinus (see above D. 27.1.6.15) who insisted that guardianship was a civil charge without compensation for the guardian.

The development of the system of excuses as a means to soften the mandatory character of the office has shifted guardianship towards public charges. Terminology and motives for excuses provide evidence of this shift and of the propinquity of exemption causes for guardianship and for other public charges. Therefore guardianship, which was initially an office based on agnatic relationship or on the testator's trust in the person of the guardian, became mandatory just like any other public charge related to the community. Guardianship, as a private charge, was then absorbed in the *munera publica*, just like all *munera civilia*. It is in that background that we should understand the introductory prologue of the title *De excusationibus tutorum vel curatorum* of the Institutes of Justinian: *nam et tutelam et curam placuit publicum munus esse*.<sup>57</sup>

<sup>54</sup> See GRELLE 1961.

<sup>55</sup> Hermogenianus (1 *Epit.*) D. 50.4.1.4.

<sup>56</sup> Hermogenianus (1 *Epit.*) D. 50.4.1.3: "In general, something is to be regarded as a personal *munus* if it regularly arises from bodily activity together with the conscientious exercise of the mental faculties; as a patrimonial *munus* if it particularly involves expense".

<sup>57</sup> I. 1.25 pr.

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