The End of *Tutela Mulierum**

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ABSTRACT

Despite the well-known weakening of the Roman guardianship of women by the early Principate, its final disappearance from Roman law has remained a mystery. In modern scholarship, the proposed dates for the abolishment of tutela *have ranged from the late third century to the early fifth, or to the claim that it just fell out of use without ever being formally abrogated. This article combines legal and papyrological sources to show that we can in fact establish the time when* tutela *was abolished in the reign of Constantine. It further places the disappearance of the guardianship in the broader context of the historical development of Roman law and the legal independence of women in the Roman world.*

Keywords: Roman women; guardianship; Roman law; papyri; Constantine

I INTRODUCTION: A LEGAL ENIGMA

Women had a remarkably strong position in Roman law. Especially in the imperial period, they could own substantial properties and use it fairly independently, even if they were married — something which is quite exceptional in European historical perspective. Yet for a very long time Roman law required adult women to have a male guardian (*tutor*). The guardian did not administer her property, but he had to endorse her major legal and financial transactions. Thus, she needed his authorisation (*auctoritas*) if she was drawing up a will, manumitting a slave, contracting an obligation or taking part in any of the old-style formal legal acts which the Romans were so fond of.[1] Notably, the guardian's consent was required if a woman wished to alienate real estate in Italy, and the human and animal workforce used to cultivate it. These items (called *res mancipi*) had been regarded the most vital in the old agrarian society. All the other types of property, like real estate in the provinces, gold or money, were *res nec mancipi* and could thus be alienated without a guardian.[2]

In many respects, the force of the guardianship (*tutela mulierum*) was already weakening in the early imperial period, as will be described in Section V. However, it was only much later that the institution of *tutela* was officially abolished, though the

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[1] For the system of guardianship and its effects, e.g. Schulz 1951: 180–90; Buckland 1963: 165–7; Kaser 1971: 277–8, 367–9; Gardner 1986: 14–22; Evans Grubbs 2002: 23–34; Morrell 2020: 95–111; Hähnchen 2023: 799–802; Höbenreich 2023: 754–60.

[2] For the concept of *res mancipi*, see *Tit. Ulp.* 19.1; Gai., *Inst.* 2.14a–22, 2.80; and e.g. Buckland 1963: 238–41; Kaser 1971: 123, 381–2; Morrell 2020: 95–7. It covered slaves and beasts of burden (*animalia quae collo dorsove domantur*), i.e. horses, mules, donkeys and oxen, and also rustic servitudes.

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exact law has not been preserved — or so it has been believed. This lack of evidence has prompted scholars to advance widely diverging hypotheses on the date when the guardianship finally disappeared from Roman law:

> [*Tutela mulierum*] was still in force under Diocletian, but was abrogated in the fourth or fifth century and so is absent from the *Codex Theodosianus* as well as from Justinian's *Corpus iuris*.[3]
>
> Die *tutela* wird auf die Unmündigen (*impuberes, pupilli*) beschränkt, nachdem die Geschlechtsvormundschaft römischer Prägung unter Konstantin, vielleicht schon unter Diocletian, verschwunden ist.[4]
>
> Although *tutela* of women lost much of its force to compel, it did not entirely disappear until Theodosius and Honorius in A.D. 410 made a blanket grant of the *ius liberorum*, which exempted from *tutela*, to all women in the Empire.[5]
>
> If there was a single law which abolished the guardianship of women, it should probably be placed in the first half of the fourth century. A likely date would seem to be in the early 320s. However, certainty is impossible to attain: *tutela* might have survived even to the fifth century.[6]

The assumptions thus range from the late third century to the fifth. Still others have suggested that *tutela* was perhaps never formally abrogated, but might just have been allowed to fall into desuetude.[7]

It is the aim of this paper to show that we have all been wrong, or at least too cautious. We can in fact with reasonable certainty determine the narrow time frame when *tutela mulierum*, the guardianship of women, disappeared from Roman law, perhaps even identify the law in question. I shall first briefly review the legal sources in Section II, before turning in Section III to the papyrological evidence, which will prove vitally important for the argument. Section IV will discuss the relevant laws within the proposed time frame, while the concluding Sections V and VI will place the legislation in the broader historical context of guardianship and the legal position of women.

II LEGAL EVIDENCE

The most notable breach in the system of *tutela mulierum* had been made already at the beginning of the Principate. The Augustan marriage laws, which tried to encourage citizens to have more children, had created various disadvantages for unmarried and childless people, and privileges for those who had fulfilled their marital duties. Most of these rules concerned inheritance and public obligations, but for women there was a special incentive: if they had given three live births they received the *ius liberorum,* 'right of children', and were exempted from *tutela* altogether. For freedwomen the requirement was four live births.[8] The demographic realities of the ancient family meant that in practice a very large proportion of freeborn women could attain the *ius liberorum*: we shall return to this in Sections III and V. However, not all did, so *tutela* remained for

[3] Schulz 1951: 180.
[4] Kaser 1975: 222; cf. also 1971: 369.
[5] Gardner 1993: 84.
[6] Arjava 1996: 118.
[7] Beaucamp 1992: 260; Evans Grubbs 2002: 45–6; cf. also Hähnchen 2023: 802.
[8] For the marriage laws and their effects, see e.g. Treggiari 1991: 60–80; Evans Grubbs 1995: 103–12; 2002: 37–43, 83–7; Morrell 2020.

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centuries a fact of life for many women, before the Roman lawgivers finally decided that the guardianship of women deserved to be abolished — but when?

We shall start by examining the limits of the study: the *terminus post quem* and *terminus ante quem*. The former is provided by the Vatican Fragments (hereafter *Fr. Vat.*), an enormous, though only partially preserved, collection of existing legal principles taken from earlier imperial enactments and juristic writings. The surviving part contains almost 350 such excerpts. The guardianship of women figures in so many places that it clearly was a relevant institution at the time the compilation was made. Two examples shall stand for the others:[9]

> Tametsi usus fructus fundi mancipi non sit, tamen sine tutoris auctoritate alienare eum mulier non potest, cum aliter quam in iure cedendo id facere non possit nec in iure cessio sine tutoris auctoritate fieri possit. Idemque est in servitutibus praediorum urbanorum. (*Fr. Vat.* 45)
>
> Although the usufruct of a farm is not *res mancipi*, a woman still cannot alienate it without her guardian's consent because she can do it only by *in iure cessio*, and this cannot take place without the guardian's authorisation. The same applies to urban praedial servitudes.
>
> Parentibus licet liberis suis in potestate manentibus testamento tutores dare, masculis quidem impuberibus, feminis vero etiam puberibus … (*Fr. Vat.* 229)
>
> Fathers may in their will appoint a guardian for their descendants who remain in their power, for males if they are below puberty, for females also after they have attained puberty …

The existing text of the Vatican Fragments derives from a palimpsest of the fifth century. However, the original redaction must have taken place at Rome in the first decades of the fourth century.[10] The collection of material may have started already in the last years of Diocletian (as he is in the earlier part presented as living, later as *divus*), but the work contains many rescripts up to the year 318, where the original compilation seems to have ended.[11] It is clear that the collection then underwent revisions up to the end of the fourth century. In that process, at least a couple of further laws, some juristic commentaries and a few dozen *scholia* were added.[12] Moreover, the controversial legitimacy of the Tetrarchic emperors after Diocletian's abdication caused insurmountable difficulties for the original compilator and for the subsequent editors as they attempted to produce and reproduce the politically correct (retrospective) composition and titles of the imperial coalition at any given time. For example, after the *damnatio memoriae* of Licinius in 324, his name and title were inconsistently removed from the headings and consular dates of individual laws.

All this makes it difficult to define when the compilation was 'finished'. It remains possible that the first technical revisions and perhaps additions were made already before Licinius' fall, i.e. between 320 and 324, as some preserved imperial titulatures may reflect the way they would have been edited in the west during that time.[13] However, this does not change the fact that almost all the incorporated laws date from before 320, implying that at the very least the core substance of the original

[9] See also *Fr. Vat.* 1, 110, 259, 264, 325–7.
[10] Raber 1965: 235–8; Liebs 1987: 150–62; 1989: 64–5; De Filippi 1998: 16–24.
[11] For Diocletian, see *Fr. Vat.* 22–4, 41, 270, 297, 312, 325, 338; De Filippi 1998: 19, 169–70.
[12] Obvious later additions are *Fr. Vat.* 37 (369), 248 (330) and 90–3, with Liebs 1987: 159–61. Moreover, *Fr. Vat.* 249 (320–323) and 35 (313?) might also be later additions, since they are, like 37 and 248 but unlike the rest of the collected enactments, general laws and not rescripts; see Liebs 1987: 40 n. 33, 157; De Filippi 1998: 19 n. 15. Cf. Corcoran 2000: 160–1 n. 177, on the uncertain date of *Fr. Vat.* 35.
[13] On *Fr. Vat.* 32–6, see Liebs 1987: 156–7, followed *verbatim* by De Filippi 1998: 173–5. Cf. also Corcoran 2000: 279 n. 79.

compendium had been finished by that year and not much before.[14] We may thus conclude that *tutela* had not yet been abolished by around 318. This remains the secure *terminus post quem* irrespective of the uncertain subsequent editorial history.

As to a *terminus ante quem*, it has proved elusive. By 390 at the latest, mothers could assume the guardianship over their own children (*CTh* 3.17.4). It might be natural to conclude that they would then not have been under *tutela* themselves. However, the guardianship over children and that over adult women were legally very different constructs. While the latter had become often a formality, the former entailed real administrative trouble and power. Thus, it is not impossible to think that *tutela mulierum* could still survive, especially as so many women were in practice freed from it.[15]

In 410 the *ius liberorum* was made universal (*CTh* 8.17.2–3):

> In perpetuum hac lege decernimus inter virum et uxorem rationem cessare ex lege Papia decimarum et, quamvis non interveniant liberi, ex suis quoque eos solidum capere testamentis, nisi forte lex alia minuerit derelicta. Tantum igitur post haec maritus vel uxor sibi invicem derelinquant, quantum superstes amor exegerit.
>
> Nemo post haec a nobis ius liberorum petat, quod simul hac lege detulimus.
>
> We decree by this law for perpetuity that the policy of inheritance of ten percent between husband and wife according to the Papian law is ended, and, though they have no children, they can inherit in full from their wills, unless by chance another law has reduced what can be left behind. Therefore, after this, husband and wife may leave to each other just as much as their surviving love has required.
>
> No one shall seek the *ius liberorum* from us after this, because by this law we have conveyed it to everyone. (trans. Evans Grubbs 2002: 104)

As can be seen, the text of the law did not concern the guardianship. It refers only to the restrictions placed on testamentary succession between man and wife, and it gives the impression that at this time the *ius liberorum* no longer had any other effects. However, this impression is not quite accurate, as the *ius liberorum* still determined the succession rights of mothers up to the sixth century.[16] Hence, there remains a slim possibility that it might have played a role in the question of *tutela* as well — theoretically even after 410.

Thus, legal sources do not provide a secure *terminus ante quem*, which is of course precisely the reason why scholars have disagreed so much on the date. And that is why we must consider a different kind of evidence: the papyri from Egypt.

III PAPYROLOGICAL EVIDENCE

In Egypt, the Greek legal system of the Ptolemaic period remained in force after the Roman conquest. A type of guardianship was an integral part of it. Thus, in many legal transactions an adult woman had to be assisted by a guardian (*kyrios*), who was usually her husband or close relative. Such guardians are very common in the papyri of the late second and early third centuries. Yet, there was a possibility of confusion, as the same Greek word *kyrios* could in the documents refer either to this traditional guardian of the Greek type or to a Roman *tutor* (if the woman was a Roman citizen) or even to a local interpretation or mixture of these. That is why the guardians appearing in the papyri

[14] Liebs 1987: 151 ('ziemlich genau um 320'); De Filippi 1998: 19 ('la data del 318, ipotizzata dal Mommsen sembra la più probabile'). The latest excerpt is *Fr. Vat.* 287 (318), assuming that 249 (320–323) is an addition.
[15] e.g. Beaucamp 1992: 262; *pace* Kaser 1975: 222 n. 7.
[16] *Cod. Iust.* 8.58.2 (528); *Inst. Iust.* 3.3.4.

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are, especially after 212, often styled 'guardian according to Roman custom' (κύριος κατὰ τὰ Ῥωμαίων ἔθη).[17]

Subsequently, we encounter more and more documents where the concept of the Roman *tutela mulierum* is evident. A prime example comes from the year 261 (P.Oxy. XXXIV 2710):

> ἑρμηνεία τῶν Ῥω[μαϊκ]ῶν· Λουκίῳ Μουσσίῳ Αἰμιλιανῷ τῷ διασημοτάτῳ ἐπάρχῳ Αἰγύπτου παρὰ Αὐρηλίας Ἥρᾶτος Κάστορος μητρὸς Σύρας ἀπ' Ὀξυρύγ'χων πόλεως. ἐρωτῶ, κύριε, δοῦναί μοι κύριον ἐπ[ι]γρα[φ]ησόμενον κατὰ νόμον Ἰούλιον Τίτιον καὶ δόγμα συνκλήτου Αὐρήλιον Χαιρήμονα υἱὸν Διογένους ἀρχιερατεύσαντος τῆς αὐτῆς πόλεως· [ἐδό]θη κυρίοις ἡμῶν αὐτοκ[ρ]άτο[ρ]σι Μακριανῷ τὸ β καὶ Κυήτῳ [τὸ .] ὑπάτοις (ἔτους) α Παχ[ὼν] κβ
>
> Translation from Latin: To Lucius Mussius Aemilianus, the most sublime praefect of Egypt, from Aurelia Heras, daughter of Kastor and Syra, from the city of Oxyrhynchos. I ask you, lord, to give me as a guardian, to be registered according to the Julian and Titian law and the decree of the Senate, Aurelius Chaeremon, son of Diogenes, former archiereus of the same city. Given in the second consulship of our lords Emperors Macrianus and Quietus, in their first year, on 22 Pachon.

Another relevant papyrus is roughly contemporaneous, from the year 263 (P.Oxy. XII 1467 = FIRA III 27):

> [...] δ[ιαση]μότατε ἡγεμών, οἵτινες ἐξουσίαν διδόασιν ταῖς γυναιξὶν ταῖς τῶν τριῶν τέκνων δικαίῳ κεκοσμημέναι[ι]ς ἑαυτῶν κυριεύειν καὶ χωρ[ὶς] κυρίου χρηματίζειν ἐν αἷς ποιοῦν[τ]αι οἰκονομίαις, πο[λλ]ῷ δὲ πλέον ταῖς γρά[μ]ματα ἐπισταμέναις. καὶ αὐτὴ τοίνυν τῷ μὲν κόσμῳ τῆς εὐπαιδείας εὐτυχήσασα, ἐνγράμματος δὲ κα[ὶ ἐ]ς τὰ μάλιστα γράφειν εὐκόπως δυναμένη, ὑπὸ περισσῆς ἀσφαλείας διὰ τούτων μου τῶ[ν] βιβλειδίων προσφῶ τῷ σῷ μεγέθι πρὸς τὸ δύνασθαι ἀνεμποδίστως ἃς ἐντεῦθεν ποιοῦμαι οἰκ[ον]ομία[ς] διαπράσσεσθαι. ἀξιῶ ἔχε[ιν] αὐτὰ ἀπροκρίτως τ̣ο[ῖς δι]καίοις μ[ο]υ ἐν τῇ σῇ τοῦ [δια]σημοτάτου τ[ά]ξι, ἵν' ὦ β[εβο]ηθ[η]μένη κ̣[α]ὶ ε̣ὶ̣[σ]αεί σ[οι] χάριτας ὁμολογήσω. διευτ[ύ]χ[ει.] Αὐρηλία Θαϊσ[ο]ῦς ἡ καὶ Λολλ̣[ι]ανὴ διεπεμψάμην πρὸς ἐπίδοσιν. ἔτους ι Ἐπεὶφ β[.]. ἔσται σο[ῦ] τ̣ὰ̣ βιβλία ἐν τῇ [τάξει.]
>
> [... ... there have for a long time been laws], most sublime governor, which give the women, if they have been honoured with the right of three children, the authority to take care of themselves and to act without a guardian in any affairs they conduct, the more so if they know letters. Thus, as I am myself blessed with the grace of many children, being also literate and perfectly able to write with ease, I approach confidently your greatness through this petition of mine, so that I may without hindrance carry out the affairs which I henceforth conduct. I ask you to keep this petition in the office of your sublimity, without prejudice to my rights, so that I shall be aided and shall forever acknowledge my gratitude towards you. Farewell. I, Aurelia Thaisous Lolliane, have sent this to be handed in. In the 10th year, on x Epeiph. (Annotation) Your petition shall be kept in the office.

Here a woman claims that she has given birth to the required number of children and thus has the *ius liberorum* and is therefore exempt from guardianship. It shows that women in Egypt were well aware of the system of guardianship and also the main loophole in it. This petition is the only one of its kind, probably because there was no requirement to record the *ius liberorum* in any official archive. The actual purpose of Aurelia Thaisous' petition thus remains a matter of speculation.[18]

[17] e.g. Rupprecht 1986; Evans Grubbs 2002: 34–37; Arjava 2014: 177–9. Cf. also Gaius, *Inst.* 1.193.

[18] See esp. Kelly 2017, though his own explanation is difficult to verify. Moreover, in stressing her literacy Aurelia Thaisous overplays her case, as literacy was definitely not a requirement for the *ius liberorum*, and many women who act without a guardian state that they are illiterate: see Sheridan 1998: 199; Kelly 2017: 107.

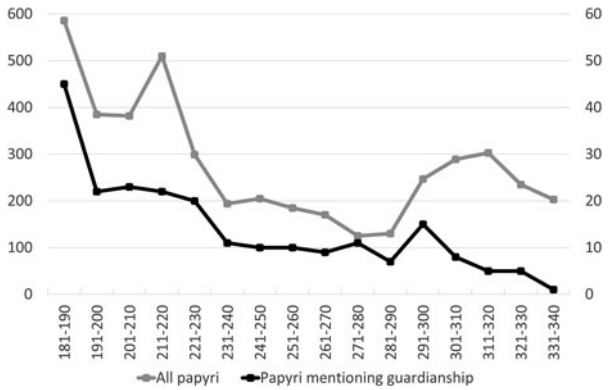

Fig. 1. Numbers of documents mentioning guardians or their absence (in black; scale on the right) compared to the total number of dateable published papyri (in grey; scale on the left), by decade. See text for exclusions.

For the whole of the third century, we have over one hundred documents where individual women are conducting financial transactions or approaching authorities and either assert that they are assisted by a guardian (μετὰ κυρίου), or are entitled to act without him (χωρὶς κυρίου) on the strength of the *ius liberorum*.[19] It should be noted that even after 212 not all of these documents concern cases where Roman law actually required the guardian's consent. Quite obviously women tended to record the *ius liberorum* even when it would not have been needed — just to be on the safe side, or because it had status value.[20]

Fig. 1 shows the number of papyri where either the presence or absence of a guardian is recorded, by decade. It is not an exhaustive display of all surviving transactions in which a woman has taken part. Sometimes the text is too fragmentary to record the guardian's presence or absence, sometimes the matter did not need to be confirmed by a guardian, and sometimes the information may just have been omitted.[21] For example, from the same period there are dozens of papyri where a woman is said to be assisted (συνεστῶτος or συμπαρόντος) by a man who is not a guardian, though in over thirty of these the *ius liberorum* is not adduced either. On the other hand, there are two dozen cases where such assistance is explicitly connected with the lack of guardian because of the *ius liberorum*.[22]

This curve is compared with the number of all documentary papyri published from each decade. I have adjusted the curve of all papyri between 241 and 270 by omitting three large homogeneous groups of administrative documents which have no relevance for this question but inflate the statistics. They are the Heroninos correspondence, the dossier of the Hermoupolis city council (CPR XXXV) and the Decian *libelli*. Other comparable dossiers are not as large and do not affect the curve's general shape. The anomalous increase in the number of published papyri in the decade 211–220 may partly be explained by the shorter reigns of Caracalla, Geta and Macrinus, which make it easier to date documents by decade, while the preceding and succeeding reigns of Septimius

[19] The following statistics are based on searches in the Trismegistos database (www.trismegistos.org) and the Papyrological Navigator (https://papyri.info) in October 2023. They include documents which can be dated at least to a decade. For earlier, partial lists, statistics and discussions, see Kutzner 1989: 79–99; Beaucamp 1992: 198–202, 385–440; Sheridan 1996: 117–31; Arjava 2014: 178–9.
[20] See also e.g. the inscriptions quoted in Evans Grubbs 2002: 37–43; and Arjava 2014: 178 n. 49.
[21] cf. e.g. Kutzner 1989: 81, 95–9; Beaucamp 1992: 212–47, 408–35.
[22] Beaucamp 1992: 436–40; Sheridan 1996: 118 n. 5.

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TABLE 1 Women with and without guardian.

Type	Dates					
	181–210	211–240	241–270	271–300	301–330	331–360
Μετὰ κυρίου (with guardian)	72	36	8	1	1	2
Χωρὶς κυρίου (without guardian)	3	11	17	27	16	4

Severus and Alexander Severus were split between decades. I am not aware of any study which has attempted to analyse this effect.

As can be seen, the number of documents mentioning guardians or their absence roughly follows the overall curve up to the early fourth century, when it starts to fall somewhat more rapidly. However, within this group, those where the woman is assisted with a guardian and those where she is acting without him develop in totally different ways. Table 1 gives the numbers of these two types between the years 180 and 360. After around 240, the documents where a guardian is present become very rare and almost disappear in the late third century. At the same time, the number of documents where a woman has the *ius liberorum* is increasing and remains significant up to the beginning of the fourth century. Fig. 2 shows this more clearly in a graph by decade.

These statistics suggest that after the Constitutio Antoniniana in 212, it took almost thirty years for the people in Egypt to come to terms with the Roman type of guardianship and the way out of it. In practice, it meant that subsequently much fewer women were under guardianship, as most of them could boast the *ius liberorum* and the legal exemption. Of course, this development does not show that *tutela* as such had been abolished — on the contrary, it shows that it remained in force and women still wanted to mention the *ius liberorum* to escape it. And now we come to the final phase, and the crucial period where we can detect a change.

Table 2 shows the last published papyri where the *ius liberorum* is mentioned. Between 300 and 325, there is on average almost one document per year. The short gaps in 310–313 and 315–317 can simply be explained by random variation: no other reason is plausible. Clearly women were still keen to claim that they did not need a guardian. But after 325, there is a sharp stop, and then a few stray cases separated by several years. As time went on, these outliers tended to mention only the *ius liberorum* but no longer the guardianship. They may just reflect a conservative practice of a few scribes, using antiquated pattern books, or some uncertainty in a transitional period after the

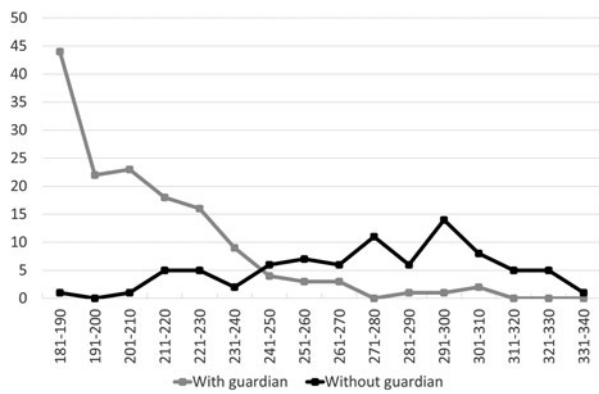

Fig. 2. Numbers of documents mentioning presence of guardian (grey) and absence of guardian (black), by decade.

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TABLE 2 Last papyri with the *ius liberorum*.

Papyrus	Date	Text
P.Berl.Möller 1 = SB IV 7338	300	χωρὶς κυρίου χρη(ματίζουσα) τέκνων δικαίῳ κατὰ τὰ Ῥωμαίων ἔθη
P.Cair.Isid. 112 = SB V 7625	300	χω[ρὶ]ς κυρίου [χ]ρη(ματίζουσα) τέκνων δικαίῳ
P.Col. VII 179 = SB VIII 9835	300	χωρ[ὶ]ς κυρίου χρηματ(ίζουσα) τέκνων δικαίῳ
P.Laur. IV 154	300	χωρὶς κυρίου χρηματίζουσα τέκνων δικαίῳ] κατὰ τὰ Ῥωμαίων ἔθ[η
P.Oxy. XLVI 3302	300/1	χωρὶς κυρίου χ[ρηματιζούσης] τέκνων δικαίῳ
CPR VII 14 ll. 8–20	303/4	χωρὶς κυρίου χρηματίζουτος [τέκνων δικαίῳ
P.Sakaon 59 = P.Thead. 2	305	χωρὶς κυρί[ου χρημα]τιζούσῃ κατὰ Ῥωμαίους τέκνων δικαίῳ
P.Sakaon 60 = P.Thead. 1	306	χωρὶς κυρίου χρημ(ατίζουσα) τέκνων δικαίῳ
P.Graux II 17	307	χωρὶς κυρίου χρη(ματιζούσης) τέκν[ων] δικαίῳ
P.Graux II 18–19	307	χω[ρ]ὶς κυρίου χρη(ματιζούσης) τέκ[νων δικαίῳ
SB XVI 12289 Kol. i–ii	309	[χωρ]ὶς κυρίου χρηματίζουσα τ[έκνων] δικαίῳ
P.Select. 7 = Pap.Lugd.Bat. XIII 7	314	χωρὶ[ς] κ[υρί]ου χρηματίζουσῃ τέ[κν]ων δικαίῳ
SB X 10728	318	χωρὶς κυρίου χρημ(ατιζούσης) τέκνων δικαίῳ
P.Col. VII 185	319	χωρὶς κυρίου χρηματίζουσα τέκνων δικαίῳ
SB VI 9219	319	χωρὶς κυρίου χρηματίζ(ουσα) τέκνων δικαί[ῳ]
P.Vindob G. 16712*	320	χρηματίζουσα χωρὶς κυρίου τέκνων δικαίῳ κατὰ τοὺς νόμους
SB XIV 11611	322	χωρὶς κυρίου χρηματίζου]σα δικαίῳ τέ[κνων
P.Oxy.Hels. 44	324	χρημ[ατί]ζουσα τέκνω[ν δι]καίῳ
SB XVI 12673	324/5	χωρὶς κυρίου χρηματίζ]ουσα δίκαιον τέκνων ἔχο[υσα
P.Oxy. LIV 3758	325	τέκνων δικαίῳ γεγένηται
P.Haun. III 55	325	χωρὶς κυρίου χρηματιζούσης τέκνων δικαίῳ
P.Charite 33	331/2 or 346/7	χωρὶς κυρίου χρηματ[ίζουσα δικαίῳ τέκνων
P.Matr. 5	336/7	χωρὶς κυρίου χρηματίζου[σα
P.Charite 8	348	χωρὶς κυρίου χρηματίζ(ουσα) δικαίῳ τέκνω[ν]
P.Abinn. 63	before 350	δίκαι[ο]ν παίδων ἔχουσα
P.Abinn. 64	mid-fourth century	ἔχουσα δίκαιον τέκνων
P.Coll.Youtie II 83	353	χρηματίζο[υ]σα τέκ[ν]ων δικαίῳ
PSI VIII 951	*c.* 388	δίκαιον τέκνων ἐχούσης
BGU III 943	389	τέκνων δίκαιον ἔχουσα

* Note: This unpublished papyrus is cited in P.Mich. XV p. 167.

guardianship had disappeared from imperial law. I shall return to this transition in the property regime in Section VI.

We may thus conclude that around 325 or a little after (allowing for some random variation here as well) Egyptian women, or their scribes, rather abruptly ceased to plead the *ius liberorum* to escape the guardianship. If we combine this discovery with the evidence of the legal sources, we can now narrow the search for a law which abolished the guardianship to the period between around 320 and 325. And there are in fact two candidates for such a law.

IV THE ABOLITION OF *TUTELA*

On 31 January 320, Constantine issued an edict which, after three centuries, relaxed the Augustan penalties affecting people who were not married or did not have children (*CTh* 8.16.1). This law is very well known, and was extolled already in antiquity by the church historians Eusebius and Sozomen, who underlined its benefits for Christian celibates. How far it really was motivated by Christian ideals is less clear, as the Augustan regulations had always been very unpopular.[23]

> Imp. Constantinus A. ad populum. Qui iure veteri caelibes habebantur, inminentibus legum terroribus liberentur adque ita vivant, ac si numero maritorum matrimonii foedere fulcirentur, sitque omnibus aequa condicio capessendi quod quisque mereatur. Nec vero quisquam orbus habeatur: proposita huic nomini damna non noceant. **Quam rem et circa feminas aestimamus earumque cervicibus inposita iuris imperia velut quaedam iuga solvimus promiscue omnibus.** Verum huius beneficii maritis et uxoribus inter se usurpatio non patebit, quorum fallaces plerumque blanditiae vix etiam opposito iuris rigore cohibentur, sed maneat inter istas personas legum prisca auctorita[s].
>
> Emperor Constantine Augustus to the People: Those who were considered celibate under the ancient law are to be freed from the threatening terrors of the laws and are to live in such a way as though they were among the number of married (and) were supported by the bond of matrimony, and all are to have an equal condition of taking whatever each one deserves. Moreover, no one is to be considered childless: the penalties proposed for this name shall not harm him. **We determine this matter also in regard to women and we release from everyone indiscriminately the commands of the law which were placed on their (fem.) necks like yokes.** But the usurpation of this benefit will not lie open to husbands and wives between themselves, whose false blandishments very often are scarcely even contained by the opposing rigor of the law; but the ancient authority of the laws shall remain among those persons. (trans. Evans Grubbs 2002: 103)

Whichever reasons had prompted Constantine or his advisors to promulgate his edict at the end of January 320, his wording implies that at least the most onerous inconveniences for the unmarried and childless people were going to be removed. However, the extant text does not give any detailed list of the cancelled rules. Only the capacity to receive testamentary bequests, which was perhaps the most important issue for males, is mentioned ('aequa condicio capessendi'). Further, as Constantine's favour did not extend to the bequests between husband and wife, that was separately cited ('huius beneficii maritis et uxoribus inter se usurpatio non patebit').[24] Otherwise the text, as we

[23] Euseb., *Vit. Const.* 4.26; Sozom., *Hist. eccl.* 1.9. For the whole law and for Constantine's motivation, which remains a moot question, see esp. Evans Grubbs 1995: 103–39, with references to the voluminous earlier literature. For Constantine's legislation in general, see recently Dillon 2012.

[24] They were included only ninety years later, when the *ius liberorum* in this sense was granted to all childless couples: *CTh* 8.17.2–3 (410), quoted above, Section II.

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have it, passes over all the other disadvantages. Nor are the privileges mentioned which had been granted to those who were blessed with a large family — although the lack of them might also be seen as a kind of penalty. Because of this general silence, the law has always been taken to concern only the rights of inheritance, the topic where *caelibes* and *orbi* were particularly disfavoured (e.g. Gai., *Inst.* 2.286). According to this interpretation, all the rest of the Augustan regulations and their later modifications were left to stand as they still were around 320.[25]

However, this is not necessarily the whole truth. There is an odd sentence (bolded in the quote) referring particularly to women and citing 'commands of the law which were placed on their necks like yokes'. It is striking how emphatically the lawgiver underlines the effects on women. It would have been quite a prolix way to express a principle which would have been self-evident for any educated jurist: the same rules normally applied to both sexes, unless otherwise indicated.[26] If the same yokes had been placed on both male and female necks, we would expect a different formulation. Instead, it seems that some very specific legal burdens, which had been imposed on females, were now also relieved.

What could this burden be which applied just to women? The sole inheritance restriction which affected females alone was connected with a mother's right to inherit from her children (SC Tertullianum), a right which depended on the *ius liberorum*. But as in that particular context the *ius liberorum* remained in force up to the reign of Justinian, it could not be the burden which was removed in 320.[27] A second-century administrative handbook from Roman Egypt, the *Gnomon of the Idios Logos*, seems to codify some of the Augustan regulations, though it is unclear if they include also details which were specific to Egypt. There were gender-specific limits of age and property value, but these would hardly have justified a separate mention in Constantine's law.[28] The *Gnomon* also mentions an extra property tax of one per cent on unmarried women, not attested in other sources. However, if this was meant in *CTh* 8.16.1 it could not have been covered by the extant text because the tax was in no way linked with inheritances and thus would definitely have required a separate lost clause anyway.[29]

An obvious explanation is that the constitution here referred to *tutela mulierum*, which was thus abolished together with the testamentary restrictions. To be able to read the law in this way, we have to understand the textual history of the Theodosian Code. It does not preserve any constitutions exactly in their original form. The laws were often split up and the pertinent segments were relocated where their subject matter in the Code belonged. And we indeed know that the text of *CTh* 8.16.1 was just one excerpt from a much longer edict which covered various subjects, including testamentary processes, but also other matters.[30]

Moreover, even the Theodosian Code itself has not survived in the form in which it was once compiled. The first five books were covered by the manuscript T (lost in a fire in 1904), but it was so fragmentary that only around one-third of its text has been preserved.[31] A part of the losses can be supplemented from the *Breviarium Alaricianum*,

[25] e.g. the exemption from being a guardian, *Fr. Vat.* 168, 191–9, 247.
[26] *Dig.* 3.5.3.1, 13.5.1.1, 15.1.1.3, 50.16.1, 40, 152, 163, 172, 195 pr.
[27] *Cod. Iust.* 6.56.7, 8.58.1–2; *Inst. Iust.* 3.3.4; *Nov. Iust.* 22.47.2; Buckland 1963: 372–4; Kaser 1975: 222–3 n. 8; Arjava 1996: 105–7.
[28] BGU V 1210.73–92; again, part of these rules were abolished only by Justinian: *Cod. Iust.* 5.4.27 (531/2). The most recent treatment is Babusiaux 2018: 144–56. Some interpretations remain ambiguous, esp. ll. 87–8: see Babusiaux 2018: 152–5.
[29] On the property tax, BGU V 1210.84–86; Babusiaux 2018: 151.
[30] See *CTh* 3.2.1, 4.12.3, 11.7.3; *Cod. Iust.* 6.9.9, 6.23.15, 6.37.21. Despite some confusion in the consular years, which is typical of this period, their dating in 320 seems secure enough: see Barnes 1982: 74; Evans Grubbs 1995: 120; Matthews 2000: 236–40; Corcoran 2000: 194; and Barnes in a personal letter in 2001.
[31] See Mommsen in the introduction to his authoritative 1905 edition, pp. xxxviii–xlii. A lucid description of the manuscript tradition and reconstruction of the Code is Matthews 2000: 85–120.

which is a sixth-century abridgment of the Code. A further part can be reconstructed from the constitutions which were later incorporated in the Justininan Code. The extent of omissions within a single title can be seen e.g. in title 2.8, where the *Breviarium* preserves only three constitutions from the original twenty-six.

Thus, we may surmise that some relevant sections of Constantine's original extensive law were included in those titles of the Code that are now deficient or missing in its fragmentary manuscript tradition. This is actually demonstrated by the three excerpts from the same constitution which have been preserved in the Justinianic but not in the Theodosian Code, although they cannot have ended up in the former in any other way than through the latter.[32] Hence, a passage specifying more distinctly the fate of *tutela* may subsequently have been inserted in some other title of the Theodosian Code, where it was thought to fit better, because it did not concern inheritance but guardianship.[33]

It is impossible to know exactly how the original text might have run before the constitution was split up. The compilers of the Code could adjust the wording of a law to make the text flow better after they had removed one or more sentences. This practice can be seen in some rare cases where an original constitution has been preserved independently outside the Code. Our most valuable source in this respect is a separate collection of statutes, the so-called Sirmondian Constitutions. It includes many extensive laws which were later abridged, slightly edited, cut into pieces, and then inserted in a truncated form under different titles of the Theodosian Code.[34] The crucial extract on *tutela* may have followed the last sentence of the quote, or even preceded it, depending on how much the compilers had edited the section. The passage certainly appears to us more ambiguous than to the contemporaries, who could read the intact wording.

Assuming that we have correctly identified this constitution and determined 31 January 320 as the date when *tutela mulierum* was officially eliminated, it might be asked why the change was reflected in the papyri only five years later. We could of course suspect that laws enacted in Rome often reached Egypt, or at least became known to scribes, only after some lapse of time. But there is an even simpler explanation. Between the years 320 and 324 Egypt was not ruled by Constantine, but by his rival Licinius. We are not well informed about the legal situation in Egypt during those years. However, the two rulers' relationship was already quite strained at that time.[35] This would have made it even less likely that Constantine's enactments affected Egyptian scribal practice. Constantine finally defeated Licinius and captured Egypt in late 324. At the end of 324, Constantine took care to annul Licinius' legislation and confirm his own, and the church historian Eusebius in his religious and political zeal indeed contrasted Constantine's beneficial legislation with the barbarous laws of Licinius.[36]

[32] Judging by their subject matter, *Cod. Iust.* 6.9.9 may have been located in *CTh* 4.1 (De cretione vel bonorum possessione); *Cod. Iust.* 6.23.15 in *CTh* 4.4 (De testamentis et codicillis); and *Cod. Iust.* 6.37.21 in the same *CTh* 4.4 or in a missing title around it; they are thus arranged in Paul Krüger's less well-known 1923 edition of the Theodosian Code.

[33] A possible place for it might have been in the title 3.17 (De tutoribus et curatoribus creandis), which is not covered by any manuscript of the original Code, so we have just the four laws supplied by the *Breviarium Alaricianum*. An alternative would be somewhere in the Second book, where just three titles (2.8–10) are preserved in the ms T, while all the other titles are incomplete because they derive only from the *Breviarium*.

[34] cf. e.g. *Const. Sirm.* 16, with *CTh* 5.7.2; and *Const. Sirm.* 4, with *CTh* 16.9.1 and 6.8.5. The Sirmondian Constitutions are found at the end of Mommsen's edition of the Code, but the texts can be most conveniently followed in the two-column presentation of Matthews 2000: 121–67. For other laws surviving independently, cf. *Fr. Vat.* 35 with *CTh* 3.1.2, and *Fr. Vat.* 249 with *CTh* 8.12.1; and further Matthews 2000: 200–79.

[35] See e.g. Barnes 1981: 68–77.

[36] *CTh* 15.14.1 (324, probably December), with Corcoran 2000: 275 n. 55, 291–2; Dillon 2012: 91–7. See also SB XVI 12306 = P.Oxy. VI 889 (12 Dec 324), with Barnes 1982: 234–7; Corcoran 2000: 197. Euseb., *Vit. Const.* 4.26, *Hist. eccl.* 10.8.12, 10.9.9, with Evans Grubbs 1995: 129; Matthews 2000: 239, 265–7; and Corcoran 2000:

True, we have to admit that the connection of *CTh* 8.16.1 with the abolishment of *tutela* cannot be made watertight. That is why it is worth noting that there is another possibility within the same narrow timeframe. A law of 324 (*CTh* 2.17.1) decreed that young men and women who had not yet attained the age of legal majority (twenty-five years), but had behaved properly, could be granted a personal majority (*venia aetatis*) a few years earlier (age of twenty for males, eighteen for females).

> Feminas quoque … … decem et octo annos egressas ius aetatis legitimae mereri posse sancimus: sed eas, quas morum honestas mentisque sollertia, quas certa fama commendat … … ut etiam ipsae in omnibus contractibus tale ius habeant, quale viros habere praescripsimus.
>
> We have decreed that women also … … are able to earn the right of legal age after they have turned eighteen; but (only) those whom an honorable character, an intelligent mind, and a steady reputation recommend … … so that in all business matters they too shall have the same right as we have ordered that men have. (trans. Evans Grubbs 2002: 50)

The law's focus is on the age of majority, and not on guardianship, which at this time may not have been regarded as a very important element in everyday transactions anyway (see next Section). That is why this law has not been taken as conclusive proof of the disappearance of *tutela*, especially as we do not have the full text preserved.[37] However, the wording strongly suggests that women had exactly the same rights as men, and the guardianship was no longer in play. Whether it had been removed a few years before, or only by this very same constitution, is impossible to say because there is again a fair chance that important parts of the text have been omitted and possibly placed somewhere else in the Code.

In sum, there are two alternative ways to understand Constantine's constitution of 320. We may assume that a vital part has disappeared, and the law removed the *tutela mulierum* together with the restrictions on inheritance. Alternatively, we may believe that the law was aimed at the Augustan penalties only in a narrow sense, leaving the *ius liberorum* and *tutela* untouched. This would require us to believe that whoever drafted the law just chose for some unknown reason to emphasise its effect on females. However, even the second alternative would not much change the general picture. There must have been a law which abolished the guardianship, and it almost certainly must have been enacted between 320 and 325.

V GUARDIANSHIP, LAW AND SOCIAL REALITIES

To put the Constantinian legal change into a historical and social perspective, we have to assess the impact which *tutela* might have had on Roman women's lives. This is not an easy task, as it affected them very differently depending on their personal circumstances, such as age, domicile, financial position, free or slave birth, number of offspring and even the personalities of the woman and her guardian. Moreover, changes in Roman society and legal institutions over the centuries meant that the effects of *tutela* did not remain constant.

Already in the late Republic wealthy women seem to have administered their property quite freely, not really hindered by their guardians. It became possible to change the guardian and to overturn his veto in a court. For some time, a certain category of guardians (*tutores legitimi*), typically the nearest relatives in the paternal line, exercised

71–3, 275–9. In general, Eusebius attests to very active legislation by Constantine soon after his victory: *Vit. Const.* 2.20–60.

[37] cf. Kaser 1975: 222 n. 2; Beaucamp 1992: 260–1; Arjava 1996: 117–18. One final Constantinian statute of 326 (*CTh* 3.17.2) refers to a guardianship over women, but it is considered more likely to mean female children and not adult women. It seems to re-establish the *tutela legitima* of the paternal relatives. However, a later law, *Cod. Iust.* 5.30.3 (472), cites this Constantinian statute explicitly in connection with girls only below the age of twelve; Kaser 1975: 222 n. 2; Beaucamp 1992: 261; Arjava 1996: 116–17; Evans Grubbs 2002: 44.

more effective power, but this type was abolished by Claudius. After this, in practice only the *patronus* of a freedwoman preserved the strong position which guardians in the earlier stages of Roman history had held. We may assume that in the case of freeborn women it was above all individual character which determined how much influence the guardian really had.[38]

The result of these developments is described in the *Institutes of Gaius*, a legal textbook from the late second century. His remarks on the nature of guardianship are one of the most famous contemporary statements on Roman women, cited in almost every study written on their legal and social position.[39]

> Feminas vero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse videtur: nam quae vulgo creditur, quia levitate animi plerumque decipiuntur et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera; mulieres enim, quae perfectae aetatis sunt, ipsae sibi negotia tractant, et in quibusdam causis dicis gratia tutor interponit auctoritatem suam; saepe etiam invitus auctor fieri a praetore cogitur. (Gai., *Inst.* 1.190)
>
> However, there is almost no solid reason why adult women should be under guardianship. For the common belief — that because of their levity they are often deceived and it is just fair that they are overseen by the authority of guardians — appears specious rather than true. In fact, women who are of legal age conduct their business themselves, and in some cases the guardian gives his consent only for form's sake. And often he is compelled by the praetor to give his consent against his will.

Clearly Gaius did not consider the guardianship a very useful, or meaningful, institution, at least for many women. There were exceptions which will be discussed shortly. And of course the whole idea behind the Augustan laws — that exemption from the guardianship was a privilege — shows that *tutela* was not regarded by the contemporaries as a general blessing to women.

The significance of the Augustan innovation, the *ius trium liberorum*, cannot be overestimated. It was not only a conspicuous symbolic gesture. From comparative population studies we know that in a pre-industrial society with high infant mortality, the average life expectancy at birth must have been between twenty and thirty years. Consequently, female fertility had to be very high, unless the Roman population was in drastic decline, which does not seem to have been the case. Few ancient sources provide enough statistical material to support this theoretical model, nor did the actual fertility need to remain exactly uniform across time, region or social class. However, the Empire as a whole could not possibly have escaped these demographic realities. This means that on average each woman who survived to her menopause must have borne four to six children, half of whom would have died before adulthood.[40] It follows that a woman who reached, say, her late twenties would usually have produced three live births.[41]

[38] See esp. the balanced overview of Morrell 2020: 98–106, 109–11.

[39] e.g. Gardner 1986: 21; Arjava 1996: 114; Evans Grubbs 2002: 29; Höbenreich 2023: 755. The debate over the original motives behind the system of guardianship in the more archaic periods of Roman history remains outside the scope of this study: cf. e.g. Gardner 1993: 87–109; Morrell 2020: 95; Hähnchen 2023: 800.

[40] See esp. the groundbreaking work of Parkin 1992: 72–5, 84–90, 111–33; and Scheidel 2007: 41–2; for Egypt, Bagnall and Frier 1994: 135–47, with Scheidel 2001: 172–80; for fourth-century inscriptions from Asia Minor, Patlagean 1978: 180–2; for senatorial families in the fourth century, Etienne 1978, revised by Arjava 1996: 82–4. As Kelly 2017: 114–16 admits, his minimum estimate from Egyptian census records (30 per cent of women had the *ius liberorum*) is much too low because of infant mortality and adult children living separately; cf. also Morrell 2020: 106–8.

[41] It remains possible that the original law required the children to be living, though it might have appeared awkward if a woman who had been freed from the guardianship would then have lost this right when one of her children died. In any case, in the late third century live births counted: Paulus, *Sent.* 4.9.1, 9; cf. Parkin 1992: 116–19.

Of course, there were still quite a few women who were under guardianship. For freedwomen it was much more difficult to achieve the required family size, especially because they were usually not freed at an early age. We shall return to this. But even among freeborn women there was an obvious large group who had not yet acquired the *ius liberorum*: young women. Although Mediterranean girls married quite early by modern standards, not a few in their mid-teens, and probably almost all by the age of twenty, it is unlikely that many had given three births before their early twenties. The Roman guardianship of orphan girls, *tutela minorum*, ended at the age of twelve, so for at least ten years, and often more, they were supervised by a *tutor mulieris*, before they had produced the required number of offspring. We may imagine that for such teenagers the assistance of a guardian could often seem beneficial. All this of course concerns only girls who had lost their father — otherwise they would have been under *patria potestas*, paternal power, and would not even have owned anything.[42]

For a long time, these younger women provided one logical argument for keeping the system of guardianship working. But from the late second century this argument started to crumble. A new type of guardianship was formalised, *cura*, the curatorship.[43] Now curators supervised the affairs of young men and women after they had attained puberty but before they had reached the legal age of twenty-five. And a law from the reign of Gordian (*Cod. Iust.* 5.37.12) confirms that in the third century *ius liberorum* did not exempt women from curatorship:

> Neque enim ignoras non multum patrocinari fecunditatem liberorum feminis ad rerum suarum administrationem, si intra aetatem legitimam sunt constitutae.
>
> You should know that fecundity does not enable women to manage their own affairs, if they are still below legal age.

As a result, since *cura* now covered exactly the age when *tutela mulierum* had been the most useful, there would certainly have been reason to question the existence of two overlapping systems.

Moreover, the universal grant of Roman citizenship in 212 made an additional curiosity evident:

> Mulier sine tutoris auctoritate praedium stipendiarium instructum non mortis causa Latino donaverat. Perfectam in praedio ceterisque rebus nec mancipii donationem esse apparuit; servos autem et pecora quae collo vel dorso domarentur, usu non capta. Si tamen voluntatem mulier non mutasset, Latino quoque doli profuturam duplicationem respondi: non enim mortis causa capitur, quod aliter donatum est, quoniam morte Cincia removetur. (Papinian, *Fr. Vat.* 259)
>
> A woman had given a gift of a provincial farm with all its appurtenances not *mortis causa* to a person of Latin status without her guardian's consent. The donation of the land and other items which are *nec mancipi* are clearly valid, but the slaves and beasts of draught and burden have not been acquired by use. However, if the woman had not changed her mind, I opined that even a Latin person could avail himself of the legal objection that he is being sued fraudulently; for an item is not acquired *mortis causa* if it has been donated otherwise, and Lex Cincia does not apply after the donor's death.

The vexed juridic question in this precise case need not interest us further here.[44] The passage reveals a more important general anomaly. As was noted in the beginning, a

[42] For *patria potestas*, see Arjava 1998.
[43] Kaser 1971: 369–71; Hähnchen 2023: 804–5.
[44] An item which was *res mancipi* but had not been transferred in the appropriate way prescribed by the more formal civil law (*ius civile, ex iure Quiritium*) was held by right of the less formal praetorian rules, but it could

woman needed her guardian to alienate *res mancipi*, the most important of which was land in Italy. However, after 212 the land that most citizens owned was not located in Italy but in the provinces, so it was not *res mancipi*. This meant that most citizen women could now freely sell or donate all their landed property without asking the guardian, but still needed him to transfer a donkey or cow properly. If this did not seem outright silly, at least it must have undermined the logic of guardianship even further.

The developments described so far would suggest that the guardianship had gradually lost much of its previous importance and thus could be removed by Constantine without further consequences for the legal, or social, order. However, it remains to consider a sizable further group affected by *tutela*: freedwomen (*libertae*). As they were mostly freed only after the age of thirty, it would have taken them longer to achieve the required number of four freeborn births, if they reached it at all.[45]

Although many rules of the guardianship affected freeborn and freed women in the same way, the existence of *tutela legitima* was a notable exception. It had otherwise been removed already in the first century, but the *patronus* of a freedwoman (and even his male heir) still became her *tutor legitimus*, a fact which gave him much more power than the other types of guardians had.[46] He could not be easily compelled by the praetor to give his authorisation. And perhaps most important of all, he could prevent the woman from writing a will, thus remaining her primary heir on intestacy.[47] This meant that, in the early Principate, the patron could exclude even the freedwoman's own children from inheritance because in the Roman family system they did not count as her nearest relatives. Gaius was well aware that the guardianship in this case was directly meant to benefit the *patroni,* and it remained an important aspect of *tutela* in the late second century (*Inst.* 1.192, 3.43). Of course, we do not know how often the patrons really used their authority. And in any case, this prerogative soon lost part of its force, as the SC Orphitianum in 178 decreed that a woman's children would be her primary heirs on intestacy before anyone else (*Tit. Ulp.* 26.7; *Dig.* 38.17.1).

In sum, it can be argued that in the early fourth century *libertae* remained the largest group of women who still to some extent suffered 'under the yoke' of guardianship.[48] And as the Romans certainly wished to protect the interests of slaveholders, this may have served as one rationale for keeping *tutela* in force. Nevertheless, I suspect that Roman legal conservatism still played the decisive role. After all, if freedwomen had been the primary reason behind the perpetuation of *tutela* and if the Romans had been inclined the adjust their law to social realities, it would have been simple to determine that the guardianship applied only to *libertae*. At least it is difficult to believe that

still eventually be acquired *ex iure Quiritium* by *usucapio* if the buyer or donee possessed the item for one year (two years in the case of land). Freedmen who had the Junian Latin status could not inherit or take legacies or gifts *mortis causa* and thus could not acquire an inheritance by *usucapio* (as it was forbidden); that is why it was important to specify that the gift had been given *inter vivos*, cf. Gai., *Inst.* 1.21–4, 2.21, 2.40–2; *Dig.* 41.8.7. It is not clear why *usucapio* nevertheless was here impossible for the Latin freedman: because of his status, or the lack of *tutoris auctoritas* (and thus *bona fides*) or just because the gift was against Lex Cincia (which prohibited large gifts). However, in the end the freedman could defend his title against the woman's heirs through a claim that she really had, up to her death, wanted to make him the owner. Cf. *Fr. Vat.* 1, 266, 272, 313; Gai., *Inst.* 2.47; and see e.g. Naber 1930: 169–80; Sotulenko 2018; Morrell 2020: 104; and cf. Buckland 1963: 254–5; Kaser 1971: 419, n. 5.

[45] Morrell 2020: 108–9. For the age limit, Gai., *Inst.* 1.18; Perry 2014: 197–8, and 193–4, on the unknown but certainly high frequency of manumission. *Libertae* who were freed to marry their *patronus* formed an exception, but they were a special case anyway: Gai., *Inst.* 1.19; *Dig.* 40.2.20.2; Perry 2014: 90–3; Huemoeller 2020.

[46] Gai., *Inst.* 1.157, 165, 171, 194; *Tit. Ulp.* 11.8. Another exception were emancipated daughters, whose fathers also remained their *tutores legitimi*: Gai., *Inst.* 1.166, 172, 175; cf. *Inst. Iust.* 1.18. However, that group is less important in this respect, because the father had initially made the decision to emancipate his daughter, and her property would mostly have derived from him anyway.

[47] Gai., *Inst.* 1.192, 2.118–22, 3.43–7; Perry 2014: 83–8; Morrell 2020: 102–4.

[48] This is suggested by Perry 2014: 87–8; and Morrell 2020: 109–11.

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Constantine particularly wanted to favour freedwomen with the abolishment of *tutela*, though it remains remotely possible that his words in *CTh* 8.16.1 ('promiscue omnibus') might have referred to freeborn and freed women together. Finally, one additional reason why *tutela* survived so long might have been that it formed part of the official population policy based on the Augustan marriage laws.[49]

The history of *tutela mulierum* in the imperial period demonstrates how difficult it is to use Roman law as a source for social history. The decisive change in the social and economic role of women had taken place already by the beginning of the Principate, but it did not suffice to put an end to the institution of guardianship. Nor were the subsequent legal developments directly linked with the status of women. They were determined by the Augustan population policy, the weakening of agnatic ties, the care of fatherless minors and the universal grant of Roman citizenship. During the three centuries of the Principate, the Romans did not see a need to remove *tutela* from their law, even if step by step it lost most of its original meaning. And as we cannot establish the various motives behind Constantine's comprehensive but imperfectly preserved legislation in the 320s we do not know if his court was interested in the gender roles in any particular way.

Still, Constantine's law can be seen essentially as the final removal of an antiquated and, for freeborn women, largely obsolete legal relic, while it had the more or less unintentional practical consequence of benefitting above all many freedwomen. Whichever we regard as more important, the abolition of *tutela* was nonetheless a milestone in the long history of Roman women's legal status. It took place at a time when their social and economic position was still at the same level as in the early Principate, if not better. In the 290s, one third of all imperial rescripts were sent to female petitioners, and the proportion of women had indeed risen from the early third century.[50]

On the other hand, we must admit that the history did not end here. The guardianship definitely vanished from imperial law, once and for all. There is no trace of it in Justinian's compilation or in later western legislation. However, the papyri in particular indicate that after this the story of women's supervision continued in another form. We shall conclude with a brief review of this sequel.

VI FEMALE SUPERVISION AFTER CONSTANTINE

Unlike most other legal systems, Roman family law in the Principate had been based on a strict separation of the spouses' properties. This was partly due to the paramount position and economic power of the Roman father (*patria potestas*). Hence, women were not normally placed under the supervision of their husbands — and as the fathers were likely to die sooner rather than later, the result was a wide practical independence of adult women. Husbands do not seem to have been generally banned from being their wives' guardians, but it was certainly not an automatic choice in Roman society. And since the *ius liberorum* usually exempted mature freeborn wives from *tutela* this was rarely an issue. Perhaps more importantly, husbands were forbidden to serve as curators for their young wives.[51]

A totally different system is found in the papyri of the sixth century, though the roots may be visible much before. Already in the third century Egyptian husbands had often informally functioned as 'assistants' for their wives who had the *ius liberorum*. By the sixth century, the old Roman *tutela* had been replaced by a semi-official arrangement

[49] Originally proposed by Schulz 1951: 181; see also Arjava 1996: 155–6; Morrell 2020: 111.
[50] Huchthausen 1974; 1976; Sternberg 1985.
[51] For the ban on curators, *Cod. Iust.* 5.34.2 (225); *Fr. Vat.* 201–2; and for the whole question of wifely independence, Arjava 1996: 133–43.

where husbands acted as *de facto* guardians for their wives, sometimes (though rarely) even called *kyrioi*. At the same time, widows (and perhaps nuns) were free to conduct their own affairs, often using the phrase 'acting without husband as guardian'.[52] This later system may be called semi-official because the phrases appear regularly in Byzantine papyri, although there was nothing to support the practice in contemporary imperial law. Similar tendences can be perceived in the limited sources of post-Roman western Europe, in Gaul, Italy and North Africa: married couples in the fifth and sixth centuries conducted their affairs together, while widows acted alone.[53]

Such developments after Constantine may help us to understand better the history of the guardianship and its connection with the whole Roman social and legal system. As said, that system emphasised to an exceptional degree the paternal family line at the cost of other human relationships, such as the maternal line or the marital bond. That is why *tutela* was so closely connected with the agnatic family and, unlike in most other societies, was separated from the conjugal relationship. The agnatic principle and its corollaries were already weakening in the early Principate, and the spread of Roman citizenship to all the Empire's inhabitants certainly reinforced this process. When the guardian was no longer needed to protect the interests of the agnatic family, he became dispensable in Roman law.

On the other hand, there was less need for a nominated guardian in the new (and more universal) system of family finances, which prevailed by the early medieval period. The spouses' properties were thought to be held in common, and the husband assumed his role in the family affairs by nature. Besides, the wife also had rights to his assets, so that she had to consent, too, if anything was going to be alienated from the common estate.[54] A western constitution of 444 quite rightly remarked that, even if the properties remained separate in theory, the everyday costs of a household were difficult to divide afterwards, when the marriage ended. A contemporary eastern law suggested that a wife might do well to leave property decisions to her husband, but it still stressed that the choice was entirely hers.[55]

As widows were not placed under male supervision even where husbands more or less informally controlled their wives, we can conclude that in the centuries after Constantine there was no general female incapacity in the Mediterranean world. True, local customs in different regions may have varied considerably. But by and large the juridic sources indicate that in the eyes of the law Roman women in Late Antiquity had not lost the legal and financial independence which they had achieved by the early Empire, at least in the urban upper and middle classes. The position of women was as strong as ever in the legislation of Justinian. It is more difficult to follow the developments in the west, but even there it seems that at least widowed women preserved their legal autonomy until the traces of the old Roman populations fade away in the Early Middle Ages.[56]

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[52] These developments have been exhaustively described by Beaucamp 1992: 193–267, followed by Arjava 1996: 147–9. For the 'assisting' husbands (συνεστῶτος or συμπαρόντος) in the third century, see above, Section III. The documents after Constantine where a husband is named *kyrios* are BGU IV 1049 (342); MChr 361 = P.Oxy. IV p. 202 (355); SPP XX 117 (411); P.Lond. V 1724 (578/82); these are best interpreted as local rather than official terminology, Beaucamp 1992: 194–7, 262–3; Arjava 1996: 147.

[53] Arjava 1996: 149–54, with a discussion of the primary sources.

[54] Arjava forthcoming; and 1996: 152–4.

[55] *Nov. Val.* 14.1 (444); *Cod. Iust.* 5.14.8 (450).

[56] For the social and legal status of women in the transition from antiquity to the Middle Ages, see further Arjava 1996: 155–6, 254–6, 261–6.

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