TYCHE

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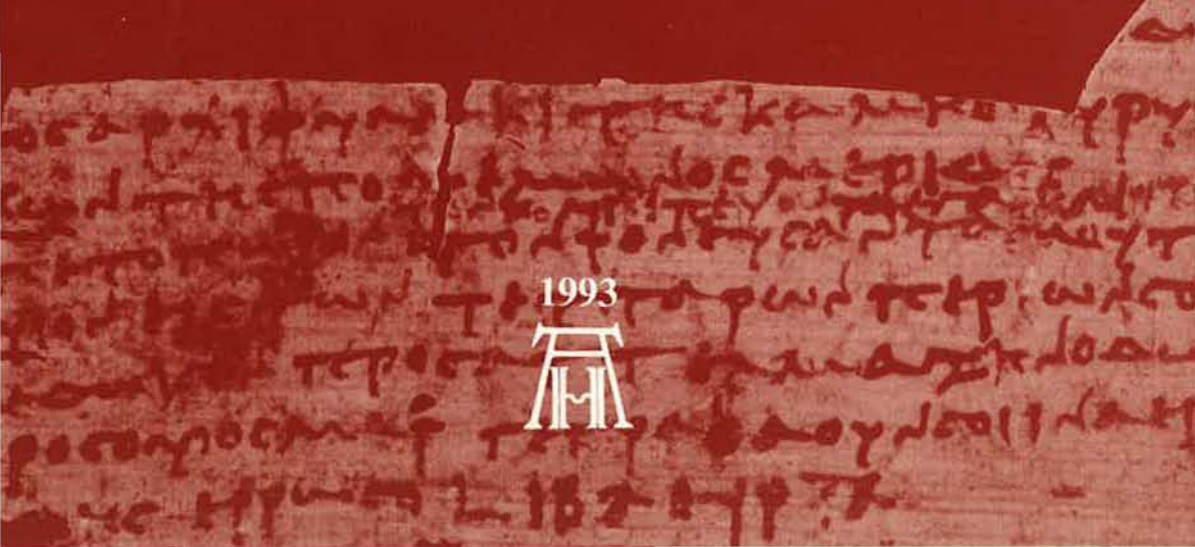

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INHALT

A. J. BOUDEWIJN SIRKS

Did the Late Roman Government Try to Tie People to Their Profession or Status?

§ 1 The government of the Later Roman Empire tried to intervene in the social and economic life by statutory regulations in order to stabilise and restore these. This, at least, has been maintained by J.-P. Waltzing and others, and is still considered to hold good, *vide* A. Demandt's *Die Spätantike*. The intervention was most visible in rules that made professions and statuses obligatory and hereditary[1]. The government would have wanted sons, particularly elder sons, to take over their fathers' professions or functions, and would have obliged them to do so ('Erbpflicht', 'fatalità della nascità', 'Erbzwang'). These occupations had then become obligatory in the sense of *munera*, and since they were, supposedly, generally exercised within

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[1] We do not refer to specific authors, since the said view is widely found. The main protagonist was J.-P. Waltzing in his very influential *Étude historique sur les corporations professionnelles chez les Romains I–IV*, Bruxelles, Louvain 1895–1900, and further F. M. De Robertis, already in his *Il corpus naviculariorum nella stratificazione sociale del Basso Impero*, Rivista di diritto della navigazione 3 (1937) 3ff., later in his *Il fenomeno associativo nel mondo romano*, Bari 1955 (reprinted Roma 1981) and his *Lavoro e lavoratori nel mondo romano*, Bari 1963; all incorporated in his comprehensive *Storia delle corporazioni e del regime associativo nel mondo romano I–II*, Bari 1971 (for example on II, 149–151: the occupation of the *pistores* of Rome would have been a hereditary one, transferred to the children); L. Cracco Ruggini, *Le associazioni professionali nel mondo romano-bizantino*, Settimana di studio del centro italiano di studi sull'alto medioevo. Artigianato e tecnica nella società dell'alto medioevo occidentale, Spoleto 1971, 59–193, part. 138–139 '... praticamente vincolate, spesso già creditariamente, tanto nelle persone quanto nel patrimonio dei propri membri (oltre che, ovviamente, nei beni — o fundi dotales — appartenenti all'associazione come entità giuridica autonoma' and the professional *collegia* would have become 'veri e propri organi inglobati nel connettivo della burocrazia statale.' (for the incorrectness of her interpretation of *fundi dotales* see A. J. B. Sirks, *Late Roman Law: the Case of dotis nomen and the praedia pistoria*, Z.S.S. Rom. Abt. 108 [1991] 187–212), and *'Collegium' e 'corpus': la politica economica nella legislazione e nella prassi*, Atti di un incontro tra storici e giuristi, Milano 1976, 80; and D. Liebs, *Privilegien und Ständezwang in den Gesetzen Konstantins*, RIDA 24 (1972) 297–351, who also interprets the transmission of the decurionate as inherent to the personal status. For a general account, see now for a survey of the various current opinions on the professions in the impressive manual on the Later Roman Empire by A. Demandt, *Die Spätantike*, München 1989, 272–276, and more in detail on 349–351; 322 ('vom Vater auf den Sohn übergehende Erbpflicht', yet stating that for the more well-off, like veterans and decurions, the obligation was coupled with the patrimony. This is partly true, in as far as it concerns duties coupled with fortune. Further, 329, 332 (the younger sons often free to take up other occupations: it would be interesting to know the evidence for this). Demandt, of course, voices here the general mood of the literature: the nature of his work implies this. For legal history we mention as a most recent example P. Voci, *Nuovi studi sulla legislazione romana del Tardo Impero*, Padova 1989, 253–281 (III. Mestieri obbligati e capacità matrimoniale) takes this as point of departure. Similarly J. L. Murga, *Los "corporati obnoxii", un eslavitud legal*, Studi Biscardi IV, Milano 1984, 545–585, is founded on Waltzing's interpretations of the Later Roman Empire (see A. J. B. Sirks, *Food for Rome*, Amsterdam 1991, § 3 for a survey restricted to the groups involved in the provisioning of Rome and Constantinople). In economic history, for example F. De Martino, *Wirtschaftsgeschichte des alten Rom*, München 1985, 461–465, and H. Kloft, *Die Wirtschaft der griechisch-römischen Welt*, Darmstadt 1992, 216–217 'in Collegia eingebundene Handwerker (*collegiati*)', 'Berufsgruppen'.

the framework of a professional association, it were these organisations which were responsible for the enforcement of the obligation[2]. This view is based on two assumptions: compulsion to exercise a profession or function, and hereditability of professions and functions. On the other hand, *vide* again Demandt, we may not consider this to have been a kind of 'Staatskapitalismus' or 'Staatssozialismus', and should even be careful to assume without more that the mentioned compulsion really had a deep effect, since there was, apparently, much social mobility. This produces, an odd contradiction which is explained generally by assuming that the government was incapable of forcing its will upon its subjects[3].

What we want to discuss here is this contradiction. We think the proposition that the government was interventionist or at least tried to intervene in the way described before, is unfounded, and will try to prove this by analysing the evidence adduced for that proposition, namely the laws by which the government is supposed to have endeavoured to implement the compulsion. It will appear that it merely tried to maintain and uphold the established social and economic structure, with some adaptations of an evolutionary nature. Other authors have already published studies of non-legal sources, which indicate no compulsion at all.

§ 2 The suggested ubiquitousness of (paternal) professions compulsorily exercised has already been doubted by F. M. De Robertis. The presence of *vacui*, persons not burdened by the *munus* in question, demonstrates both for the decurionate and for other *munera* that liability did not automatically lead to imposition[4]. Further R. Teja has maintained, against Waltzing, that only a certain proportion of the working people formed part of the corporations of artisans[5]. On the question whether *all* professions and functions had become obligatory, we restrict ourselves here to repeating our statement, made elsewhere, that this was not the case. Only a small number of professional people had become obliged to perform services to the state; this did not always mean that they had to exercise their trade for the state[6]. In practice most people will have

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[2] Argued, for example, by De Robertis, *Storia* (see above n. 1) 136: 'Fu così che l'appartenenza ai corpi di origine divenne, per coloro che già trovavano a farne parte, obbligatoria ed ereditaria, come per quasi tutti gli altri cittadini l'appartenenza alla classe (ordo) in cui erano nati: per impedire le evasioni ognuno venne vincolato al proprio mestiere, come un condannato alla catena, con i beni ed i figli: è il cosidetto principio della fatalità della nascità!' De Robertis cites some texts in which indeed is said that a decurion and a *colonus* are born for their charge, but we interpret this, like F. Jacques, *'Obnoxius curiae'. Origines et formes de l'astreinte à la cité au IV^e siècle de notre ère*, RD 1985, 303–328, esp. 318–319 for the decurions, as a reference to the origo principle. See further note 1 for the summary found with Demandt. Liebs (see above n. 1) 334: 'Erbzwang', by which he means that sons were obliged to exercise the profession of their father, and which was introduced under Constantine. Cracco Ruggini (see above n. 1) does not elaborate this point.

[3] See Demandt (see above n. 1) 254 ('Wirkungslosigkeit der Gesetze'), 275. R. MacMullen (*Corruption and the Decline of Rome*, New Haven, London 1988) assumes that bribery was the clue to this: by bribery the officials were bought not to apply the rules.

[4] De Robertis, *Storia* (see above n. 1) II, 185–196, referring to the many vacui, who for this reason rejects the idea of a paramount introduction of compulsion; Sirks, *Food for Rome* (see above n. 1) 129–130; Jacques (see n. 2) 316.

[5] R. Teja, *Las corporaciones romanas municipales en el Bajo Imperio: alcance y naturaleza*, Hispania Antiqua 3 (1973) 153–177. It is not clear what Teja thinks the origin or status was of these corporations of artisans.

[6] For the limitation of the legal measures to the *navicularii, pistores, suarii* and some other groups connected with the *annona* of Rome and Constantinople, see Sirks (see above n. 4) § 3, and A. J. B. Sirks, *The size of the distributions in Rome and Constantinople*, Athenaeum 79 (1990) 215–237, where we defined the compulsory sector as relatively small compared to the free sector. De Robertis, although arguing for such a restricted application (see above n. 4), does not elaborate the proportion between free and obliged persons. This is important, because if the professional people who were *vacui* (of *munera*) made up, for example, 20%, there would still be a good case to call the Later Roman Empire a 'Zwangsstaat'.

exercised the trade or profession their father or mother taught them, but this does not affect the point at issue.

As regards the point of compulsion, G. Dagron has denied that professions in the east were compulsory in the fourth century, and likewise W. Ceran has argued, on basis of the writings of John Chrysostom, that people freely chose their professions, predominantly in pursuit of profit[7]. Similarly, Teja has said the same for the west[8]. Moreover, the army and the Imperial service do not show such a compulsory character[9]. As regards the involvement of associations, in some cases the imposition of a *munus* implied indeed membership of a corporation (for example, of the *curia* or a *corpus navicullariorum*). In line with Waltzing, De Robertis has distinguished between corporations where the members exercised their profession for the state's benefit and corporations where the members had to render a service other than that of exercising their profession[10]. This distinction, however, does not hold in general: except for some corporations connected with the *annona* of Rome and Constantinople, the corporations in the cities had to render services of a general public nature. Further the existing corporations were not professional associations; they did not comprise of all those exercising the same profession, nor did they work for the common interest of their members, nor were they obligatory for professionals as such[11].

As regards the presumed hereditability, H. W. Pleket stresses the *de facto* hereditability of membership of town councils caused by social tradition and pressure, leaving aside the question whether this was also *de jure* a hereditability, whereas H. Horstkotte puts the effect of social pressure in perspective[12]. F. Jacques enters into the crucial question what is meant by hereditary. Dealing with the decurions, he says that if a personal status of decurion is meant, which a son would acquire at his birth, this interpretation is wrong. Only by the appointment as decurion, by decree of the town council, did anybody become a decurion, whether he was a decurion's son or a plebeian. This was the rule in the early principate and it remained the rule in the later empire. True, being a son or descendant of a decurion facilitated or rather obliged somebody, socially, to seek the decurionate. In this way there was a *de facto* heredity, but appointment remained necessary. On these grounds Jacques rejects heredity as formal basis for

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[7] G. Dagron, *L'empire romain d'Orient au IVe siècle et les traditions politiques de l'Hellènisme. Le temoignage de Thémistios*, T&MByz 3 (1968) 1–242, part. 119 (but in note 201 he states that some workers were for economic reasons gathered in *collegia* and 'héréditairement' tied to their professions: bakers, *navicularii* etc.); W. Ceran, *Stagnation or Fluctuation in Early Byzantine Society*, Byzantinoslavica 31 (1970) 192–203.

[8] Teja (see above n. 5) 176–177, also referring to Church Fathers.

[9] Of course somebody could not leave the service at will after enlistment, but the enlistment itself was not compulsory, except for the *productio tironum*, but the selection then was at random; see E. Sander, s.v. protostasia, RE Suppl. X, 1965, 676–679.

[10] De Robertis, *Storia* (see above n. 1) II, 106–107 (referring to Waltzing *II* [see above n. 1] 258–259) distinguishes between corporations for whom the charge consisted in the normal exercise of their profession, and corporations for whom it consisted in a occasional service, somehow related to their profession. Among the former De Robertis counts the *navicularii*, the *pistores* and probably all the other corporations connected with the urban *annona* and the state factories, among the latter the *collegia* of the *fabri*, the *centonarii* and the *dendrophori*, who exercised their profession freely.

[11] See sections 5 and 7. To translate *collegium*, corpus with 'Gilde', 'guild', 'Innung', 'Zunft' may easily lead to wrong interpretations; cf. our *Characteristics of the Late Roman Empire*, Atti X Convegno Accademia Romanistica Costantiniana, Perugia 1991, note 16 [to be published].

[12] H. W. Pleket, *Sociale stratificatie en sociale mobiliteit in de Romeinse keizertijd*, TG 84 (1971) 235, who carefully refers to a *de facto* hereditability, observed in the returning of the same families in the town councils, whereas H. Horstkotte, *Individualistische Züge in der spätrömischen Rechts- und Gesellschaftsordnung*, HJ 106 (1986) 1–22, argues that the social restrictions were rather lifted than maintained.

the transmission of the decurionate. Further Jacques states that in principle every citizen was liable for the decurionate, but that even if somebody fulfilled all requirements set, it did not automatically entail election[13]. In our analysis of the corporations involved in the supplying of the public distributions in Rome and Constantinople, we found no heredity of a personal status, and in the case of the *navicularii, pistores* and *suarii* a liability, coupled with the inheritance of a member of the corporation. Rejection of the inheritance entailed release from the liability[14].

As said the observation that there was, actually, much social mobility led to the observation that there was a contradiction between the governmental compulsion and social reality. Thus, for example, MacMullen who explains this by assuming that bribery was the clue to this[15]. Yet this contradiction is only the result of the proposition that there was such a policy of compulsion, which covered more than the public obligations. This reduces the question to what the basis of the imposition of the public obligations was (hereditary or not): a change in policy will become visible then. That *de facto* children followed their parents in their profession or social position does not affect this since they were then free to choose, for example, for the army or the church, which would be incompatible with a legal hereditability. A legal barrier is unsurmountable except by illegal and sanctionable means. A social barrier is surmountable, in any case its overcoming does not entail legal sanctions. In this respect there is no difference then between the Later Roman Empire and the Roman Republic or the Principate.

A general analysis of the basis of the public obligations has not yet been made. First the idea of a hereditary transmission needs to be clarified. A sharper definition of what is meant by it, and an examination whether and if so what in reality determined somebody's obligation to exercise a duty or profession, is necessary. Jacques' analysis, correct as it is, has to be refined and extended with, for example, the *praedia curialia.*

Heredity may mean several things. First, the term may mean the transmission of rights and obligations at death from the *de cuius* to the heir. This is the original and literal meaning, applied in the private law. Then there are other, more metaphorical meanings, of which an extreme example is genetic heredity. One of these meanings is the *de facto* heredity mentioned before. However, is not the phenomenon in question not heredity but rather the wish of a certain group to restrict the admission of new members (and by that its perpetuation) to descendants of members or former members of their or a another council, descendance not implying, however,

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13 Jacques, *'Obnoxius curiae'*. (s. above n. 2) 305–307, 314–18. The conclusions of this article are based on his *Le privilège de liberté. Politique impériale et autonomie municipale dans les cités de l'Occident romain* (161–244), Rome 1984.

14 Sirks (see above n. 1) 172, 327–330, 367; originally in A. J. B. Sirks, *Qui annonae urbis serviunt,* Diss. Amsterdam 1984.

15 MacMullen, *Corruption* (s. above n. 3) 195–196, and particularly 82. On 195–196 he gives a description of the *collegiati*, according to him 'all sorts of workers associations': 'It was the object of very minutely detailed legislation, over the whole course of the fourth and later centuries, to lay all such occupations under obligations to the state. Whatever they made or did, a part they owed like a tax ... granted.' And MacMullen concludes: 'Bribes were the key ... to freedom.' This is his way of explaining the apparent contradiction between the compulsion as assumed and the obvious social mobility. Yet in note 82 MacMullen confesses: 'Disappointingly the papyri of Egypt return no clear answer to the question, did the legislation diminish social mobility at all? But perhaps the fact that there is no detectable difference post-300 compared with pre-300 is in itself revealing'. Revealing of what? Not only that there are merely two constitutions on the *collegiati* themselves, of all the constitutions MacMullen has in mind, but they date from the period 364–425, a period even less than 75 years. This legislation was, moreover, restricted to some groups of importance to the authorities, who received some immunity in exchange for their public services. Professions were left in freedom. Further see Demandt (see above n. 3).

automatic admission (which we will call, provisorily, *endohairesis*)[16]. In the case of the decurions this group was defined, as we will see, as comprising of sons or grandsons of decurions (within it, there was a differentation between legitimate and illegitimate sons: the former were preferred over the latter). It was not an absolute restriction. Legally, all persons respectable were admissible (but this may have been, as with the illegitimate sons, an extension imposed by the emperors; see below § 5), but what counts is the social rule and preference. Of course such a preference was already existing, but both in the Roman towns and *municipia* under the Republic and in Rome admission to the council or senate was regulated by the election for an office and open to outsiders. Thus the rule under consideration must have been an effect of the change in the second century towards admission as decurion by decree of the council (thus cooptation). Was it introduced in order to reinforce the position of the local leading families, who could not control anymore admission by way of the elections[17]?

Likewise citizenship was conferred upon a preferred category of eligible persons, but here the choice was fixed according to rules on *conubium* and *origo*, and applied automatically at birth. Yet its origin shows itself in the possibility of admitting outsiders (grant of citizenship) and withdrawing membership (exile). The decurions formed a group within the citizens' body. If the motive for the introduction of such a restriction regarding the admission to the council was to allow more of the actual members to magistratures, the parallel with endogamy would be complete[18]. Further, these cases belong to the sphere of the public law.

With this distinction in mind we will have to determine the exact meaning of the ostentatious heredity of functions and professions, that is the transmission of public duties, because this is what is implied by the term as used by Waltzing and others. Only an analysis and juxtaposition of the relevant legal rules can provide the answer. For this we have to consider the system of *munera* and *honores* as it functioned in the ancient world, which we will do in the next sections. It will appear that there is ample reason for rejecting the idea, that heredity — in whatever meaning — was a general ground for imposition of *munera* and *honores*, or for

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16 By analogy to endogamy we could call this, in order to stress the difference with heredity, *endohairesis*, the restriction of candidates for election to a group (in contrast to oligarchy, the rule by few; town administrations were, in general, oligarchies), or *endo-onomasia, endocheirotonia*. The reverse would be a system where candidates for the council were selected amongst others than descendants of the councillors (thus: the *plebei*). We do not see this here, but the system by which in some mediaeval Italian towns the podestà was always conferred upon somebody from another town, in order to prevent any local family from becoming too strong, comes close to it. The system will have led to (or confirmed) a rule of towns by few families; it was not closed in this respect: any new resident could be enrolled as long as he was of the required descent. As to oligarchy, this term refers to the rule by few but does not cover the system of admission to these few. An oligarchy may select its new members on basis of family ties, military career or other criteria, whether or not combined, as did the imperial administration. Such criteria may have existed in the towns as well, yet in any case second to the primary criterion of curial descent. On oligarchy: G. Bien, s. v. Oligarchie, *Historisches Wörterbuch der Philosophie*, Darmstadt 1984.

17 And to what extent could or did non-Roman towns apply such a restriction?

18 Endogamy is always accompanied by exogamy: within the greater group to which endogamy is applied, there are smaller groups which practice exogamy. By this these groups establish bonds between them, forced as they are to seek partners outside their own group. Originally, a magistrature led to membership of the council, but this was reversed by the middle of the second century; cooptation by the council became the rule, and thus the decurionate became more exclusive. If in a town several families vied for the magistratures (which would contribute to the family's standing), then it would be sensible to divide as much as possible between the families — and the system of vacancies after a tenure would assist to this — while at the same time keeping newcomers out, who would make the available positions more scarce. Thus a balanced system would come into existence. The danger of course would be that the number of decurions might dwindle, and the emperors' decisions on the illegitimate sons and certainly on plebeians were meant to remedy such danger.

exercising professions, in the Later Empire. In stead of this there existed a few criteria, in spite of the great detail of the various legislation of which the actual scope was, however, rather limited.

§ 3 Roman society was a society replete with obligations, legal and social. Many of the public obligations towards the state, the public provincial authorities and particularly towards the municipal authorities were known as *munera*. Taxes formed part of these *munera* and were therefore to a certain extent interchangeable with other *munera*[19]. The emperor might grant an immunity from a tax in exchange for the fulfilment of some *munus* (as was already done in the case of some services in the public interest). The same occurred on the level of towns[20].

The execution of the *munera* depended on certain criteria. We can distinguish here the basis upon which the person who had to perform the public obligation was summoned. Such a person was called *obnoxius vocationi*. This basic criterion which determined the *obnoxietas vocationi* is the subject of this paper. It established the primary liability for those obligations and has to be distinguished from the imposition of a *munus* for the first time (the imposition *ex novo*)[21]. The basis was generally meant to secure the autonomous continuation of the obligation from one person to another. Beyond the basis, other criteria were applied to establish the actual imposition, such as solvability, bodily capacity, age, *existimatio*.

From this point of view, are there not two concurrent mistakes made in the proposition, that only descent was decisive for the obligation? Firstly, that the descent is seen as decisive whereas it is merely a prominent feature of one of more criteria, in use for the imposition or transmission of public obligations. Secondly, that the exercise of a private profession is not or not clearly enough distinguished from the duty to fulfil one's public obligations such as paying tax; in other words, private and public law are not kept apart. In that case the apparent contradiction is no longer a contradiction. The freedom to choose a profession remained unimpaired in the fourth and fifth century[22]. What the emperors attempted was to curb the evasion of public duties such as taxes.

§ 4 For taxation (the *tributum* on basis of the *iugatio*, the *tituli* of the fisc, the *collatio lustralis* and other taxes, and the local taxes[23]) and some *munera* like the delivery of animals for the public post[24] landed property was the criterion of levying[25]. One was taxed in the town (or its territory) where the property was situated[26]. The part of the *tributum* assessed on basis of

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19 V. Arc. Char., *sing. mun. civ.* D. 50. 4. 18. 29. W. Goffart, *Caput and Colonate*, Toronto 1974, 22–30 and 74, also makes the remark regarding the paramount obligations, but classifies the *munera* among the taxes, whereas the latter are a species of the *munera*.

20 The immunity granted to a fixed number of physicians etc. since they provided a service considered of public importance. Originally the *navicularii* of the *corpora* enjoyed an immunity of *munera publica* for this reason, until their voluntary obligation was assimilated to the *munera* (see § 4).

21 We often see an imposition *ex novo*, for example with the *navicularii* in CTh 13. 5. 14 (371, E), as the imposition of the 'free' colonate on able-bodied beggars (CTh 14. 18. 1 (382, W) = CJ 11. 26. 1) and on defeated barbarians (CTh 5. 6. 3 (409, E)). This, however, lies outside the scope of this paper.

22 Demandt (see above n. 1) 322 underlines this by citing Theoderet ep. 144.

23 Arc. Char. D. 50. 4. 18. 25: *munus collationis*.

24 Arc. Char. D. 50. 4. 18. 21: *agminales equi, mulae, angariae*.

25 The *aurum coronarium* and the *aurum oblaticium* were not, originally, taxes, but gifts to the emperor. The *collatio lustralis*, imposed on merchants, was assessed both on their capital assets and themselves and their families.

26 The *munera patrimoniorum possessoribus*; see for example CTh 11.1.10. Ulp. 3 *censibus* D. 50. 15. 4. 2 says that the landowner had to declare his land in the town in whose territory these lay and not in his *origo*. The tribute is rarely mentioned in this context, since an immunity from it

the *capitatio* (amounting to a poll tax for those who did not have anything else to declare) being levied on basis of the person, was an exception to this. An immunity from this was granted to the urban populations in the east in 313[27].

Praedia like the *praedia navicularia* seem to fall also into this category (of *obnoxietas ob rem*), yet their origin lay elsewhere. The *munus* as such was not established by the *praedia* (for example, in the case of the decurionate the usual criteria were still applied). Here possession is the basis of the obligation to contribute to the performance of a *munus* (see below §§ 5 and 6).

§ 5 Regarding the obligation to perform the *munera civilia* (including the decurionate and the *honores*) the summoning took place on the basis of the *origo* and its equivalent the domicile (*incolatus*). The *origo* defined somebody's *status civitatis* both in public and private law. It determined the city someone was a citizen of, and consequently the private law he was subjected to. The Roman government encountered both these aspects in its provincial administration. Regarding the local administration the *origo* determined, in respect to the *munera*, in which town within the empire somebody was obliged to perform municipal duties. The extension to the domicile, under Hadrian or earlier, did not change this principle[28]. In general, the paternal *origo* prevailed, although in some cities that of the mother also obliged[29]. This rule applied to valid marriages, but after Caracalla's grant of Roman citizenship, as a result of which nearly all free inhabitants of the empire had the *conubium*, practically only concubinage and *contubernium* remained *iniusta* unions[30]. This grant further reduced the significance of the *origo*. Perhaps local private law continued to exist, but for the government almost all inhabitants were Roman citizens and subjected to the Roman private law. Thus the *origo* was only important now for the administrative law dealing with local and provincial administration, as a criterion to establish where somebody had to carry out his public duties. The term *origo* originally had a geographical meaning, but obtained quite soon also a metaphorical sense, thus giving '*per originem obnoxius*' an ambiguous significance[31]. Although it was descent (and to a certain extent marriage)[32] which determined the *origo*, we cannot speak of heredity or inheriting here. One did not inherit the *origo* in the way one inherited assets, nor could one reject it like that. Similarly one cannot say that somebody inherited his father's or mother's personal status. De-

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was hardly ever given. As a result, it does not play an important role in the system of immunities. It is different for the irregular taxes. Further there were in some towns local taxes on real estate (*munus possessionis*), a *collatio* (Arc. Char. *sing. mun. civ.* D. 50. 4. 18. 25).

27 CTh 13. 10. 2 (313, E).

28 CJ 10. 40. 7 (117–138). On the *origo* see D. Nörr, s. v. *origo*, RE Suppl. X, 1965, 433–473.

29 Ulp. 2 *ed.* D. 50. 1. 1. 1.

30 The *dediticii* were excluded, as were, later on, the barbarians who settled within the boundaries of the empire.

31 CTh 12. 1. 13 (326). The use of *originalis* and *originarius* in this sense is already common in the beginning of the fourth century (CTh 4. 12. 3 [320]; CJ 11. 68. 1 [325?]), and the metaphorical use must consequently date from an earlier moment. Nörr has argued that the word *origo* slowly obtained another signification than merely a geographical one, becoming synonym with hereditary condition, status etc. in the fourth century (Nörr, note 28, 466, 469–471). This observation is correct only to this extent that origo also indicates liability on a footing other than the geographical one. Jacques (see above n. 2) 324 assumes that *origo* came to denote one's citizenship, wheras *obnoxius* signified the attachment to one's town, but this seems too strict a distinction. *Obnoxius* means in a very general sense 'liable', for example to punishment.

32 A valid marriage *could* alter the *origo* for the wife, but was not — in this case — constitutive for the liability for the obligation; contrary to what Voci (see above n. 1) 262ff. and elsewhere suggests. Marriage in itself was only in a very few cases the basis, see § 7.

scent was just a criterion to establish to which group somebody belonged, and supported by facts.

The decurions represent a particular group within these *munera*. The *origo* criterion was applied, but to this was added another criterion from the second century onwards, more of a social than of a legal nature, namely (legitimate)[33] descent from a father or grandfather who had been decurion[34], and in exceptional cases from a mother of curial descent[35]. Yet plebeians were admissible, since the law stresses this. It is possible, however, that municipal laws expressly prescribed *endohaeresis*, whereas the emperors, anxious to promote full councils, overruled this by adding that in the end, but presumably as a second choice, illegitimate sons, grandsons and plebeians were admissible too, as long as they were of good reputation[36]. This criterion resembles the *origo* but is different from it, since it derives from a social preference for sons of decurions or of curial descent. It is therefore a criterion of preference. To assume on basis of this preference that the decurionate was hereditary is wrong since not all those liable were ever summoned, and birth alone never made a decurion[37]. Indeed, beyond the cases specified, a descendant of a decurion could only be summoned as plebeian. It was the present group of councillors which admitted new members, and it preferred to restrict its choice. The decurionate itself was the requirement for several public obligations and made one liable for these.

In the fourth century the category of *bona* or *praedia curialia* came into being[38]. Already in 319 *bona caduca* of a decurion could be claimed by the *curia*[39], in 391 this was extended in the east to *bona vacantia*[40]. If we may put this in the context of later practice, these *bona* were put in the trust of poor potential decurions as a kind of substitute in order that they could perform the decurionate and its duties. Later on, in 389 in the west and in 391 in the east, it was established that somebody who acquired property (that is: landed property) from a decurion and who was not himself eligible for the decurionate, had to pay a financial contribution to that decurion or his successor, in proportion to the part the property had formed in the assets of the alienating decurion[41]. In 428 this was extended with the provision that if an unsuitable person suc-

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[33] Illegitimate unions robbed the council of potential candidates and were combated for that reason; CTh 1. 1. 6 (319) on unions between decurions and slave women. Since the emperor mentions that the decurions took refuge, in this way, in the *donus potentissimae*, such devices may have been a case of *patrocinium*: the *potentior* could manumit the sons, leaving them their *peculium*, by which they would be free but uneligible for the council. See M. Bianchini, *Condicio dei genitori e status dei figli: Riflessioni su Nov. Just. 38.6*, in: *Diritto e società nel mondo romano*, 1. Atti di un incontro di studio, Pavia 21 aprile 1988, Como 1988, 181–210.

[34] CTh 12. 1. 51 (362, E); CJ 10. 32. 27 (368, W).

[35] In Antiochia: CTh 12. 1. 51 = CJ 10. 32. 22 (362, E).

[36] The rule on the grandsons may have been applied by towns themselves, to allow sons of daughters, or of plebeian sons, of decurions to enter the council; in Antiochia maternal descent obliged to the council. The decision on plebeians may also have been based on the former entrance of plebeians into the council via election and an office.

[37] Thus also Jacques (see above n. 2) 316–319, contrary to, basically, Th. Mommsen, *Die Erblichkeit des Decurionats*, Gesammelte Schriften III, Berlin 1907, 43–49; but we find Mommsen's opinion also, for example, in W. Schubart, *Die rechtliche Sonderstellung der Dekurionen (Kurialen) in der Kaisergesetzgebung des 4.–6. Jahrhunderts*, Z.S.S. 86 (1969) 287–333. Jacques has the heredity of a personal position in mind.

[38] The term *praedia curialia* is ours, taken from the existing terms *praedia pistoria* and *praedia navicularia*. Although *bona* is used in CTh 12. 1, it is certain that landed property was the criterion of wealth for the decurions, as it was in general in Antiquity. *Bona caduca* are bequests unclaimable for the beneficiary on account of the *lex Papia*, *bona vacantia* are bequests not claimed by the beneficiary.

[39] CTh 5. 2. 1 (319).

[40] CTh 12. 1. 123. 6 (391, E).

[41] CTh 12. 1. 107 (384, W); 12. 1. 123. 2 (391, E).

ceeded a decurion, he had to hand over one-quarter of the bequest to the *curia*[42]. Similarly if a decurion became senator or cleric and as a result became immune from the decurionate, he had to set apart his fortune (as decurion) in order to enable an appointed substitute to act in his place, the expenses being paid out of his estate (which means that his children would remain *obnoxii decurionatu*)[43]. Clerics could also transfer their entire property to the *curia* if they did not want to arrange for a substitute[44]. If in the west somebody evaded his obligations as decurion his property would be assigned to the *curia* as a punishment[45]. If in the east somebody had appropriated the possessions of a decurion he could be appointed as a substitute[46]. Also in the case of appointment by virtue of a marriage to the daughter of a decurion (in the east; see § 9) the assets became apparently property of the *curia* (although the husband had been instituted as heir), but remained in trust with the husband-substitute decurion[47].

We find various situations, as in the case of the *praedia pistoria*, *suaria* and *navicularia*. They all have in common that the property of a decurion obliges other persons who acquire these to maintain those who succeeded the decurion, or to function as substitutes if suitable themselves. They are consequently derivations of another criterion, in themselves based on property. Yet in itself they are not sufficient to establish the *munus decurionatus* in full for the proprietor: at the most he will act as substitute, which means that his successors if any will not be *obnoxii* to the obligation. The basic criterion remained the *origo* combined with paternal descent, whereas *plebeii* might be enrolled *ex novo* on basis of their *origo*.

§ 6 Regarding the corporations of the *naviculariі* (shipowners), *pistores* of Rome (millers-bakers) and *suarii* (pork traders) in Italy with the corresponding *munus navicularium*, *pistorium* and *suarium*, the quality of being heir to a member of the group was the basis of the obligation (a criterion traceable to the origin of these corporations in the second and early third century)[48]. One could evade the liability for the charge (limited to the value of the inheritance)[49] by renouncing the inheritance[50]. A register ensured that the members of a corporation were known. Hence probably the use also here of *origo* to designate the criterion of the footing[51]. The execution of the charge, a *munus patrimonii* (with the *pistores* a *munus mixtum*)[52], did not imply, in itself, the performance of a profession, but merely the continuation of an investment, for ex-

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[42] CJ 10. 35. 1 (428, E); Nov. Theod. 22. 2 (443, E) = CJ 10. 35. 2.

[43] CTh 12. 1. 123 pr. (391, E); 12. 1. 130 (393, E); 12. 1. 160 (398, E); 12. 1. 163 (399, E); 12. 1, 172. 1 (410, E).

[44] CTh 12. 1. 121 (390, W); 12. 1. 163 (399, E); 12. 1. 172 (410, E).

[45] CTh 12. 1. 143 (393, W); 12. 1. 161 (399, W).

[46] CTh 12. 1. 134 (393, E).

[47] CTh 12. 1. 124 (392, E).

[48] CTh 13. 5. 2 (315, R): *pistores*; CTh 13. 5. 3 (319, R): *naviculariі* of Rome; CTh 13. 5. 14 (371, E): *naviculariі* of Oriens and Africa; CTh 14. 4. 1 (334, R) and Nov. Val. 36. 8 (452, R): *suarii*. Perhaps also for the *susceptores vini* CTh 14. 4. 8. 3 (408, R). It merely concerns here certain groups and not all *naviculariі*, *pistores* etc. of the empire or even Rome or Constantinople (Demandt [see above n. 1] 385–386, 386–387): see Sirks (see above n. 6). That the quality of being heir was decisive here is because these corporations were originally set up to accumulate capital. See further on these groups Sirks (see above n. 1) 138: capital of *naviculariі*, 327: of *pistores*, 367: of *suarii*.

[49] CTh 13. 5. 2 (315, R), CTh 12. 1. 149 (395, W) for the *pistores* of Rome and the *naviculariі* in the provinces.

[50] CTh 13. 5. 2 (315, R) for the *naviculariі* and *pistores* of Rome, CTh 14. 4. 1 (334, R) for the *suarii*.

[51] *Origo* with the *naviculariі* in the provinces: CTh 13. 5. 12; with the *pistores corporis* of Rome: CTh 14. 3. 13, 14.

[52] See for these terms below n. 108.

ample in a ship[53]. If a *pistor* was still too young, his guardian had to act as his substitute in this respect as well, with the *corpus* as guarantor, and also to remain substitute after his guardianship had ended[54]. The criterion which existed for the corporation of the *catabolenses* at Rome is a special case of this, since they were most likely charged on account of their property as derived from *pistores corporis*[55].

Later on, in the west and in Rome, and subsequently in the east, ownership might also suffice: namely in the case of goods (usually real property) alienated by a member of the corporation. This was the category of the *praedia*, where the obligation was quite soon limited to a regular payment (*titulus, pensio, portiuncula*) to the corporation. With the *navicularii* in Africa this happened in 368–375, with those in Rome in 367, with those in Egypt and *Oriens* after 371, with the *suarii* in 389, with the *pistores* in Rome in 369, and with some other groups in the east in 424 (see below § 8)[56]. The *corpus pistorum* in Rome also acquired possessions from *pistores* and put these in trust with substitutes called *mancipes* (who performed this as a *munus personale*)[57]. Here also bakers who wanted to become senators had to appoint a substitute to their property for the *munus*[58].

§ 7 For the *coloni originales* and *inquilini originales*[59] the basis for the *colonatus* was determined by the *origo*, although restricted to land within the town or its territory. The *colonus* was inscribed in the census register of this land[60]. (Two kinds of colonate existed[61]: Firstly, the colonate later called adscripticiate, which included the obligation to cultivate land and was found among *coloni originalis (adscripticius)* of the *res privata* in combination with an immunity of municipal charges[62], and among other *coloni*, always in combination with the limita-

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53 It concerns corporations involved in the supply for the public distributions in Rome and Constantinople, and it was the investment which the emperors wanted to be continued. With the *pistores* the situation became complicated after the (personal) *munus mancipatus* had been introduced. See further note 10 for the question of the professional associations.

54 CTh 14. 5. 5 (364, R).

55 This corporation was responsible for the transportation of grain in Rome from the granaries to the bakers of the *corpus*. It was supplemented with freedmen of the said bakers who had received legacies or fideicommissa from bakers of the *corpus*, or who possessed more than thirty pounds of silver (probably derived from his *peculium* and thus from property deriving, in the end, also from a *pistor corporis*).

56 CTh 13. 6. 3, 4, 6, 7 (368–375, W): *navicularii* of Africa; CTh 13. 6. 5 (367, R): *navicularii* of Rome; CTh 14. 4. 5 (389, R): *suarii*; CTh 14. 3. 13, 19 (369, 396, R): *pistores*. Other groups: the *murileguli* and *monetarii* of the east. The same extension with the decurions in 384 and 391, see above.

57 CTh 14. 3. 7 (364, R); 14. 3. 19 (396, R). See below n. 108 for the term.

58 CTh 14. 3. 4 (364, R).

59 We find various adjectives: *originales, originarii, censibus adscripti, adscripticii, homologi, tributarii,* which all designate the *adscripticii*; whereas particularities depend on the context, for which see below. *Colonus* is a diffuse term and has always to be examined in its context. See on this D. Eibach, *Untersuchungen zum spätantiken Kolonat in der kaiserlichen Gesetzgebung, unter besonderer Berücksichtigung der Terminologie*, Köln 1980.

60 A. H. M. Jones, *The Roman Colonate*, in: *The Roman Economy*, Oxford 1974, 303–304 speaks of the hereditary nature of the tied colonate, although correctly linking *originalis* to the *origo*.

61 We use the term colonate (as such attested in CTh 12. 1. 33: *colonatus*) to designate the legal construction of the adscripticiate, and the term 'free' colonate, a public obligation. For the rest, the term colonate has no legal meaning. In general the Romans indicated the legal condition of a farmer by an adjective: see above n. 59.

62 CTh 13. 10. 3 (357, W), CTh 11. 1. 7 (361, E), CTh 11. 1. 12 (365, W), CTh 11. 1. 14 (366, E). These charges included the taxes; see CTh 12. 1. 33 (342, E) which links these privileges (*privilegia rei privatae nostrae colonatus iure*) to the obligation to cultivate (*studium cultionis*) and

tion of the *peculium* and the guarantee of the landlord to pay the capitation. Secondly, the so-called 'free' colonate, only found in the Balkans and in the east, and after 371,[63] where the obligation merely consisted of the prohibition to migrate and the duty to cultivate the land, the *coloni* being bound to pay the tax themselves and being free to dispose of their goods[64].) We can distinguish variants in the basis here.

For the coloni *originales* of the imperial domains (the *fundi Domus divinae*) the rules of the *origo* formed the point of departure: the father's condition prevailed[65]. In 367 in the east this was modified: children of a *colona originalis Domus divinae* and an *ingenuus* (a man, free of the duty to *operae* or *obsequia*)[66] would follow their mother's condition[67]. A similar rule was introduced for the offspring of *inquilinae originales Domus divinae* and decurions[68]. Later, in 474–491, this rule was confirmed for the *coloni originales* of the *fundi tamiaci* (imperial domains)[69]. Such rules favoured the domains since they expanded the circle of persons liable for the colonate on these lands.

CTh 11. 16. 5 (343, Italy); see R. Delmaire, *Largesses sacrées et res privata*, Paris 1989, 682–686 with an enumeration of immunities. Delmaire does not make the connexion between obligations and immunities. The immunity from municipal charges for *coloni rei privatae*: CJ 11. 68. 1 (325); CTh 11. 65. 5 (343, Italy) = CJ 11. 75. 1; CTh 12. 1. 33 (342) must be seen as privileges favouring these domains. Abuse was made, and CTh 12. 1. 33 abolished this immunity as regarded the decurionate for *coloni* who possessed more than 25 *iugera* land or possessed less but still more than they cultivated of domains. In *Reconsidering the Roman Colonate*, to be published in the Savigny Zeitschrift für Rechtsgeschichte 110, 1993, we consider some possible reasons for the introduction of the adscripticiate.

[63] Illyricum and neighbouring regions such as Macedonia, to which CJ 11. 53. 1 (371) presumably refers; Palestine (CJ 11. 51. 1, 386) and Thrace (CJ 11. 52. 1, 393); a general prescription of thirty years, turning the adscripticiate into freedom from the landlord's potestas but imposing the 'free' colonate as compensation for the landlord (CJ 11. 48. 19; see our *Reconsidering the Roman Colonate* (see above n. 62) section 7).

[64] See on both colonates and the reasons behind this restriction of the *origo* to the land to be cultivated our *Reconsidering the Roman Colonate* (see above n. 62). To the survey of literature there in note 1 should be added: E. E. Lipsic, *Contribution à l'histoire de l'asservissement de la paysannerie byzantine au VIe siècle. Évolution de la législation concernant le colonat dans les années 505–582 de notre ère*, Vizant. ocerki. Trudy sovietsk. ucen. XIV Kongr. Vizantin., Moskva 1971, 98–124; I. F. Fikhman, *On the Structure of Egyptian Large Estates in the Sixth Century*, Proc. of the XIIIth Intern. Congress of Papyrology, München 1974, 127–132; A. Avram, *Zur Rentabilität der Kolonenarbeit in der römischen Landwirtschaft*, StudClas 23 (1985) 85–99; K.-P. Johne, *Römische Grundherren und Pächter im Wandel der Jahrhunderte*, Altertum 33 (1987) 163–170; A. V. Koptev, *Le pécule des colons romains de la basse époque*, X[e] Conf. VDI, Moskva 1987, 124–125; A. V. Koptev, *The "Freedom" and "Slavery" of Coloni in the Late Roman Empire*, VDI, 1990, 24–40; P. Rosafio, *Studies in the Roman Colonate*, Diss. Cambridge 1991; P. Rosafio, *Dalla locazione al colonato: per una tentativo di ricostruzione*, AION (archeol.) 13, 237–281; M. Kaplan, *Les hommes et la terre à Byzance du VIe au IXe siècle*, Paris 1992, 160–162.

[65] This follows implicitly from CJ 11. 68. 3 (364, E) and 11. 64. 1 (386, E), CJ 10. 32. 29 for the east, and from CJ 7. 38. 1 (365, W) and the below mentioned exception for the west. See CJ 10. 39. R, *De municipiis et originariis*, a rubric derived from the Justinianic compilers but which indicates the identical origin of *origo* where it concerns both the *munera* and the *coloni originarii* and other groups.

[66] Normally, apparently, since it was the groups of the *inquilini* and *collegiati-corporati* which created problems for the *origo*-principle and for which the additional rules were created; not the decurions or, for example, the *cohortales*.

[67] CJ 11. 68. 4 (367, W).

[68] CJ 10. 32. 29 (365, W). *Inquilini* were probably workers resident on the estates. The *inquilini originales* are treated on the same level as the *coloni originales*, see below.

[69] CJ 11. 69. 1. pr. (Zeno, E).

For *coloni originales* of private lands in the west the usual rules of the *origo* applied. This becomes clear in 400 when it was stated for the offspring of *inquilini* and *coloni*: whether *originales* (*censiti*, the text says) or not, the paternal condition would always prevail[70]. This is confirmed in 419 for unions between *coloni originales* and free women[71], but for *colonae originales* and free men the maternal condition would take over from now onwards[72]. For the case of unions between *coloni originales* a division was made. If the mother was fugitive, her landlord could claim a substitute for her and a third of her children[73]. Much later, in 458, such a division also appeared for unions between *colonae originales* and decurions, in order to increase the number of decurions[74]. In 465 the maternal condition was declared dominant in unions between *colonae originales* and *collegiati-corporati* of Rome[75]. In the east we find around the middle of the sixth century the term *adscripticius* (ἐναπόγραφος) for these *coloni originales*. Here the old law was applicable for unions between *adscripticii* and *coloni Domus divinae* (the *coloni dominici*)[76], which probably meant that the paternal condition prevailed, as it did for unions between *coloni originales* and *inquilini originales*[77]. For unions between *adscripticiae* and free male persons the *origo* was already applied before 530 so that the maternal condition dominated[78]. This was a new interpretation[79], perhaps inspired by the exception for marriages between *colonae originales* and free men[80]. In any case a direct or analogous application of the *senatus consultum Claudianum* as the ground for attributing the condition to the offspring must be rejected[81]. On the other hand, children of *adscripticii* who had married free women became in this way free of the charge. In order to prevent this undesired effect the emperor in 531–534 gave the landlord the right to bar such unions[82], and this was extended in 542 to

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70 CJ 11. 48. 13. pr. (400, W but also applied in the east), saying that the difference between the two conditions is not great. The rule would merely have established a difference in the case of a marriage of a *censita* and *non censitus* if previously the status of the *censita* would have prevailed (which we do not know).

71 CTh 5. 18. 1. 2 (419, W).

72 CTh 5. 18. 1. 4 (419, W) = CJ 11. 48. 16 (419); Nov. Val. 31. 6 (451, W).

73 CTh 5. 18. 1. 3 (419, W). Expressly confirmed and refined in Nov. Val. 27. 6 (449, W), Nov. Val. 31. 2–3, 6 (451, W) and Nov. Val. 35. 18–19 (452, W).

74 Nov. Mai. 7. pr. (458, W); the sons followed their father's condition if their mother was a *colona* (Nov. Mai. 7. 2 (458, W).

75 Nov. Sev. 2 (465, W).

76 CJ 11. 69. 1. 1 (474–491, E).

77 CJ 11. 48. 13. pr. (400, W) since it is included in Justinian's Code.

78 CJ 11. 48. 21. pr. (530, E), 11. 48. 24. pr. (531–534, E), Nov. Just. 54, praef. (537), CTh 5. 18. 1. 4 (419, W) = CJ 11. 48. 16 since it is included in Justinian's Code. The text underlines the difference between slaves and *adscripticii*, and the rule of *ventrem matris sequi* is cited to prove this difference.

79 *Quod hactenus in liberis tantum et servis observabatur*, as CJ 11. 48. 21. 1 says.

80 CJ 11. 48. 16 (419).

81 As argued by, amongst others, Eibach (see above n. 59), 69–70, 175, I. F. Fikhman, *Ad P.Wash. Univ.*, I, 25, in: *MNHMH Georges A. Petropoulos*, Athènes 1984, 385, and W. Schmitz, *Appendix I der Justinianischen Novellen — Eine Wende der Politik Justinians gegenüber adscripticii und coloni?*, Historia 35 (1986) 381–386. The *senatus consultum* rendered the woman who cohabitated with a slave into a slave herself, but only in case the owner had warned her formally three times. We do not see anything of that here, nor that the woman is assimilated to her lover's status. Besides, this *senatus consultum* is an exception to the rule that the child follows *ventrem matris* if there is no *conubium*. Eibach cites Nov. Val. 31, but the *denuntiatio* must be linked to the *coloni*-slaves and not the others. The crux is, that the *senatus consultum* concerns the *status libertatis* which had nothing to do with the *status civitatis*, merely decisive within the Roman Empire after 212 for the *munera*. For a more detailed discussion see our *Ad SC Claudianum*, to be published in the Savigny Zeitschrift für Rechtsgeschichte.

unions between *adscripticii*[83]. In 539 the offspring of unions between *adscripticii* and free women were subjected to the 'free' colonate[84]. These rules were enacted for the east. The rule of 531-534 was introduced, with the promulgation of Justinian's Code, in Africa where, as later in Italy, the colonate had been perpetuated after the Byzantine re-conquest in 533[85]. It was not until 570 that the additional rule of 539, imposing the 'free' colonate on offspring, was introduced into Africa[86] where the rule of 531–534 had caused a diminishing of *coloni originales*. But it seems not to have had the desired result there, since it was already in 582 substituted by the old rule (since 540 in vigour in Italy) that the paternal condition prevailed, whether it was the adscripticiate or the 'free' colonate, in unions with free women[87]. On the other hand, a division of the children of *coloni originales* of different landowners was also introduced in the east in 539–542, whereas in case of a union between a not subjected person and a *colonus originalis* the children would follow the mother's status[88]. Such a division already existed in the west[89].

The *inquilinatus* tied agricultural workers (without a home?) by way of the *origo* to the land. Their position was treated similarly, as already may have become clear, to the *coloni originales*[90]. Here this obligation could exist separately from the capitation, as its introduction in 371 in Illyricum and neighbouring regions proves[91].

§ 8 The corporations of the *collegiati* or *corporati* (the *collegia*, already in existence in the second century AD), were established in many cities. They consisted of *fabri* (carpenters, builders etc.), *centonarii* (feltmakers?) or *dendrophori* (wood sellers?). Their members had to perform services (*operae*) of public utility for the town, such as nightwatching, consorting carrying animals of the fisc, cleaning canals (in Alexandria) or forming a fire brigade[92]. Member-

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82 CJ 11. 48. 24. 1 (531–534, E), repeated in Nov. Just. 22. 17 (535–536). It has the appearance as if the women and children became beforehand *adscripticii* due the an analoguous application of the *senatus consultum Claudianum*. This is suggested by CJ 7. 24. 1 (531–534), whose section 1 is identical to CJ 11. 48. 24. 1. Yet it concerned here an imposition of a public duty, like we know for the sons-in-law of *pistores* and for *adscripticii* in the west (see Nov. Val. 31. 5 (451, W)).

83 Nov. Just. 157 (542).

84 Nov. Just. 162. 2 (539): a decision, based on an analogy.

85 It existed already in 414 (CTh 16. 5. 54, a fine of one-third of the *peculium* of Donatist *coloni*); App. VI (552, Africa), App. VII. 16 (554, Italy), App. IX (558, Africa).

86 Nov. Justini 6. 1 (570).

87 App. I (540, Italy); Nov. Tib. 13 (582, Africa).

88 Nov. Just. 156.1 (s. d.): in case of an even number, they were divided equally, in case of an odd number the mother received one more than the half. It concerns here unions not disapproved by the landlords. Since the *coloni originales* were free citizens, unions between them and slaves were ruled by the normal rules concerning different personal statuses, which are apart from the above rules. Thus articles like A. V. Koptev, *Roman Legislation on Marriages of Slaves and Coloni in the 4th and 5th Centuries*, VDI 1985, nr. 175, 62–83, deal with, regrettably, a non-issue. This is the result of the idea that the adscripticiate is to be explained by a shift in the agriculture towards a slave workforce; for example, S. Puliatti, *Ricerche sulle novelle di Giustino II*, Milano 1984, 164–165.

89 See above n. 73 and 74. That there were less rules on the 'free' *coloni* is due partly to its late introduction, partly to its less complicated and less onerous structure.

90 CJ 11. 48. 6 (366, W): *inquilini Domus nostrae*; CJ 11. 48. 13 (400, Gaul); CTh 5. 18. 1 (419, W). P. Rosafio, *Inquilinus*, Opus 3 (1984) 121–131, makes clear on ancient sources that the *inquilini* were settlers (*incolae*) without a home (*domus*). He argues that the *inquilinus* was bound by the *agnatio*, contrary to the *colonus* who was bound by the *origo*. Objections are that the texts treat both alike and that the *agnatio* is an aspect of the *origo*.

91 CJ 11. 53. 1. pr. and 1 (371, Illyricum).

92 Within the framework of an *onus commune*; see CTh 11. 10. 1 (369, W): *prosecutio animalium*); 12. 19. 1 (400, W): *cultus urbium, officia sua*; CTh 14. 27. 2 (436, Alex.): *repurgandi fluminis onus*; Nov. Mai. 7. 3 (458, W): *operae patriae*.

ship was limited to members of one or sometimes more professions, but again not all exercising that profession were incorporated[93]. Here the basis was also the *origo*, limited to the corporation[94] and obliging descendants (*agnatio*) (unknown when and why introduced)[95]. This was redefined in 397 when measures to recall members were introduced. If *origines* competed, the paternal prevailed in case of a legitimate and equal union, and otherwise the maternal one. In 400 a division was promulgated in the west for unions with *coloni originales*[96]. Moreover, this criterion had been applied before in the west in 365 with the *navicularii-caudicarii* (Tiber shippers) of Rome[97]. In the east the *origo* as limited to the corporation was the footing for the *monetarii* (minters), *murileguli* (purple snail fishers), *gynaecarii* (weavers), *linyfarii* (linen weavers) and other similar administrative groups (*alii similes*) resembling the *collegia*[98]. With the *murileguli* in the east the maternal condition received priority in case of ranking *pari passu* with a paternal *origo*[99]. The criterion of property was not accepted there until 424 for alienated goods, and was perhaps not limited to a contribution[100]. For the *metallarii* (miners) in the east the origo limited to the corporation was established in 424, with a priority for the fisc or a division of the descent (*agnatio*) and with the criterion of property for alienated goods, entailing, however, the obligation to fulfil the *munus*[101]. In the west the sanctions of the *senatus consultum Claudianum*, mitigated in 320 for, amongst others, *servi fisci* and slaves of corporations attached to the *res privata*, were re-introduced for slave-*gynaecarii* (in 365) and slave-*monetarii* (in 380)[102].

§ 9 Finally, the rare criterion of marriage (*coniunctio*) bound those wedded to daughters of *pistores* of the *corpus* in Rome (355, extended in 372 and 404)[103] and of *conchyleguli* (purple snail fishers) in the west (371)[104]. In the east it bound the husband of a daughter of a decurion,

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93 The idea that with the *collegiati* it concerned all the artisans, merchants etc. (see the survey with Demandt [see above n. 1] 337f., 349–351) is to be rejected. D. 50. 6. 6. 12 says about admission: the member to be has to be an artisan, but not: a good artisan, or: a proven artisan. Thus no check on professional capacity. Further the age should not be too high or too low, so that they could perform the services wanted. The public nature of these services shows by the immunity granted in exchange: Call.1 *de cogn.*, D. 27. 1. 17. 2–3 and 50. 6. 6. 12 (for *collegiati*), and CTh 3. 31. 1 (400, R) for the *caudicarii* of Rome. See Sirks (see above n. 1) § 35.

94 Limited since only the descendants of these citizens could be called and not other citizens with the same town as *origo* regarding other *munera civilia*.

95 When and why this criterion was introduced is unknown. The *origo* may have been chosen since the membership, as soon as it became an obligation, could have been considered another *munus civile*. The requirements of the craft and the fact that sons would usually take up their fathers' profession may subsequently have led to restrict the *origo* to descendants of members, in the same way as with decurions. This is not to say that being a *collegiatus* implied a personal or social status. We merely want to point out that the legal technique of such a restriction was known and could be used.

96 Measures to recall and to regulate equal claims: CTh 14. 4. 7 (397, W), CTh 12. 19. 1 (400, W).

97 CTh 13. 5. 11 (365, R).

98 CTh 10. 20. 16 (426, E). The corporation of *pistores* of Constantinople may have resorted under *alii simili*.

99 CTh 10. 20. 15 (425, E).

100 CTh 10. 20. 14 (424, E).

101 CTh 10. 19. 15 (424, E).

102 Relaxation in 320 (CTh 4. 12. 3 [320]) for the *servi fisci* and the (*servi*) *originarii* of the *fundi patrimoniales*, the *praedia emphyteuticaria* and the *corpora res privatae*. Re-introduction: CTh 10. 20. 10 (380, W): *servi monetarii*, CTh 10. 20. 3 (365, W): *servi gynaecei*.

103 CTh 14. 3. 2 (355, R), 14 (372, R): *pistores* in Rome.

104 CTh 10. 20. 5 (371, W).

if she had died and instituted him as heir, and there were no children (392)[105]. We also see nuptial prohibitions emerge in order to prevent the competition of *origines* or the application of immunities: for daughters of *monetarii* in the west with *extranei* in 380[106], for the *pistores* of the corpus in Rome in 403[107].

§ 10 Concerning the fulfilment of the *munera*, this did not automatically entail the exercise of a profession. With a *munus patrimonii*, the obliged person had to provide capital or pay expenses, with a *munus personale* he had to make a personal contribution. Contrary to the *munera patrimonii*, the *munera personalia* were not always to be performed by women, nor was the decurionate[108]. In this way the *munera civilia* are divisible, and the other public obligations can be divided accordingly. Arcadius Charisius also distinguishes the *munera mixta*, *munera* which combined both aspects. Some *munera* involve activities, which might be called the exercising of a profession. Yet does this mean that such 'professions' were hereditary? Certainly not. The *munus* is the central object and its fulfilment has to be secured every time again that the incumbent is absolved or fails. Outside the sphere of the *munus* the professions are left untouched. If we make a statement about a profession it should include all those exercising it, and therefore we cannot say that a profession was governed in this way by public law. If in practice the sector left untouched were marginal, one might nevertheless argue that *de facto* a profession was subjected to the rules of transmission as prescribed for that activity. Yet it is possible to argue that all those corporations of which we find the legislative measures in the Codes, formed only a small section of public life. Besides, in those corporations which selected only certain kinds of artisans etc., the criterion of selection was unrelated to the nature of the services wanted. Reversely, we do not see the argument accepted that someone should be exempted from the adscripticiate because he is not trained for this work[109].

§ 11 Regarding the point of social mobility, can we say that if it existed, this was only in spite of high pressure from the central government, whether this pressure materialised in compulsion or merely pressure?

First of all we have to remark that an administration which cannot impose its will is of no substance. Therefore we may always find traces of or references to administrative compulsion. On the other hand, Waltzing and other authors have quoted constitutions in which the faculty to summon persons for the *munera* has been given to administrative bodies. Yet disposing of a faculty does not mean that it is permanently used in all cases. Moreover, in the case of the inheritance criterion one could reject the inheritance (or legacy) and by that escape the inherent obligation. Further, after the fixing of the liability, a person summoned was examined according to secondary criteria whether he or she could actually fulfil the obligation in question. For example, insolvency would bar the execution of those obligations requiring solvency. Be-

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[105] CTh 12. 1. 124 (392, E). The property of the deceased *filia decurionis* would become property of the *curia*, her husband having it in trust.

[106] CTh 10. 20. 10 (380, W).

[107] CTh 14. 3. 21 (403, R); see A. J. B. Sirks, *The Administration and Family Law: 4th Century Interference with the Bakers of the Corpus at Rome*, Atti Accademia R. Costantiniana VII, Napoli 1988, 483–485. Voci (see above n. 1) 253–281, considers not only the *pistores*, *conchylegüli* and *monetarii*, but also the *gynaecarii, suarii, coloni* and others affected by matrimonial prohibitions. This is partly caused by his incorrect assumption that the *senatusconsultum Claudianum* was extended over these free persons (254), and further by his assumption that in the case of the *collegiati* and others marriage was the basis of the imposition of the obligations (262ff.)

[108] Arc. Char. *sing. mun. civ.* D. 50. 4. 18. pr. Not the *munera corporalia* (D. 50. 4. 3. 3), and of the remaining only those, compatible with their sex (CJ 10. 64 (62) 1, a., 244–249).

[109] For the limited applicability see above n. 6. For the last argument on the *colonus originalis* (*adscripticius*): CJ 11. 48. 23.

sides, there are too many references to persons who succeeded in evading their responsibilities by way of immunities, rescripts, bribery etc. (as summarised by De Martino and Demandt in general and for example MacMullen in particular)[110], than that those public obligations might bar social mobility. We might even reverse the argument: all these dispositions, which generally condemn the mentioned practices, prove that social mobility was experienced as being too great.

To put the question in this way is insufficient. With social mobility is meant, in the present context, the drain of suitable persons from the local government level to higher places, in the army, the provincial and palatial imperial service. Such a drain may emerge when the pressure on the local level is too high, but also if the pressure in the other sector is too low, to extend the metaphore. In other words, it suffices to make the imperial careers more interesting and attractive. In our opinion the latter is in any case as true as the first possibility, if not more probable. In many laws the summoning is ordered of persons in high positions, sometimes even protected by immunities[111]. To call this a case of persons, fled from the unbeareable pressure on the towns, is not necessarily true. It may well have been possible for them to sustain their curial or other civic duties, but they may have seen more gain in the army or an imperial service position. It may be true that overall pressure on local government was very heavy, even to the point of breaking this down, but for this proposition good arguments should be inferred then: the mere constitutions will not do. For the time our conclusion should be that in some cases the possibility of an alternative career drained the resources of the towns, which may have been a contributory cause of the greater pressure on the remaining suitable candidates; in other cases, perhaps of persons not so lucky in connections, pressure was indeed so high as to lead to flight.

§ 12 The administration used several criteria as a basis for the summons for the *munera publica*: ownership, person, *origo*, being heir (*heres* or *hereditas*) and marriage (*coniunctio*). Whether modified or not these established, in principle, the liability for public obligations (*obnoxietas*, a term first used in legal sources in 450)[112]. After that, other criteria were applied to establish whether the summoned person should indeed be subjected to the *munus*. The basic criteria ensured that there was a system, by means of which the various groups involved could maintain strength and continue rather autonomously, without being too much dependent on voluntarism or impositions *ex novo*[113].

One of the characteristics of the Late Roman Empire is thought to have been the antagonism between the official policy of tying people to their professions or status and the actual social mobility. The criteria for imposing public obligations do not show a change, sudden or not, towards heredity of status or profession. As we hope to have demonstrated the criteria as applied in the fourth and fifth century evolved slowly out of already existing criteria and left professions as such outside the public law sphere. Even the *origo* criterion as limited to the descent of a member of a *collegium* or a *colonus originalis* had its parallel in the criterion for the decurionate: restricted both to citizens of a town and to descendants of certain citizens. The rulings which seem to point to a succession of father by sons, appear, when more closely ob-

110 See above n. 1 and 15.

111 For example: CTh 12. 1. 5, 10, 14, 26, 36, 38, 42, 44, 57, 58.

112 Nov. Val. 29 (450, R). The term is derived from *obnoxius*, 'responsible', which is far more frequently used for responsibility in the public law.

113 Sirks (see above n. 4) 144; A. J. B. Sirks, *Munera publica and exemptions (vacatio, excusatio and immunitas)*, Studies in Roman Law and Legal History in Honour of Ramon D'Abadal I De Vinyals (Annals of the Archive of 'Ferran Valls I Taberner's Library' vol. 6), Barcelona 1989, 79–111, section 12.

served, to fit into the framework of public obligations, on a basis not so new nor so simple. Outside of this, professions and social mobility were uncurbed by the government. If children were forced to take up their parents' profession, it was due to other causes such as unavailability of instruction in other professions or lack of other possible sources of income. As such this complements, from the side of the administrative law, the observations, made by Dagron, Ceran and Teja on basis of literary sources, and by Jacques on basis of his analysis of the local government.

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