

MISREPRESENTATION OF ATTIC LAW IN MENANDER'S *ASPIS*

This article will show that in Menander's *Aspis* some elements do not echo family institutions of Classical Athens, because they are inconsistent either with each other or with the whole legal system, known from the Attic orators.

The comedy deals with Smikrines, a greedy old bachelor, elder brother of Chairestratos. Smikrines insists upon marrying the *epikleros* young sister of the allegedly deceased Kleostratos despite his age and the fact that Chaireas, Chairestratos' stepson, is about to marry her¹.

To mock Smikrines' avarice, Menander introduces another *epikleros*, whose (*kleros*) estate is fifteen times greater than that of the other girl. Forgetting his former «love», Smikrines seeks the hand of the wealthier heiress and thereby falls into a trap; for in fact, the natural *kyrioi* of the two women (F_1 and F_2), i. e., respectively the brother Kleostratos and the father Chairestratos, are alive. In the dénouement, to the audience's satisfaction, Chaireas marries Kleostratos' sister and Kleostratos marries his cousin (i. e., Chairestratos' daughter).

The first step is to establish the genealogical tree of the persons of the drama. Smikrines, Chairestratos and Kleostratos' father (unnamed) were homopatric brothers² (whether or not they were also homometric is irrelevant for our purposes).

We are not told, and have no means of inferring, whether Chairestratos' daughter (F_2) was Chaireas' homometric sister or was born to Chairestratos' first wife. It is certain that Chaireas' mother is the present wife of Chairestratos (after her first marriage) and Kleostratos' sister grew up in their house³. Gomme and Sandbach state⁴ that Chaireas' mother is the second wife of Chairestratos but say nothing of his daughter. We incline to believe that Chairestratos' daughter (F_2) is not homometric sister of Chaireas, partly because Menander prefers complicated relationships and partly because the playwright would have indicated that Chaireas has a legal link and consequently a claim (if she (F_2) were his homometric sister) to Chairestratos' household through her⁵.

After this brief discussion the genealogical tree is formed as follows :

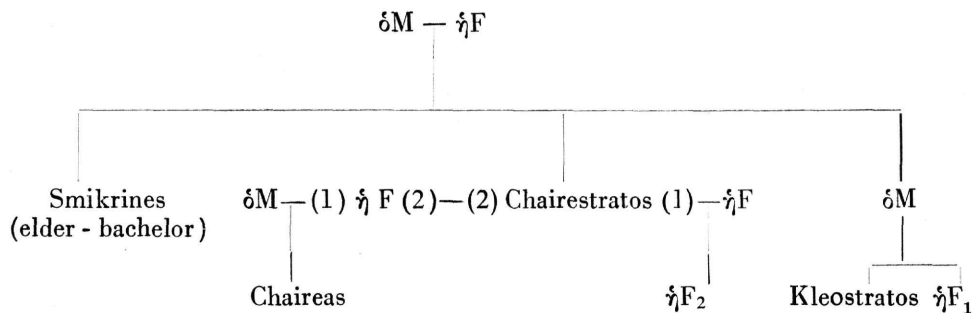
1. This article is a part of my future work concerning the examination of Menander's comedies from a legal point of view. Referencies are to: F. H. Sandbach, *Menandri Reliquiae Selectae*, Oxonii 1972. Cf. also A. W. Gomme and F. H. Sandbach, *Menander: A commentary*, Oxford 1973; *Anzeiger für die Altertumswissenschaft* XXVI (1973) 1./2., p. 44 f. for the bibliography.

2. *Aspis* vv. 114—124; 179; 350—352. Cf. Gomme—Sandbach, loc. cit., p. 76 «... all sons of the same father».

3. *Aspis* v. 293. Cf. also vv. 384—385.

4. Gomme - Sandbach, loc. cit., p. 61 «Kleostratos has gone to the wars, to improve his finances, and put his sister in charge of Chairestratos, who has a daughter and a stepson, Chaireas, the child of his second, and present, wife». Cf. also *Aspis* vv. 126—129; 134—135.

5. For the rights and duties of an homometric brother see: J. E. Karnezis, *The Epikleros: A contribution to the interpretation of the Attic orators and to the study of the private life of Classical Athens*, Athens 1972, p. 220 f.



The wish of Smikrines that he were dead rather than his nephew Kleostratos, so that his nephew would be his sole legal heir⁶ contradicts the Classical law of Athens, and is therefore simply a dramatic ploy. According to Attic law the estate (*kleros*) of a brother who died intestate was inherited in equal shares by the homopatric brothers, or, if the brother of the deceased was also dead, by his sons *per stirpes*⁷. Smikrines' wish, in envisioning Kleostratos as his sole heir, temporarily loses sight of Chairestratos' equal share. Similarly, at the beginning of the play, Daos assumes that Smikrines is the sole heir of the *kleros* and the *epikleros* (F_1)⁸. However, under Attic law the claim of the brother Chairestratos cannot be excluded *a priori* (i. e., before *epidikasia*)⁹. Hence, in these two cases Menander ignores legal exigencies for the sake of dramatic effect.

According to the play Kleostratos has gone to war (in Lykia) to make his fortune so that he can dower his sister (F_1) after his return¹⁰. This means that he has not contracted any *engye* for her on condition of his death. Likewise there is no mention in the play that the woman's natural *kyrios* (i. e., her brother) had authorized his uncle Chairestratos to arrange his sister's betrothal (*engye*)¹¹. Moreover, such a substitution for the natural *kyrios* by the uncle or any other *anchisteus* is not attested in our sources¹². The tenth speech of Isaeus mentions a case in which the uncle Aristomenes might¹³ have betrothed his fraternal niece but the text does not say that he actually made the betrothal (*engye*). Therefore, we cannot conclude from this case that such a substitution of the natural *kyrios* was exercised.

To justify betrothing his niece in spite of the fact that her brother is still alive, Chairestratos cites her poverty and her brother's long absence. Hence he kindly,

6. *Aspis* vv. 167—171.

7. Isaeus XI. 1; VII. 19; Demosth. XLIII. 51. Cf. Karnezis, *The Epikleros*, loc. cit. p. 210 f., 223 f.

8. *Aspis* vv. 84—85; 88—89.

9. Demosth. XLVI. 22.

10. *Aspis* vv. 8—9.

11. *Aspis* vv. 127—129; cf. vv. 197—198.

12. J. E. Karnezis, *Solonian Guardianship laws of Classical Athens and the Senatus Consultum* (*Digesta* 23, 2, 59), Athens 1976, p. 93 ff. After the examination of 24 cases of women who married twice the males who could betroth an *atthis* were: a.) the natural *kyrios* and b.) her husband.

13. Isaeus X. 19, 5. Cf. Karnezis, *The Epikleros*, loc. cit., pp. 212, 231.

offers to dower her with two talents and betroth her to his stepson Chaireas¹⁴. His arguments, however, are legally irrelevant and do not make him *kyrios* of the girl¹⁵, since her brother is still alive and intends to return and dower her.

Likewise Chaireas' belief that he can receive the girl from Chairestratos' hands is without legal foundation. Furthermore, his conclusion that, when the girl became *epikleros* after the death of her brother Kleostratos, «the law makes someone else *kyrios* (sc. of the *epikleros*)»¹⁶ does not hold true under Attic law, in part because Chairestratos never became her (first) *kyrios* and in part because he could not know to which *anchisteus* the *epikleros* would be adjudged by the archon (or the court).

When, at the news of Kleostratos' death, his sister is assumed to be *epikleros*, several further details are out of tune with Attic law:

a. Daos' assumption that Smikrines is heir (*kleronomos*) of the *kleros* and the *epikleros*¹⁷.

b. Smikrines' warning to Chairestratos not to betroth the *epikleros* to anyone because henceforth he is her *kyrios*, as an *older* next-of-kin (brother) and because Chairestratos has a daughter and wife¹⁸.

Daos' statement (a) ignores the provisions of Attic law, because the *epikleros* could be adjudged to a minor brother. In Attic law there were no primogeniture; all brothers inherited equally¹⁹. On the other hand, Smikrines' words (b) presuppose that Chairestratos was formerly the girl's *kyrios*. Furthermore, as we have just seen, Attic law would not allow Smikrines' claim based on primogeniture²⁰. The Gortynian provision²¹ under which the older brother would marry the *epikleros* did not apply at Athens, as is shown by a case mentioned by Aeschines in which the younger²² of two brothers married an *epikleros*. Smikrines' second argument, that Chairestratos has a wife and daughter, is also legally irrelevant since if an *anchisteus* wanted to claim (and marry) the *epikleros*, he could

14. *Aspis* vv. 130—137, 268—269.

15. See notes 10—12.

16. *Aspis* vv. 297—298.

17. See note 8.

18. *Aspis* vv. 253—256. I incline to accept that the imperative «*ὁμολόγει τὴν παρθένον // μηθεὶν*» is used not to indicate «a preliminary informal agreement to give a girl in marriage» as Gomme-Sandbach (p. 84, n. 253) and C. Austin (vol. II, p. 27, n. 253) believe, but the meaning of ἐγγυᾶν. My reason is that 1) the use of ὁμολογῶ is unparalleled in Classical Greek in the active voice and 2) verses 135—137, 176—177 speak of a present marriage, while the verses 132—134 speak of marriage with the verb συνοικίσειν, a common word for legal marriage. We meet also the same verb ὁμολογῶ in line 516 (Act V), where the two marriages take place. In addition to the use of the legal terms ἐγγυᾶν (v. 484) and ἐγγύην (v. 540), the imperative ὁμολόγει can mean «formal betrothal», a poetic (or unsuccessful?) use in this comic plot.

19. Isaeus VII. 19. Cf. J. H. Lipsius, *Das attische Recht und Rechtsverfahren*, Leipzig 1905—1915 (repr. 1966), p. 542, n. 12

20. *Aspis* vv. 172, 255. Cf. also vv. 141—143.

21. The Law Code of Gortyn VII. 15 ff. Cf. Karnezis, *The Epikleros*, loc. cit., p. 233

22. Aeschines I. 95. The view of Kirchner (*PA* 6307) that the husband of this *epikleros* was older is not right; there were three brothers. Cf. J. K. Davies, *Athenian. Propertied Families 600—300 B. C.*, Oxford 1971, 6351.

dismiss (ἀποπέμπειν) his wife²³. Actually, the fact that Kleostratos left his sister in Chairestratos' house would lend weight to his claim to become her *kyrios* in the event of Kleostratos' death.

Further, on what legal basis did Chairestratos propose to his avaricious brother that he (i. e., Smikrines) take only the *kleros* and leave the *epikleros* to Chaireas?²⁴ Attic procedural law required *epidikasia* of all *epikleroi* whether alien or Athenian²⁵. Therefore, Chairestratos' proposal is illegal, because only the archon (or the Heliaea) could adjudge the *epikleros* to the *anchisteus*.

Furthermore, Smikrines could not get only the *kleros* without the *epikleros*, because «the *epikleros* always followed the *kleros*»²⁶.

Smikrines, as characterized in the play, would accept Chairestratos' proposal, if he were not afraid of a suit by a hypothetical son of the *epikleros* «two years after his (the son's) reaching puberty»²⁷.

Besides the fact that Smikrines is an old man and such a fear of litigation after eighteen years is ludicrous, the son of the *epikleros* was not necessary the full and exclusive recipient of the *kleros* of his maternal grandfather; for (a) the husband of the *epikleros* could sell the *kleros* which he inherited with the *epikleros* and (b) the institution of the single-heir, upon which in pre-classical times the *epikleros*' son based his right, had fallen into disuse in the age of the orators²⁸.

When Chairestratos' daughter (F_2) becomes *epikleros*, there are several more discrepancies with Attic law.

Even though Smikrines falls for the bait, the trick does not help Chaireas; he cannot claim Kleostratos' *epikleros* sister, because he is not *anchisteus*. Thus, Daos' supposition that Smikrines would take the second *epikleros* and give the first (F_1) to Chaireas²⁹ takes no account of the law which required «*epidikasia* of all the *epikleroi*». Therefore, the next-of-kin could not offer the *epikleros* to anyone, if he himself did not want to claim her, but only the court could adjudge her.

From this brief survey we can see that the statements of the characters of the *Aspis* frequently ignore provisions of Attic law. Menander manipulates legal premises to meet the requirements of dramatic effect and plot.

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Π Ε Ρ Ι Λ Η Ψ Η Σ

Εἰς τὸ ἄρθρον αὐτὸ δεικνύεται διὰ τῆς ἀποκαταστάσεως τοῦ γενεαλογικοῦ δένδρου εἰς ποῖα σημεῖα ὁ Μένανδρος εἰς τὴν «Ἀσπίδα» παρουσιάζει ἐσφαλμένως θεσμούς τῆς ἀττικῆς κοινωνίας. Ἐνῶ δὲλ. ἐκ τῆς κωμωδίας μαρτυρεῖται α) ὅτι μετὰ τὸν θάνατον τοῦ ἀνεψιοῦ ἐξ ἀδελφοῦ ὁ εἰς μόνον (ὁ μεγαλύτερος) πρὸς πατρὸς θεῖος τὸν ἐκληρονόμει β) ὅτι ὁ μεγαλύτερος ἀδελφός (ἀγχιστεύς) ἠδύνατο νὰ λάβῃ μόνον τὸν κλῆρον ἀνεψ τῆς ἐπικλήρου γ) ὅτι ὁ πρὸς πατρὸς θεῖος μίᾳ ἀπθίδος καίτοι μὴ κύριος αὐτῆς ἠδύνατο νὰ τὴν ἐγγυήσῃ εἰς τινα κλπ., ἐν τούτοις αἱ μαρτυρίαι αὗται ἔρχονται εἰς πλήρη ἀντίθεσιν μὲ ὅσα πληροφοροῦμεθα ἀπὸ τοῦ ἀττικίου ρήτορα. Διὰ τοῦτο ὁ ὑπομνηματιστὴς καὶ τῆς κωμωδίας ταύτης πρέπει νὰ ἀποφεύγῃ νὰ ἀποφαίνεται περὶ ἀττικῶν θεσμῶν, διότι ὁ Μένανδρος μόνον διὰ τὴν πλοκὴν ἐνδιεφέρετο.

23. Demosth. LVII. 41; XXX, hypoth. 1.

24. *Aspis* vv. 262—269, 311—313.

25. See note 9.

26. Demosth. XLIII. 51.

27. *Aspis* vv. 270—273.

28. Aeschines I. 95. Cf. Karnezis, *The Epikleros*, loc. cit., pp. 204, 227 ff.

29. *Aspis* vv. 353—355. Cf. Gomme - Sandbach, loc. cit., p. 62 «Smikrines will drop his intended bride, and marry her off to the first comer, who will be Chaireas, in order to be free to claim Chairestratos' daughter».