

The Androgynous and Bisexuality in Ancient Legal Codes

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The androgynous between myth and history

The name derives from his parentage: 'Hermaphroditus', son of Hermes and Aphrodite. His place of birth remains unknown, but we know where he spent his first years of life: the woods surrounding Mount Ida in Phrygia where he was brought up by the Nymphs. A normal life, like any other boy, until the age of fifteen when he decides to explore the world. He travels through Asia Minor until he reaches Caria, and the banks of a beautiful lake. A bold Nymph lives in the vicinity of the lake: Salmacis. As soon as she sees Hermaphroditus, now a handsome young man, she falls in love with him and tries various ways of seducing him – all in vain, as Hermaphroditus resists her advances. Salmacis is not discouraged. More and more determined to conquer the youth, she pretends to have given up all hope and waits for the right moment. The occasion presents itself when, naked, Hermaphroditus dives into the waters of the lake. Salmacis, who has been eagerly awaiting that moment, dives in after him and clasps him in an embrace from which he cannot free himself. An embrace of only a few seconds does not satisfy the desires of the lovestruck Nymph: she wants her body and her beloved's to become fused for the rest of eternity. She prays to the gods and the gods grant her request. Hermaphroditus and Salmacis are transformed forever into a new single being that is both male and female (the story can be found in Ovid, *Metamorphosis*, IV, 285).¹

The myth goes no further. We recognize in it all the traits of a love story, the celebration of the indestructible power of desire (exceptionally, the desire of a woman). But how does this love story end? What happens to that being born from the unrestrained passion of the Nymph? What else do we know about Hermaphroditus, apart from the circumstances relating to his birth?

If the myth is unforthcoming about this, other sources reveal to us that his life was far from being a happy one.

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The bisexuality of the androgynous as a 'monstrosity'

While this story could strike the optimist as shocking, it comes across to the realist as utterly tragic. Sources dealing with the facts of existence (specifically those that are verifiable) rather than with fables, reveal that the myth of Hermaphroditus tells us about the coming amongst us of a 'monster' – a monster in the technical sense in which the Greeks intended this word (they used the term *teras*) and the Romans (*monstrum*, *portentum*, *prodigium*): an event or a strange being, something extraordinary sent by the gods to communicate to humans that the *pax deorum*, in other words the agreement between mortals and the immortals, had been violated. A certain behaviour, the forbidding of some rule, a disrespectful attitude towards the gods could also bear this consequence, a consequence usually followed by calamities that concretely showed the gods' anger (pestilences, floods, famines, military defeats . . .).²

The miraculous event, in other words, was an admonishment: aware of the danger, mortals could avoid the consequences of the gods' anger by accomplishing the necessary acts. One of many, this story is typical. According to the Romans a type of *portentum* was the lightning strike or the extinction of the fire sacred to the goddess Vesta. When an event of this kind took place, it was very likely that a Vestal had committed *incestum*, in other words she had broken the trentennial vow of chastity. In such cases – to prevent the gods' rage – the Vestal was executed by being buried alive in an underground room near the *Porta Collina*; her accomplice would be whipped to death. In the 3rd century BC, at a particularly difficult time in Roman history, numerous Vestals were put to death. In the space of just fifteen years these included: Tuccia (228 BC), Opimia and Floronia (216 BC), Emilia, Licinia and Marcia (214 BC). Particularly sensational was the last of these cases, occasioned by the death of an aristocratic maiden named Elvia.

During a journey, Elvia, following her father's advice, had sat on her horse to protect herself from a violent storm. Lightning struck and killed her, disarranging her clothes. Clearly, this signified that the women who belonged to the higher social class (the same one Elvia belonged to) had not been obedient to the duty of *pudicitia* they were strictly obliged to respect. In other words, their sexual behaviour was certainly blameworthy. Who were the guilty ones? Some rushed and superficial enquiries concluded with the naming of three Vestals: Emilia, Licinia and Marcia. They were immediately condemned and put to death (Valerius Maximus, *Fact. Dict. Mem.* 8, 15, 12).³

Why was the hermaphrodite a *prodigium*? The answer can be found in the legal documents, in particular in the Roman ones. They attest that since the most ancient times all newborns affected by strongly visible deformities were considered to be *monstra* (*prodigia*). As a consequence, one of the first rules in the Roman code, attributed to Romulus and recorded by Dionysius of Halicarnassus, allowed the killing of the newly born *anaperon* (deformed, mutilated) or any infant bearing the characteristics of a *teras*, in other words of a *monstrum* (Dionysius of Halicarnassus, 25: see Cantarella, 2000b).

This law, authorizing the death of a monster was deemed insufficient. In 450 BC, the Twelve Tables dealt with the question again. Cicero tells us (*De legibus* 3, 8, 19) they established that particularly deformed babies (*insignes ad deformitatem pueri*) had

to be killed. If Romulus' norm had contemplated the possibility of killing, now killing became compulsory. One problem remained: none of the two norms – neither the Romulus' norm nor the one of the Twelve Tables – set the boundary between the 'normal' (acceptable) deformities and the 'monstrous' (unacceptable) ones. Given the absence of such normative specification the decision was left to interpretation. Legal experts discussed the problem for centuries, as is clearly shown by the fact that still in the 3rd century BC Ulpian feels the need to reconsider it, as we know from a famous passage to be found in Justinian's *Digestum* (*Digesta Iustiniani Augusti*, 50, 16, 135): the deformity of a baby is serious enough to consider him a *monstrum* – says Ulpianus – when such a baby is so deformed as to look more like an animal than a human being.⁴ Such a resemblance is not the case with the hermaphrodite, and yet we know that they too were considered to be a *monstrum*.

In the *Prodigiorum libri* by Julius Obsequens (edited in Livy's *Perioche*) we find a list of cases regarding the birth and killing of androgynous babies. As a norm, it happened straight after their birth, but not necessarily: on a few occasions some of these little 'monsters' were not killed. Following the parents' order or on the initiative of a servant the baby was abandoned at birth – a gesture motivated by pity from those involved, but one that turned out to be an atrocious cruelty in its outcomes. Nobody took care of these children. And yet, miraculously, some of these 'monsters' survived: they could be seen roaming the countryside, desperately seeking the basics of survival. A most serious threat, said the experts: the survival of an hermaphrodite represented a threat to the community, since the impurities of this 'monster' were contagious to any object or person it came into contact with.

However, even more attention was needed. In order to eliminate the hermaphrodite it was not enough to kill him. All traces of the existence of the 'monster' had to be erased. How? Seneca writes: by drowning him (Seneca, *De ira*, 1, 15, 2). Which is what they did: when, for example, a woman in Frosinone gave birth to a baby whose sex was dubious, the aruspices, who had been called immediately, after acknowledging that the newborn was a 'horrible and hideous prodigy' (*foedum ad turpe prodigium*), ordered that it must be drowned. To bring the rite to completion, three groups each of nine virgins walked across the city singing in order to disperse all contamination.

Despite the romantic element characterizing its aetiological myth the hermaphrodite was considered a hideous being, an unforgivable and unacceptable mistake of nature, an even more monstrous monster than the others. It questioned the fundamental man/woman pair. The hermaphrodite broke the rule of the division between sexes on which the survival of humanity relied. It was the monster *par excellence*.

Bisexuality as behaviour and the rules governing it

In the case of the Hermaphroditus, the distance between myth and reality seems to be impossible to bridge. Its bisexuality could not be tolerated. We have to be careful, though, when dealing with this term. What we have said so far is valid only if by 'bisexuality' we mean the coexistence in one single being of the sexual traits characteristic of the two sexes. The discourse changes radically if we use the term to indi-

cate not somebody's physiology but his/her sexual behaviour. In this case bisexuality (or rather, the behaviour that nowadays we define as such) was not problematic at all, neither in Greece nor in Rome.

Greeks and Romans, in fact, did not know and would have never understood the modern distinction we set between homosexual and heterosexual behaviour (which makes the idea of bisexual behaviour meaningful). The fundamental opposition in the field of sexual behaviour was for them between active and passive role. The man was active and the woman passive. Being a man meant, thus, playing the sexually active role, not necessarily and not only with women: virility could be also shown by sexually subjugating another man. In the course of their life both Greeks and Romans sexually dominated both men and women. The sex of the partner, in other words, was of no relevance at all with respect to the rule of activity. Whoever dominated another man remained a man.⁵ Only the passive partner fell short of the rule and lost his virility, with different consequences depending on whether he was a Greek or a Roman.

Athenian norms

Let us state straight away that in Greece (and more precisely in Athens) males at a certain stage of their lives could play a sexually passive role: this was during their adolescent or teenage years, roughly between the ages of twelve and seventeen. The young Athenian (called *pais*) then could, and usually did, start a relationship termed pederastic, that bonded him in the role of 'beloved' (*eromenos*) to an adult 'lover' (*erastes*). Virility, in fact, for the Greeks was to be acquired only with maturity. Boys did not yet possess it, and so, from other points of view as well – for example their inability to deliberate and reason fully – were appraised on the same level as women. In other words, they were considered as apt to play the passive role in a relationship that in Athens – at least for the youth belonging to the aristocracy – was not only acceptable but also very appropriate. Pederastic relationships, as well as love relationships, were also in fact intellectual ones, that in some ways saw the beloved as the disciple and the lover as the master of life, ethics and civic education. Pederasty, in other words, was a 'highly esteemed' noble institution, that played a fundamental role in the *paideia* of the young Athenian. Such a relationship was not a long-term one: as soon as he became a man – by the age of eighteen that is – the young man had to put aside these habits and this psychic and sexual attitude and become sexually active, both with women and with a young 'beloved'. In no way, once he reached maturity, was he allowed to remain a 'beloved'. The adult who accepted a sexually passive role was socially castigated and much ridiculed: he had turned into a 'woman' and renounced his virility. A quick reading of Aristophanes suffices to demonstrate the rich and imaginative vocabulary he uses to describe sexually passive adults.

One could say thus that, for an Athenian bisexuality (in the sense of a behaviour that allows for relationships with both men and women) was the rule. This does not at all mean that Greek men were sexually free: the individuation of the sex of the partner was determined by a very precise set of social rules, linked to the age and

the status of the *people* involved. Thus, any relationship with a slave was totally forbidden, and the breaking of this rule was punished with severe sanctions.

Roman behaviour

The approved behaviour for men in Rome, despite being grounded in the same basic rule, was profoundly different. Male behaviour had to be active, almost obsessively so. For the Roman man virility, interpreted as the capacity to sexually dominate the other, was an obsession. This is no surprise. Sexual ethics sprang from the same principles that inspired civic ethics, the ethics of the conqueror. The *civis romanus*, the Roman citizen, had to dominate the world. He had to impose his dominion with the power of weapons and laws on foreigners, on the countries that were not Roman: only if they accepted to be subjugated to them, could they hope for their clemency. Should they rebel, they had to be reduced to total submission through force of arms: *parcere subiectis*, wrote Virgil, *et debellare superbos* (*Aeneid*, VI, 851–3). Roman men had to prevail on the civic battlefield as well: words were their weapons, and they availed themselves of the rhetoric they studied from childhood that allowed them to carve out a space in politics. In the family – in this case without having to compete with anyone – the Roman man ruled like an absolute king with unchallenged powers, first of all over his slaves. But not only on them: he exercised an equal authority over and imposed his will on his children, the children of his children, his wife and his daughters in law.

Obviously, from this perspective, he felt entitled to impose his will on everyone in the sexual field too. As Paul Veyne rightly observed, his virility was a virility of ‘rape’: if he wanted to be a real man he had to subjugate anyone who might arouse his desire, or who was available in such moments.⁶

Consequently, not only did the sex of the subjugated person have no relevance at all, but in some ways causing a man to be sexually submissive was an even more meaningful proof of one’s virility. The only limit imposed on Roman men, in this field, was the respect due to fellow citizens. There were no paederastic relationships in Rome. Roman boys, destined to dominate the world, could never be subjugated, not even in their early years. From this stemmed a number of rules aimed at protecting them from potential assaults. When they were small and played in the streets they wore a chain with a golden *bullā* that served to distinguish them from the slaves (with the imaginable consequences). In the Republican period a specific law, the *lex Scatinia*, punished with a fine those who seduced an adolescent (*puer*).⁷

Slaves were provided in order to guarantee adult males the satisfaction of all their desires: for slaves, therefore, submission to the master was a duty. In fact, in Plautus comedies, slaves were ironically reminded that in order to pay their master the services expected from them they had to crawl. More romantically, Cicero tells us about the kisses he stole in the night from his young secretary Tiro, saying in all tranquillity that there was no reason why he should hide his love (*Tusculanae Disputationes*, IV, 33).

More debatable are the relationships with the *liberti* (former slaves that had been freed). They were, in fact, bound to their former master (*patronus*) by a relationship

that imposed on them a certain deference. For instance, they were to visit his home every morning and pay him homage (*obsequium*). What about their sexual relationships? Was conceding oneself to one's ex-master part of the *obsequium*? Seneca, in the *Controversiae*, tells of a *libertus* who, having been criticized for a relationship with his former master, was defended on the grounds of the following rule: '*impudicitia* (sexual passivity) is a crime for a free man, a necessity for a slave and a duty for a *libertus*' (Seneca, *Controversiae*, 4, *praefatio* 10).

The relationship with the master or the former master, though, was not always a necessity or a duty. For slaves in particular, having a relationship with the master could be a privilege. To the master, all slaves were not the same. He showed preference to some of them and, among these, the most privileged of were assigned a special role: it was the so-called *concubinus*, the young slave that would usually sleep with the master, with all the advantages deriving from the position. This was acceptable only until the day the master married. From that day onwards, such relationship could only continue on a clandestine basis. The wife was not aware – or pretended she was not. This is why the *concubinus* dreaded the day of his master's wedding. Catullus left us a famous description of Manlius Torquatus' wedding. The bride has arrived, covered by the *flammeum*, the traditional red-orange nuptial veil. A boy, the *concubinus*, performs the ritual distribution of nuts, a symbol of fertility. The *concubinus* is negligent: with that gesture he celebrates the end of his relationship with the master. Catullus encourages him, addressing the future husband with allusions and jokes that today would sound extremely heavy for a nuptial reception, but that in those times were perfectly allowed, and perhaps even ritual:

They will say that you, perfumed bridegroom, are / unwilling to give up your old pleasure; but abstain. / We know that you are acquainted with no unlawful / joys; but a husband has not the same liberty.⁸ (*Carmen* 61, 136–44; Catullus 1988: 77–9)

Once married the husband was meant, in theory, to renounce boys. Whether this actually happened is another question. Let us go back to Greece and compare the two situations: although with a different set of rules, in Rome bisexual behaviour was also accepted *per se*. Even *moreso*, it was considered as completely normal. Only in some circumstances (after marriage), and only with some partners (free boys), relationships with other men – no matter whether active – were castigated or forbidden. Within these limits, the Roman man accepted without problem the behaviour that today we define as bisexual. In fact, it was definitely seen as natural, as Lucretius clearly explains in *De Rerum Natura*, where he describes how desire arises and is satisfied. Pleasure, writes Lucretius, consists in transferring one's semen into the body of another person, whose charm has led to the accumulation of the semen itself. This accumulation happens independently of the sex of the desiring and the desired one:

If one is wounded by the shafts of Venus, whether it be a boy with girlish limbs who launches the shaft at him, or a woman radiating love from her whole body, he tends to the source of the blow, and desires to unite and to cast the fluid from body to body. (*De Rerum Natura*, iv, 1052–6; Lucretius, 1992: 359)

Moving from theory to practice, Horace reinforces the concept: when one has to

satisfy a desire there is no need to make things difficult. If a young female slave or slave boy is available at home, why look elsewhere? If other people want to complicate their lives, let them do it. 'For pleasure', he says, 'I love those easy to attain (*parabilem amo Venerem facilemque*: *Satira* 1, 2, 116–19; Horace, 1991: 29). What difference could it make if such 'easy' love were offered by a woman or a man?

So, indifference towards the sex of the object of desire gradually led to indifference towards the sex of the object of love:

It gives no joy to me as once it did / Pettius, to write little verses in the throes of love, / love that demands that I should dote / more than anyone else upon pretty boys and girls. (*Epodes*, 11, 1–4; Horace, 1997: 14)

Thus wrote Horace: an easy prey, he declares himself, of 'a thousand passions for lads and lasses' (*mille puellarum, puerorum mille furores*: *Satira* II, 3, 325; Horace, 1991: 181), among them, Ligurinus and Lyciscus. Ligurinus rejects him and ignores his courtship. Following a model dear to Greek lyrics and Alexandrine poetry, Horace takes his revenge by reminding him that his beauty will vanish with youth and that he will regret his lost time (*Odes*, IV, 10). Regarding Lyciscus, Horace is literally bewitched by him:

But now Lyciscus is my love / and he boasts he's prettier than any mere woman could be. / From him no freely given advice / of friends nor rough abuse can separate me. / Another passion might, for some lovely girl, / or a slender boy with his long hair tied up behind in a knot. (*Epodes*, 11, 23–8; Horace, 1997: 14)

The sex of the beloved object is totally irrelevant to Horace. Millions of men living in Rome and in the Roman world shared his views for centuries.⁹ Things changed with the spreading of Christianity.

Epilogue: the new sexual ethics and the condemnation of homo- and bisexuality

Christianity imposed (although not without difficulty) a new opposition between sexual behaviours. The pair heterosexuality / homosexuality substituted for the old pagan one, between activity and passivity, and constituted the basis of western sexual ethics. It would take too long here to follow its development and trace its origins (which are certainly linked to the Jewish tradition).¹⁰ It would also take too long to discuss here the role played by Christianity in the metamorphosis of pagan sexual attitudes.

As rightly observed by Paul Veyne, between the time of Cicero and the age of the Antoninus dynasty Rome saw a number of changes in sexual relationships. By the end, pagan morality was very close to the Christian one. In the first two centuries of the Christian era, Romans, who up until that time had been 'citizens', became 'subjects'. Those who based their prestige on the ability to impose themselves, both in the family situation and in their relationships with other aristocrats, all became, with the establishment of the Principdom and then of the Empire, servants to the prince. Their prestige depended no more on the ability to impose themselves, but on their ability to establish good relationships with others. Their morals had to change. In order to

survive they had to set new rules and turn towards respectability. In the field of sexuality, they imposed a duty on themselves to consider their woman as a partner, not as a possession; they became more or less faithful to her, and avoided sexual relationships intended as pure manifestations of power – among them, relationships with other men.

This rule was reinforced by the lower classes. They tried to legitimize their socially inferior position by imposing measures of self-control, thus establishing themselves as free beings, capable of self-determination. In the course of two centuries, says Veyne, the pagan world saw the development of the ‘morality of the couple’, which considerably eased the tasks Christians had set themselves: those of moralizing sexual life, establishing its procreative function and restricting the scope for other relationships within the marriage.

As I was saying, though, this is not the appropriate context, nor is it essential for the purposes of this article, to establish whether the metamorphosis of sexual behaviour was imposed by Christianity or whether, and to what degree, it was imposed from within. All we know for certain is that it took place. Christian emperors strove to impose it with drastic legal interventions, some of which – the most severe ones – aimed first at limiting and then at criminalizing the relationships between men.

The first move was to limit the number of male prostitutes (needless to say, those available to *male* customers). Alexander Severus declared that taxes on the *exoleti* (as they were known) could not be paid into the public treasury. Such a measure aimed evidently at condemning male prostitution as a socially despicable activity. Some said that Alexander wanted to abolish it, but did not have the courage to do so (Aelius Lampridius, *Alexander Severus*, 24, 3–4). A meaningful piece of information: the customers of the *exoleti* must have been numerous and of some importance. As we can learn from Aurelius Victor, male prostitution was abolished by Philip the Arab, towards the first half of the 3rd century (Aurelius Victor, *De Caesaribus*, 28, 6). Homosexual behaviours in themselves were not questioned for a long time. The first severe laws prohibited and punished only what today is called passive homosexuality.

The first law regarding this question were promulgated by Constans and Constantius, Constantine’s children. In 342 BC, the two emperors established that: ‘when a man couples in the same fashion as a woman . . . when one commits that crime of which it is better to be ignorant, when Venus has changed nature . . . then we order that the laws intervene, that the right be armed with the sword of vengeance, so that the infamous people of today and tomorrow can suffer the punishments decreed’ (*Codex Theodosianum*, IX, 7, 3). The nature of such punishments is still an object of discussion. The reference to the sword leaves one question open: was the man coupling like a woman to be decapitated or eviscerated? One thing is certain: the constitution criminalized only sexual passivity.¹¹ The successive law, promulgated in 390 by Valentinianus, Arcadius and Theodosius, confirmed this point. Addressing Orientius, Rome’s *vicarius*, the emperors decreed that ‘all those dedicating themselves to the infamous act of condemning a virile body by womanizing it, to endure acts reserved to the other sex, must be taken out of the brothels and condemned to the maximum punishment’: death, in other words (the constitution is preserved in the *Mosaicarum et Romanarum legum Collatio*, v, 3).

In this case, as appears clearly in the text, the punishment is not inflicted on all men whose behaviour is sexually passive, but only on those who act professionally in the brothels of the capital (a clear indication, by the way, of a strong demand). Some decades later, in 438, the constitution promulgated by Theodosius the Great extended the punishment to any manifestation of male sexual passivity. Such punishment is horrendous: whoever commits such a crime 'will pay for it being burnt by the vindictive flames, in public' (*Codex Theodosianum*, IX, 7, 6).¹² It is important to observe that, even after this constitution, male bisexuality is still accepted. The man who, besides coupling with women, couples 'like a man' with another man is not punished.

Christian emperors, despite their wish to translate the Christian precepts into law, had to retreat before the strength of a mentality and a practice that had lasted for centuries. Any law trying to counteract them was doomed to fail.

The condemnation of homosexual relationships independently of the sexual role played came only in the 6th century BC. Justinianus was the first emperor to declare the relationship between people of the same sex as 'going against nature'. In a constitution dated 538 one can read that blasphemous people, perjurers and those that 'commit acts against nature' will face God's rage and the emperor's moral opprobrium (*Justiniani Novella*, LXXVII). For the first time, we can talk of the condemnation of homosexuality, a crime against nature that offends the divinity.

Nevertheless, the threat of God's punishment and the emperor's moral condemnation were not sufficient. About twenty years later, in 559, Justinianus had to face the question again. Reminding his subjects of the terrible end reserved for the Sodomites, he ordered that those who did not desist from the 'wicked and despicable act that not even animals commit' had to suffer 'the most severe punishments' (*Novella*, CXL). What these punishments were, we do not know. Contemporary reports speak of castration and death.¹³ The condemnation of homosexuality (and, consequently, of bisexuality), with no chance of appeal, had been decreed.

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Notes

1. The most famous myth on the presence in the same individual of both female and male traits is Plato's myth of the androgynous (Plato, *Sympos*. 189d–92e). On the theological, cosmological, anthropological and political implications of bisexuality, with a specific reference to the myth of Hermaphroditus, see Brisson (1973, 1978 and 1986).
2. Cf. Bayet (1971), still a key work on this topic.
3. On the death of the Vestals and the *prodigia* that pronounced on their guilt, see Cantarella (2000a).
4. On the debate between Roman legal experts see Cantarella (2003).
5. The bibliography on this topic is huge. Key works, significant in different ways for their influence on successive literature, are Dover (1978) and Foucault (1985). Later, see Winkler (1990), Halperin et al. (1990), Cohen (1991a, 1991b), Calame (1996) and Cantarella (2002). A useful collection of sources can be found in Hubbard (2004).
6. Among the many fundamental works by Paul Veyne on this subject, see in particular Veyne (1968, 1987).

7. On this law, its content and the date of its approval see Cantarella (2002: 106–10).
8. On the importance of Catullus and other poets to understanding Roman attitudes to sexuality see Cantarella (2002: 121–8).
9. A major work on Roman sexuality, with a rich bibliography, is Williams (1999).
10. On the relationship between Jewish and Christian ethics, see Cantarella (2002: 191–210).
11. On the interpretative problems raised by this constitution see Cantarella (2002: 175–6).
12. On the content of these two constitutions and their relationship see Cantarella (2002: 177–81).
13. On Justinianus' attitude and the legal interventions mentioned in the text see Cantarella (2002: 181–6).

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