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SC CLAUDIANUM AND *LEVITAS ANIMI* – A GENDER ISSUE?

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Abstract

During the reign of Emperor Claudius, a *senatusconsultum* from 52 AD contained provision concerning free women sustaining a relationship with the slave of another. In accordance with these provisions should she fail to abandon the relationship after the denouncement of the slave's master, will become the slave of the master denouncing her deed. The *senatusconsultum* also contains rules regarding the *status* of the children born from such a relationship. Some scholars tend to label this decree of the Roman Senate a "gender issue" despite the obvious anachronism of the statement. This paper aims at unfolding the sustainability of such a label. In the scope of this endeavour the common and generally known phrases, *levitas animi* and *infirmitas sexus* are also examined. Connected to *tutela feminarum*, the locutions *levitas animi* and *infirmitas sexus* turn out to contribute to a common, but mistaken opinion how women were regarded in ancient Roman society. Placed properly amongst primary sources, it turns out that they reflect an attitude stemming from Greek philosophy, and therefore not common throughout the entire history of Rome. As for the approach of male and female roles in Roman society, *mores maiorum* plays an undoubtedly important part in determining the actual content of social customs. There's also a strong endeavour to protect women in certain situations, and this is where *tutela mulierum* is supposedly originates from. Secondary literature does not rank SC Claudianum among "gender issues". In addition, the term "gender issue" as such covers a modern concept, and therefore anachronistic in Roman law research, as a consequence its use is at least doubtful.

Keywords: SC Claudianum, Emperor Claudius, slaves, slavery, enslavement, enslavement as a punishment, tutela mulierum, levitas animi, infirmitas sexus

1. Introduction

The senatorial decree dating from the age of Emperor Claudius was a case of enslavement as a punishment. The rules of the *senatus consultum* penalized any Roman woman with slavery upon cohabiting with the slave of another unless she chose to quit the relationship following a (presumably) threefold formal denouncement by the slave's master.[1]

[1] Secondary literature on this topic would well fill libraries. Without the intent to give a comprehensive list, the following works are of importance; William Warwick Buckland: *The Roman Law of Slavery. The Condition of the Slave in Private Law from Augustus to Justinian*. Cambridge, Cambridge University Press, 1908. 401. sq.; Gaston May: L'activité juridique de l'empereur Claude. *Revue Historique de Droit Français et Étranger*, XXXVI (1936), 213–254.; Türkan Rado: Le senatus consultum Claudianum. *Ann. Fac. Droit d'Istanbul*, III (1954), 44–55.; H. R. Hoetnik: Autour du « Sénatus-Consulte Claudien ». In: (ed.): *Droits de l'antiquité et sociologie juridique. Mélanges Lévy-Bruhl.* Paris, Sirey, 1959. 153–162.; P. R. C. Weaver: Gaius i. 84 and the S.C. Claudianum. *The Classical Review*, XIV (1964), 137–139.; John Crook: Gaius, Institutes, I. 84–86. *The Classical Review*, XVII (1967), 7–8.; Edoardo Volterra: Senatus consulta. In: Antonio Azara (ed.): *Novissimo Digesto Italiano*. XVI. 1969. 1047–1078.; Olivia Robinson: Slaves and the Criminal Law. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, XCVIII (1981), 213–254.; Jean Gaudement: Esclavage et Dépendance dans l'Antiquité. Bilan et Perspectives. *Tijdschrift voor Rechtsgeschiedenis*, CXIX (1982), 119–156.; R. J. A. Talbert: *The Senate of Imperial Rome*. Princeton, 1984. 431–459.; Bernardo Albanese: Apunti sul Senatoconsulto Claudiano. In: Matteo Marrone (ed.): *Scritti giuridici vol.I.* Palermo – Torino, Palumbo Giappichelli, 1991. 29–39.; Jacques-Henri Michel: Du neuf sur Gaius? *Revue Internationale des Droits de l'Antiquité*, XXXVIII (1991), 176–217.; Judith Evans-Grubbs: "Marriage More Shameful than Adultery". Slave - Mistress Relationships, "Mixed Marriages". *Phoenix*, XLVII (1993), mainly 128., and 136–137.; Elisabeth Herrmann-Otto: *Ex ancilla natus. Untersuchungen zu den "hausgeborenen" Sklaven und Sklavinnen im Westen des Römischen Kaiserreiches*. Stuttgart, Steiner, 1994. specifically 29., and other instances.; A. J. Boudewijn Sirks: Ad senatus consultum Claudianum. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CXI (1994), 436–437.; Michael Munzinger: *Vincula deterrimae condicionis. Die rechtliche Stellung der spätantiken Kolonen im Spannungsfeld zwischen Sklaverei und Freiheit*. München, 1998. 49–87.; Alfredina Storchi Marino: Restaurazione dei mores e controllo della mobilità socialea Roma nel I secolo d.C. Il senatusconsultum Claudianum "de poena feminarum quae servis coniugerentur". In: Francesca Reduzzi Merola – Alfredina Storchi Marino (ed.): *Femmes–Esclaves. Modèles d'interprétation antropologique, économique, juridique. Atti del XXI colloquio internazionale GIREA. Lacco Ameni, Schia 27–29 ottobre 1994*. Napoli, 1999. 391–426.; Hans Wieling: *Die Begründung des Sklavenstatus nach ius gentium und ius civile*. Corpus der römischen Rechtsquellen zur antiken Sklaverei. Forschungen zur antiken Sklaverei, Beiheft 1. Stuttgart, Steiner, 1999. 20 ssq.; Carla Masi Doria: In margine a PS. 2.21a.11. In: Maria Zabłocka (ed.): *Au-delà des frontières. Mélanes W. Wołodkiewicz I*. Varsovie, 2000. 507–519.; A. J. Boudewijn Sirks: Der Zweck der Senatus Consultum Claudianum von 52 n. Ch. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CXXII (2005), 138–149.; Pierangelo Buongiorno: *Senatus consulta Claudianis temporibus facta*. Collana della Facoltà di Giurisprudenza, Università del Salento; N.S. 22. Napoli, Ed. Scientifiche Italiane, 2010. 310–325.; Elisabeth Herrmann-Otto: *Sklaverei und Freilassung in der griechisch-römischen Welt*. Darmstadt, Wiss. Buchges., 2017. 2. Aufl. 226. sk. With regard to the postclassical history of *SC Claudianum,* see also: Kyle Harper: The SC Claudianum in the Codex Theodosianus: Social History and Legal Texts. *The Classical Quarterly*, LX (2010), 610–638. https://doi.org/10.1017/S0009838810000108; Marco Melluso: *La schiavitù nell'età giustinianea. Disciplina giuridica e rilevanza sociale*. Besançon, Institut des Sciences etTechniques de

Concerning its content, primary *auctor*-sources come first to be examined, among them Tacitus and Suetonius holding the lead. In addition to the *auctores*, several legal sources pay special attention to the regulations of *SC Claudianum*: classical jurists, Gaius, Ulpian, as well as Paul analyse the decree in longer or shorter excerpts.[2] From among the postclassical reports, there should be mentioned certain texts in the Theodosian Code, in Justinian's Institutes[3] and in the Code of Justinian.[4]

2. An overview of the sources

As for the *auctor*-sources, Tacitus reports on the content of the *senatus consultum*, whereas Suetonius describes the social background of the legislation.

According to Tacitus, the Emperor "proposed to the Senate a penalty on women who united themselves in marriage to slaves, and it was decided that those who had thus demeaned themselves, without the knowledge of the slave's master, should be reduced to slavery; if with his consent, should be ranked as freedwomen" *(pro libertis).*[5]

Suetonius, who links the senatorial decree to Emperor Vespasian, emphasises that "[l]icentiousness and extravagance had flourished without restraint; hence he induced the senate to vote that any woman who formed a connection with the slave of another person should herself be treated as a bond-woman […]" *(ancilla).*[6]

The text by Tacitus is clearly an account given from a non-legal aspect, it rather aims to describe a punishment imposed specifically on women *(poena feminarum),* which means that the rules of the SC are not applicable exclusively to free women in

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l'Antiquité, 2000. 47–59..https://doi.org/10.3406/ista.2000.2209; Judith Evans-Grubbs: Not the Marrying Kind. Exclusion, Gender, and Social Status in Late Roman Marriage Law. In: Sylvie Joye – Christina La Rocca – Stéphane Gioanni (ed.): *La construction sociale du suejt exclu (IVe – IXe siècle). Discours, lieux et individus*. Turnhout, Brepols Publisher, 2019. 257. https://doi.org/10.1484/M.HAMA-EB.5.114410; As for the approach of the Church Fathers cf. Amparo Pedregal: Nonnullae se libere et servis suis conferunt..., servili amore bacchata(e). Uniones entre mujeres libres y esclavos, y el orden del reino de los cielos. In: Marcelo Campagno – Julián Gállego – Carlos García Mac Gaw (ed.): *Rapports de subordination personnelle et pouvoir politique dans la Méditerranée antique et au-delà. Buenos Aires, du 31 août au 2 septembre 2011. Actes du XXXIVe Colloque International du GIREA. III Coloquio Internacional del PEFSCEA*. Besançon, 2013. 337–353.

2 Cf. Gai. 1, 84; 1, 91 and 160; Ulp. 11, 11; Paul. 2, 21a, 1–18.

3 See mainly C. Th. 4, 12, 1–7; C. 6, 59, 9 and C. 7, 16, 3, as well as C. 7, 24, 1; Inst. 3, 12, 1. Additionally cf. Herrmann-Otto op. cit. (1994) 31–32.; Melluso op. cit. 49–59.; Harper op. cit. 617–637.; Pedregal op. cit. 343–344.

4 Wieling op. cit. 22.

5 Tac. Ann. 12, 53: *Inter quae refert ad patres de poena feminarum quae servis coniungerentur; statuiturque ut ignaro domino ad id prolapsae in servitute, sin consensisset, pro libertis haberentur.* The English translation is quoted from the following work: Alfred John Church – William Jackson Brodribb – Sara Bryant (ed.): *Complete Works of Tacitus*. New York, Random House, 1942.

6 Suet. Vesp. 11: *"Libido atque luxuria coercente nullo invaluerant; auctor senatui fuit decernendi, ut quae se alieno servo iunxisset, ancilla haberetur […]."* The English text is cited from this edition: J. C. Rolfe: *The Lives of the Twelve Caesars by C. Suetonius Tranquillus*. Loeb Classical Library, 1914.

Tacitus' book. In the case the master consented to that, Tacitus claims the woman to be *pro libertis*, which means that she was taken as *libertina*. We know via the legal sources that in the case of the master's consent, the woman remains free.[7] Freedom could be obtained by birth or by manumission[8] according to how Gaius classifies free people.

The fact that Suetonius attributes SC Claudianum to Emperor Vespasian is highly probable to be a mistake or a misconception.[9] In secondary literature, there is a vivid polemic on the actual date of the SC: based on the primary sources, some point 52 AD, whereas others 54 AD as to when the SC was passed.[10] It is highly probable that the actual date cannot be established by absolute certainty. Certain is that this senatus consultum is dated to the mid-first century AD; its name in primary sources links it directly with Emperor Claudius.

Suetonius, as the only author to deal with the aims and background of this decree, mentions *libido* and *luxuria* as direct decisive factors on which SC Claudianum was based. Drawing the conclusion that *senatus consultum* generally aimed at haltering moral decline in society and preventing certain sexual offences and abuses, does not seem far-fetched. On the contrary, secondary authors hasten to override this opinion by pointing out that the main effort behind the regulation was to defend the interest of the slave's master.[11] The approach by Weaver and Evans-Grubbs is remarkable. They initially posit a recognition: despite the obvious existence of the phenomena regulated by the SC, no republican rules are reported on this topic. A possible reason for this could be that the background of *SC Claudianum* was different. At this the point the two authors claim that the essential motive for the SC was preservation of the imperial family, *familia Caesaris* and the protection of the interests of the *fiscus*.[12] Though the argument is logical, it should not be neglected that literature is unanimous about the premise that cases described by *SC Claudianum* fall under the chapter of enslavement as a punishment.[13] Consequently, if a free woman pursuing

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7 Cf. Gai. 1, 84; Inst. 3, 12, 1.

8 See Gai. 1, 10: *Rursus liberorum hominum alii ingenui sunt, alii libertini*.

9 Contrary to this cf. Sirks op. cit. p. 142., who argues that this report is entirely consistent with other sources. Hebasically regards this coverage as the description of a reinforcement of the former measures by Emperor Claudius, one generation earlier. Correspondingly, see also Storchi Marino op. cit. 411–412.

10 The date 52 AD is accepted by Theodor Mommsen: *Römisches Strafrecht*. Darmstadt, Wiss. Buchges., 1899. 854.; Buckland op. cit. 401. and 412.; Hoetnik op. cit. 153.; Weaver op. cit. 138.; Crook op. cit. 7.; Herrmann-Otto op. cit. (1994) 29.; Herrmann-Otto op. cit. 226.; while 54 AD is asserted by amongst others Max Kaser: *Das römische Privatrecht*. Bd. 1. Handbuch der Altertumswissenschaft. München, C. H. Beck, 1971. 2. Aufl. 289.; Wieling op. cit. 20. Albanese and Robinson do not mention this issue at all; cf. Albanese op. cit. 29–39.; Robinson op. cit. 242. and 245.

11 Cf. in detail Wieling op. cit. 20.; Herrmann-Otto op. cit. (2017) 226.

12 For a detailed analysis see also Paul R. C. Weaver: *Familia Caesaris. A Social Study of the Emperor's Freedmen and Slaves*. Cambridge University Press, 1972. 162–166.; Evans-Grubbs op. cit. (1993) 128.

13 On this see also Tac. Ann. 12, 53: „*Inter quae refert ad patres de poena feminarum quae servis coniungerentur [...]*"; correspondingly cf. e. g. Pedregal op. cit. 343.

relationship with a *servus Casearis* becomes the slave of her partner's master, it could not unconditionally be regarded as a simple punishment with a view to chances of promotion for *servi Caesares*.

From among the legal sources the first to cite is the Institutes of Gaius, which tackles the topic in several fragments. In the first texts, Gaius outlines a situation in which a Roman woman has sexual intercourse with a slave of another. According to Gaius' report, she will remain free herself while her baby will be born as a slave as a result of an agreement *(pactione)* concluded between her and the slave's master.[14]

SC Claudianum is also mentioned as an example of *capitis deminutio*, more specifically *capitis deminutio maxima*, stating that someone may lose citizenship and freedom at the same time. Amongst many examples, the excerpt enumerates this SC regarding women.[15]

In a model case Gaius describes a situation where a Roman woman becomes a slave under the *SC Claudianum* while being pregnant. This could occur when the woman had intercourse with the slave of another, and she was then denounced by the slave's master. The potential legal consequences vary depending on the fact that they are applicable to the woman or to her baby. According to the SC, the woman becomes a slave; whereas the child's *status* depends on whether the parents were lawfully married or not. If the child was conceived in lawful marriage, he / she will be born a Roman citizen. If, however, the baby was conceived in a promiscuous intercourse, the child will be born as the slave of the person to whom his mother belongs.[16]

Justinian's Institutes cites the famous rule of the senatorial decree as an unfair or unjust legislation, mentioning that this was the main reason to abolish this decree, omitting it even from the Digest *(a nostra civitate deleri et non inseri nostris digestis concessimus).* In Justinian's text SC Claudianum appears as an unworthy way of universal acquisition *(miserabilis per universitatem adquisitio),* when a free woman who is (as the wording puts it) frenzied by love for a slave of another, will lose her own liberty along with her property.[17] The Institutes reports only about the

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[14] Cf. Gai. 1, 84. Gaius himself cites the legislation by Emperor Hadrian who considered the rules of the senatus consultum unjust and contrary to the spirit of the law, therefore reinstated the rule of *ius gentium*, according to which if the woman herself remained free, her child was also born free. This text is analysed on several occasions by secondary authors; cf. e. g. Joseph Plescia: The Development of the Doctrine of Boni Mores in Roman Law. *Revue Internationale des Droits de l'Antiquité*, XXXIV (1987), 297. and 302.; Michel op. cit. 190., as well as 214.; Gaudement op. cit. 138.

[15] Cf. Gai. 1, 160. Vele egyezően ld. Ulp. 11, 11: *Maxima capitis deminutio est, per quam et civitas et libertas amittitur, veluti cum incensus aliquis venierit, aut quod mulier alieno servo se iunxerit denuntiante domino et ancilla facta fuerit ex senatus consulto Claudiano.* Lately on this text see mainly Martin Avenarius: *Der pseudo-ulpianische liber singularis regularum. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift. Analyse, Neuedition und deutsche Übersetzung.* Göttingen, Wallstein, 2005. 306., who points out that the Vatican manuscript contains the term *"diminutio"* instead of *"deminutio"*.

[16] Gai. 1, 91.

[17] Cf. Inst. 3, 12, 1. On this text see also Melluso op. cit. 148.; Charles Pazdernik: Libertas and "Mixed Marriages" in Late Antiquity. Law, Labor and Politics in Justinianic Reform Legislation. In: Dennis

Emperor's determination to do away with this unjust regulation, the actual decree on the abrogation of the *senatus consultum* is preserved in *Codex Iustinianus*.[18]

The most informative texts are those by Paul in his Sentertiarum libri V. The jurist examines several case variations in connection with *SC Claudianum*; the institution of *denuntiato* is thoroughly elaborated, and Paul analyses numerous situations depending on the actual status of both the slave and the free woman.[19]

> Paul. 2, 21a, 1
> *Si mulier ingenua civisque Romana vel Latina alieno se servo coniunxerit, si quidem invito et denuntiante domino in eodem contubernio perseveraverit, efficitur ancilla.*

With regard to the *sedes materiae*, Paul's first fragment deserves full attention: if a freeborn woman of Roman or Latin origin pursued a relationship with a slave of another master, and this relationship remains sustained against the will of the master and despite his denunciation, then the woman becomes a slave.[20] As a postclassical change, Paul mentions the necessity of threefold denunciation, and also the fact that the loss of freedom does notoccur *eo ipso*.[21]

3. *SC Claudianum* as a "gender issue"?

I had a contribution on the rules in SC Claudianum during the 2019 SIHDA in Edinburgh.[22] At the end of my contribution, one of the colleagues remarked: "This was after all a gender issue". It was not a specifically elaborated or underpinned statement, and his overall remarks concerned other segments of my contribution; this single statement was sort of an *obiter dictum*. In my response, I only lingered with

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P. Kehoe – Thomas McGinn (ed.): *Ancient Law, Ancient Society*. University of Michigan Press, 2017. 176.

18 Cf. C. 7, 24, 1. The text itself comes into two parts: the first one contains rules regarding free women and the abrogation of *SC Claudianum;* whereas the second part deals with slaves and *adscripti*. On this see also Sirks op. cit. (1994) 436–437.; Melluso op. cit. 50–51.; Pazdernik op. cit. 179. Interestingly, both the Institutes and the Codex contribute substantially to the term *naturalis libertas*. Despite its importance, even Justinian failed to fully abolish slavery. Correspondingly cf. Melluso op. cit. 50., and specifically footnote no. 131.

19 Specifically, the *denuntiatio* carried out by a *filius familias* or a *tutor* (Paul. 2, 21a, 2–5); a relationship pursued by a *libertina* (Paul. 2, 21a, 6–14); or even the issues related to a slave in co-property (Paul. 2, 21a, 15–18) could all equally be mentioned. In secondary literature see also Robinson op. cit. 242., with this regard.

20 Cf. also Robinson op. cit. 245.

21 Cf. Paul. 2, 21a, 17: „*Tribus denuntiationibus conventa etsi ex senatus consulto facta videatur ancilla […]*"), even though Kaser doubts its originality. See also Kaser op. cit. 299., specifically footnote no. 39.

22 Cf. Erdődy János: *SC Claudianum – Modern Questions, Ancient Answers?* LXXIII[e] Session de la Société Internationale Fernand de Visscher pour l'Histoire des Droits de l'Antiquité, Edinburgh, September 3–7, 2019.

this statement briefly when remarking that without any profound analysis, it is safe to say that the Roman approach towards "gender issues", have they had any, it would be different from today's popular attitude. Though our opinions on this were obviously different, no further comments followed. But this rough-and-ready statement I had a splinter-like feeling at the back of my mind. I was looking to find any clues or references in connection with this statement, which rather seems a somewhat all but plausible comment with its rough simplification and crudely obvious anachronism.

When *SC Claudianum* is approached in an analytical and source-centred evaluation, it is plain to see that its rules are centred on the enslavement of a free woman pursuing a relationship with another master's slave. A baby born in such a relationship will undoubtedly become a slave, while the mother only in the case the relationship was pursued against the master's will.[23] Primary authors cover this issue in connection with many different topics, which may lead us to draw conclusions about the Roman thought on this *senatus consultum*. Thematically, it appears in primary texts as a particular case of enslavement, an example of *capitis deminutio*, as an organising principle to determine the *status* of a child to be born, and as a peculiar way of universal acquisition of the woman's assets. To this list the report by Suetonius could also be added, which report put the fight against *libido* and *luxuria* in the centre as the reason for this legislation. This is what we get to know about *SC Claudianum* from the primary sources. In secondary literature, however, it is almost a canonical assertion that any relationship of free people and slaves was prohibited on the proviso that it occurred between a free woman and a slave. A relationship between a free male and a female slave did not fall under any punishment, though such a relationship did not even entail positive consequences, either.[24] In other words, a relationship between a free woman and a slave was punishable, whereas the same occurring between a free male and a female slave was not. This is undoubtedly an important recognition; however, two fundamental phenomena should be added to make this statement clearer. Primarily, the Roman thought (and therefore every Roman legal institution) was centred around *connubium* and marriage *(nuptiae, matrimonium)* within the framework of *ius civile*.[25] Secondly, when saying that a relationship between a free male and a female slave did not entail any punishment, the proper wording would be: there was no punishment linked with such a relationship, the result of which would have been similar to that regulated in *SC Claudianum* (loss of freedom and assets). Of course, the baby born in such a relationship became a

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23 Cf. Kaser op. cit. 289. See also Gai. 1, 91.

24 Cf. Evans-Grubbs op. cit. (1993) 126.

25 On this in the primary sources see also Ulp. 5, 3: *Conubium est uxoris iure ducendae facultas*. Mod. D. 23, 2, 1 (1 reg.): *Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*. The term *matrimonium* appears in connection with *ius naturale;* cf. Ulp. D. 1, 1, 1, 3 (1 inst.): *„Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus [...]"*. See also Adolf Berger: *Encyclopedic Dictionary of Roman Law*. Philadelphia, American Philosophical Society, 1953. s. v. „conubium".

slave, but this consequence was no novelty, as it was in accordance with the rules of *lex Minicia* from the 1st century BC.[26]

Despite all these additional remarks, the above-mentioned recognition is important, yet it cannot be excluded that this is merely an implication of a tendency in the (originally male-centred) Roman society.[27]

3.1. The order of ius civile: power and *"institutions"*

Ius civile is essentially based on power, more specifically, physical power. Several expressions reflect manual apprehension even in the scope of legal power (cf. e.g. *manus*, *mancipatio*, *manumissio*, etc.). In a male-centred society, if one man violated the *dominica potestas* of another man over his female slave, *ius civile* had proven to be ensured sufficient legal means to demand compensation. This was due to the fact that the two male citizens were deemed equal, both in social and legal aspects. Hence, the slave's master could claim compensation or damages, naturally when all legal prerequisites of such a claim were met. Amongst these prerequisites, the most fundamental one is the claimant's obligation to show that loss, injury or harm in the female slave's value resulted from the relationship pursued with the free male.

Cases regulated by *SC Claudianum* are mostly similar: a relationship of any sort, pursued by a free woman with the slave of another master violates the master's *dominica potestas*, his power over the slave. Consequently, violation of power persists, only the characters involved are different. The equality of the two men in the previous example is no longer upheld since the one who commits the violation is a free female. The legally critical issue stems from the fact that women, regardless of their age, were subject to power: paternal or marital power, or tutelage in the absence of their father, or in case of a marriage, without *conventio in manu*. The Latin term for tutelage used by Gaius is *tutela*, which as a legal term means tutelage. However, the actual meaning of *tutela* is far wider: whatever the father does with regard to his daughter, or whatever the husband carries out regarding his wife, is likewise called *tutela*. This leads us to the true meaning of what Gaius asserts in his institutes concerning *tutela mulierum*: *veteres voluerunt feminas [...] in tutela esse*.[28]

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[26] On *lex Minicia* see for instance Giovanni Rotondi: *Leges publicae populi Romani*. Milano, Soc. Editrice Libraria, 1912. 338.; Berger op. cit. s. v. „Lex Minicia"; Richard Böhm: Zur lex Minicia (Gaius, Inst. I, 77–78). *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abtheilung*, LXXXIV (1967), 363–371.; David Cherry: The Minician Law. Marriage and the Roman Citizenship. *Phoenix*, XLIV (1990), 244–266.

[27] Good examples of this are thoroughly analysed in Hungarian secondary literature; cf. Péter Orsolya: »Feminae improbissimae«. A nők közszereplésének és nyilvánosság előtti fellépésének megítélése a klasszikus római jog és irodalom forrásaiban [The Opinion on the Public Appearance of Women in the Sources of Classical Roman Law and Literature]. *Miskolci Jogi Szemle*, III (2008), 77–94., with abundant literature.

[28] Cf. Gai. 1, 144. On this see also Pierluigi Zannini: *Studi sulla tutela mulierum. Vol. I. Profili funzionali*. Memorie dell'Istituto Giuridico. Torino, Giappichelli, 1976. 35. skk.; Olga E. Tellegen-Couperus: Tutela mulierum, une institution rationnelle. *Revue Historique de Droit Français et Étranger*, LXXXIV (2006), 425.; Péter op. cit. 78–81.

The tutelage of women was therefore prescribed *ex lege*. It could be interesting to compare the *ex lege* obligation of *tutela mulierum* with the extra protection of *minores* granted by *lex Laetoria*.[29] In both cases the protection is established *ex lege*: in case of women the appointment of a *tutor*, as for *minores* the availability of *actio poenalis*, as well as the appointment of a *curator*. In both cases, it is true that women and *minores* were capable of administering their own businesses, yet experiences drawn from everyday cases resulted in the decision that it seemed highly useful to provide them an *ex lege* protection, so that any loss of their assets could more effectively be avoided. Additionally, in case of women the participation or contribution of the *tutor* was not necessary in all business affairs, only in instances where the business value exceeded a regular standard. What this regular standard actually meant, always depended on a social consensus, thus it was not exclusively and necessarily a legal question: legally binding custom and normative rules were highly affected by a *communis opinio* of a particular community.

In connection with tutelage over women, Gaius mentions its reason, claiming that it is inevitable due to *propter animi levitatem*, which term in the English translations appears as 'on account of the levity of their disposition.'[30] As the text continues, Gaius makes it clear that this rule was not by all means applicable to all women, as the Vestal Virgins were exempt[31] from tutelage: *"Loquimur autem exceptis virginibus Vestalibus, quas etiam veteres in honorem sacerdotii liberas esse voluerunt [...]"* (Gai. 1, 145).[32] If the Romans had wanted to link womanhood to the necessity of

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[29] Secondary literature on *lex Laetoria* is ample. To compare it with works related to female tutelage, suffice it to refer to the works as follows: Settimio Di Salvo: *Lex Laetoria. Minore età e crisi sociale tra il III e il II a. C*. Pubblicazioni della Facoltà di Giurisprudenza dell'Università di Camerino. Napoli, Jovene Editore, 1979. ; Andreas Wacke: Zum Rechtsschutz Minderjähriger Gegen Geschäftliche Übervorteilungen. *Tijdschrift voor Rechtsgeschiedenis*, 48 (1980); Hans-Georg Knothe: *Die Geschäftsfähigkeit der Minderjährigen in geschichtlicher Entwicklung.* Frankfurt – Bern, Peter Lang Verlag, 1983. ; Francesco Musumeci: L'interpretazione dell'editto sui minori di 25 anni secondo Orfilio e Labeone. In: Silvio Romano (ed.): *Nozione, formazione e interpretazione del diritto dall'età romana alle esperienze moderne. Ricerche dedicate al Professor Filippo Gallo.* II. Napoli, Jovene Editore, 1997. 39–58.; Francesco Musumeci: *Protezione pretoria dei minori di 25 anni e ius controversum in età imperiale*. Pubblicazioni della Facoltà di Giurisprudenza, Università di Catania. Torino, Giappichelli, 2013. ; Elisabeth Christine Robra: *Die Drittwirkung der Minderjährigenrestitution im klassischen römischen Recht*. Berlin, Duncker & Humblot, 2014.

[30] Gai. 1, 144.

[31] Besides the cited Gaius-text, the following source is also important: Gell. 1, 12, 9: *„Virgo autem Vestalis simul est capta atque in atrium Vestae deducta et pontificibus tradita est, eo statim tempore sine emancipatione ac sine capitis minutione e patris potestate exit et ius testamenti faciundi adipiscitur";* Plut. Numa 10, 5: „τιμὰς δὲ μεγάλας ἀπέδωκεν αὐταῖς, ὧν ἔστι καὶ τὸ διαθέσθαι ζῶντος ἐξεῖναι πατρὸς καὶ τἆλλα πράττειν ἄνευ προστάτου διαγούσας, ὥσπερ αἱ τρίπαιδες". In connection with this text cf. Osvaldo Sacchi: Il privilegio dell'esenzione dalla tutela per le vestali. *Revue Internationale des Droits de l'Antiquité*, L (2003), 321–325. See also Zannini op. cit. 173. Zannini himself examines the essential difference between *tutela impuerum* and *mulierum*; cf. Zannini op. cit. 11–15.

[32] On the Gaian text in general, see also Sacchi op. cit. 326–327.; on the originality of the text cf. mainly Zannini op. cit. 16. sq., with literature.

appointing a *tutor* in such a way to potentially result in discriminating women, upon this exception then one might get to the (false) assumption that *honor sacerdotis* (as well as *ius liberorum* as of Gellius and Plutarch) "override" womanhood. Nevertheless, a Vestal Virgin, an *ingenua* with three, or a *libertina* with four children were women, after all. We are thus right to deduce that the wording of the law is a mere reflection on the social-economic reality; there is a living experience in the community a rule and its exception run parallel with. The cited text by Plutarch also shows that all these privileges were donated by the king (traditionally by Numa Pompilius). The noun *'honor'* in the term *honor sacerdotis* does not aim at picking Vestal Virgins (i.e. certain women) from the circle of women via administrative measures. In our understanding, this term underpins their divine protection as the priestesses of Vesta, hence their different social status and position as compared to other women.[33] The same applies to women exempt from tutelage *iure liberorum*. Plutarch is unsure about the origins of guarding the perpetual fire with virgins: it is probable that chastity and pureness („καθαρὰν καὶ ἄφθαρτον") are the reasons for this rule, but the uncorrupted nature („τὴν […] οὐσίαν ἀκηράτοις καὶ ἀμιάντοις") is also a possible explanation for this legislation.[34]

There are some cases in the sources when a position or a job was unavailable to women, and the masculine character of that particular position, upon tradition, underpinned this restriction.[35]

The term *levitas animi* might raise the suspicion that the reason for whole lifespan of women was due to their loose nature. If this were the case, then the remark concerning *SC Claudianum* as a "gender issue" would come through. In order to convey the meaning of *levitas animi* properly, the origins, the different meanings and the occurrences of this expression are to be analysed.

3.2. *Levitas animi* and *infirmitas sexus* – woman nature?

The most obvious text concerning the tutelage of women is a short excerpt in the Institutes of Gaius. In this text, the classical jurist informs us about the rule in the Law of the XII Tables and provides a reason for introducing this institution.

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[33] See also Zannini op. cit. 174.

[34] Cf. Plut. Numa 9, 5

[35] A good example of this is a text by Paul on *SC Vellaeanum* (Paul. D. 16, 1, 1 [30 ad ed.]), in which the jurist points out that *civilia officia* were *moribus* unavailable for women. Paul emphasises that it is *aequum* to aid women this way *(succurri).* To support his argument, Paul does not refer to the rhetoric commonplaces of *levitas animi*or *infirmitas sexus*, nor does he deny female capacity to hold an office; his explanation is grounded on *mos* instead. A corresponding opinion can be found in Ulpian, with the minor difference that he deems these rules applicable to *impuberes* as well (cf. Ulp. D. 50, 17, 2 [1 ad Sab.]). In detail see also Suzanne Dixon: Infirmitas Sexus. Womanly Weakness in Roman Law. *Tijdschrift voor Rechtsgeschiedenis*, LII (1984), 360.; Birgit Feldner: Zum Ausschluss der Frau vom römischen Officium. *Revue Internationale des Droits de l'Antiquité*, XLVII (2000), 382–383.; Péter op. cit. 77–81.

Gai. 1, 144
Veteres enim voluerunt feminas, etiamsi perfectae aetatis sint, propter animi levitatem in tutela esse.

The jurist bases the introduction of this legal disposition on an ancient decision *(veteres voluerunt);* he deducts from this the rule that women, even if being of age (*etiamsi perfectae aetatis sint*) were subject to tutelage *(in tutela esse).* He adds as an explanation, that this is due because of their *animi levitas*.

Tutela mulierum is not strictly separated from *tutela impuberum* in the sources, yet, while *tutela impuberum* lasts no longer after the *minor* reached puberty, *tutela mulierum* is *perpetua*.[36] *Tutela impuberum* is explained by *naturalis ratio.*[37] *Levitas animi* and *infirmitas sexus* appear exclusively in connection with tutelage over women.[38]

3.2.1. Levitas animi

In the expression to be analysed, the component *levitas* means *mobilitas* or *inconstantia*.[39] Relying on these synonyms, "frivolity", "volatility", "rashness" or "thoughtlessness" would be the words to reflect the sense of *levitas*.[40]

A semantic analysis leads us to conclude that neither *Totius Latinitatis Lexicon*, nor Finály's Latin dictionary link the concept expressed by the term *levitas* with women. According to *Thesaurus Linguae Latinae,* this locution signifies *defectus firmitatis*, ἀσθένεια, and *imbecillitas*.[41] This approach and the primary sources correspond to the ablative form of the noun *levitas* appears in connection with age in one of

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[36] Cf. Zannini op. cit. 12–13.

[37] Cf. Gai. 1, 189: *„[...] id naturali rationi conveniens est [...]"*. Correspondingly Zannini op. cit. 31.; Feldner op. cit. 386.

[38] Concerning *levitas animi* as a ground for tutelage, see Feldner op. cit. 386., with restrictions. Quoting Gaius (Gai. 1, 190), she emphasises that *levitas animi* merely serves as a grandiloquent rhetorical reason (*speciosa ratio*) with less basis.

[39] On this see also Egidio Forcellini – Jacopo Facciolati: *Totius Latinitatis Lexicon*. Patavii, 1711. s. v. "levitas" II, 1. Concerning the core meaning of *levitas* cf. additionally Alfred Ernout – Antoine Meillet: *Dictionnaire étymologique de la langue latine. Histoire des mots*. Klincksieck, 1951 s. v. *"lĕvis"*

[40] Cf. Henrik Finály: *A latin nyelv szótára*. Budapest, Akadémiai Kiadó, 2002. s. vv. *"levitas", "mobilitas", "inconstantia"*. The latter ones mean inconsistency, volatileness in Finály's interpretation. Correspondingly see Peter G. W. Glare (ed): *Oxford Latin Dictionary*. Oxford, Clarendon Press, 1968. s. h. vv., especially "*levitas*[3]". Also cf. Hermann Gottlieb Heumann – Emil Seckel: *Handlexikon zu den Quellen des römischen Rechts*. Jena, Verlag Gustav von Fischer, 1907. s. v. "levitas". It should also be noted that the definition "Leichtsinn" corresponds with the approach of other dictionaries, it is still extremely simplifying.

[41] Cf. *ThLL* s. v. *"infirmitas",* where *infirmitas sexus* is specified under I, A 1, b, whereas *infirmitas mulierum* is presented under I, A 2, b.

Paul's opinions.[42] Nevertheless, we need to point out that Oxford Latin Dictionary explicitly cites the above quoted text by Gaius (Gai. 1, 144), which appears in the textual reconstruction of the Law of the Twelve Tables. In addition to this, it should also be remarked that there is another Gaian text (Gai. 1, 190) which also contains this expression, but in this latter excerpt, the jurist's approach is critical. We are going to get back to this finding later.

As a partial conclusion and, with reference to the concept of *levitas* in primary sources, womanhood does not come up either as a key example (cf. Totius Latinitatis Lexicon, Finály, Heumann – Seckel), or as an exclusive example (cf. Oxford Latin Dictionary). Moreover, the examples in the dictionaries clearly indicate that the fragments of the Digest reflect the everyday usage of this term.

3.2.2. Infirmitas sexus

Besides *levitas animi*, another expression worth mentioning as a typical description is the phrase *infirmitas sexus*.[43] It should immediately be pointed out that the word *infirmitas*, as well as its most common counterpart, *imbecillitas* both refer first and foremost to a physical weakness.[44]

The use of the term *infirmitas sexus* could be traced back to two reports by Cicero in his speech *Pro Murena*, and by Livy respectively. In these texts, both authors agree that tutelage over women was first introduced by those who came before *(maiores),* and that the introduction was necessary; *propter infirmitatem consilii*.[45]

> Cic. Mur. 12, 27
> *„Nam, cum permulta praeclare legibus essent constituta, ea iure consultorum ingeniis pleraque corrupta ac depravata sunt. Mulieres omnis propter infirmitatem consili maiores in tutorum potestate esse voluerunt [...]"*

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[42] See also Paul. D. 4, 4, 24, 2 (1 sent.): *Scaevola noster aiebat, si quis iuvenili levitate ductus omiserit vel repudiaverit hereditatem vel bonorum possessionem, si quidem omnia in integro sint, omnimodo audiendus est: si vero iam distracta hereditate et negotiis finitis ad paratam pecuniam laboribus substituti veniat, repellendus est: multoque parcius ex hac causa heredem minoris restituendum esse*. Cf. Musumeci op. cit. (2013) 48–49., and specifically with regard to the term *iuvenili levitate ductus* 123., with further sources. Likewise see Heumann–Seckel op. cit. s. v. "levitas", where this text appears as the sole reference from the Digest.

[43] From the secondary literature of *levitas animi* and *infirmitas sexus* the following works should be cited: Siro Solazzi: Infirmitas aetatis e infirmitas sexus. *Archivio Giuridico*, CIV (1930), 3–31.; Fritz Schulz: *Classical Roman law*. Oxford, Clarendon Press, 1951. 180–185.; Zannini op. cit. especially 44–47. and 60–65.; Joëlle Beaucamp: Le vocabulaire de la faiblesse féminine dans les textes juridiques romains du III^{e} au VI^{e} siècle. *Revue Historique de Droit Français et Étranger*, LIV (1976), 485–508.; Dixon op. cit. 343–371.; Péter op. cit. specifically 79., and footnote no. 8.

[44] It could be a good contribution to this topic when we refer to the Gaian text on *vis maior*, which describes *vis maior* as event or phenomenon which human inferiority is unable to resist (cf. Gai. D. 44, 7, 1, 4 [2 aur.]: „[…] *cui humana infirmitas resistere non potest* […]").

[45] Cf. correspondingly Dixon op. cit. 343.

Liv. 34, 2, 11
„Maiores nostri nullam, ne privatam quidem rem agere feminas sine tutore auctore voluerunt, in manu esse parentium, fratrum, virorum [...]"

In the first quoted text, Cicero points out that the ancestors excellently settled many issues by the laws *(cum permulta praeclare legibus essent constituta),* yet most of them have been depraved and corrupted *(corrupta ac depravata sunt)* by the genius of the lawyers *(iuris consultorum ingeniis).* As an example, he cites the rule of the ancestors *(maiores)* which determined that women should be under the protection of *tutores (in tutorum potestate)* on account of the inferiority of their understanding *(infirmitas consilii).*[46]

The text by Livy asserts that the ancestors *(maiores)* permitted no woman to conduct even personal business *(privatam rem)* without a guardian to intervene on her behalf *(sine tutore auctore);* they wished them to be under the control of husbands *(in manu)*[47], fathers, brothers.[48]

At first sight the texts seem to imply that lifelong tutelage over women would have been linked with their incapacity of some sort.[49] Classical jurist, Gaius and Ulpian also mention this late republican and early imperial commonplace of tutelage over women: in these texts[50] references are made to a practice to be traced back to the time of the ancestors. These mentions lack any evaluation.[51]

The term *infirmitas sexus* became more and more emphatic by the gradual change of both the meaning and the content of *tutela mulierum*.[52] Classical texts show clearly that the expressions *infirmitas* and *imbecillitas* were rhetorical commonplaces of the 1st century BC, which τόποι are used to refer to female inferiority or incapacity, without any detailed explanation.[53] These τόποι however designated physical weakness in the texts.[54]

The original significance of physical weakness got gradually extended by further, more abstract meanings. These alterations are easily proven and reconstructed in some instances, such as the expression *infirmitas occulis* by Pliny: the weakness

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46 With special attention to such meaning of *consilium* as "thoughtfulness", "cunning", "understanding", "sense" cf. Finály op. cit. s. h. v.; *Oxford Latin Dictionary* s. h. v.; and correspondingly in general Heumann–Seckel op. cit. s. h. v.

47 Cf. Finály op. cit. s. v. „manus".

48 On these two texts see also Zannini op. cit. (1976) 19.

49 Cf. Dixon op. cit. 343. She deems the Cicero text to be its first appearance.

50 See also Gai. 1, 144; Ulp. 11, 1.

51 Correspondingly cf. Zannini op. cit. 44.; Dixon op. cit. 360.

52 Cf. Zannini op. cit. 9.; Dixon op. cit. 356.

53 On this cf. in the primary sources e. g. in Valerius Maximus on the *lex Oppia*, where *inbecillitas mentis* appears (Val. Max. 9, 1, 3); in Quintilian in connection with *matrimonium* the term *imbecillior sexus* (Quint. Decl. min. 368); or even in Tacitus the already known expression of *imbecillitas sexus* (Tac. Ann. 3, 33).

54 Cf. Schulz op. cit. 182.; Zannini op. cit. 65–66.; Dixon op. cit. 356–357.

of the eyes obviously refer to the worsening eyesight.[55] Other examples, however, are less apparent, such as *infirmitas animi* or *mentis*. The appearances of the terms *infirmitas*, *imbecillitas* and *fragilitas*, which lack any attribute are even harder to comprehend.[56]

3.2.3. Infirmitas sexus in the Digest

In 1930, the excellent Naples scholar, Siro Solazzi published a lengthy paper on the occurrence and the possible meanings of the terms *infirmitas sexus* and *infirmitas aetatis*.[57] In his work, Solazzi meticulously quotes the sources containing these expressions, first and foremost from a standpoint of *Interpolationenjagd*. Relying mainly on the findings of Beseler, Solazzi presumed the existence of interpolations, and came to the conclusion that that neither *infirmitas sexus* nor *infirmitas aetatis* are of classical origin.[58] He examined the texts in the Digest and imperial decrees on this topic in *Codex Iustinianus,* and the result of his comparison let him conclude that these two terms are outcomes of postclassical insertions.[59] He also believed that the texts by Gaius and Ulpian are also yields of postclassical alterations.[60]

In one volume of the 1976 issue of Revue historique de droit français et étranger[61] Joëlle Beaucamp dedicated another extensive paper to the meanings of *infirmitas*, *imbecillitas*, *fragilitas*, with special focus on the texts in Novellae.[62] Contrary to the opinion of Solazzi, she concluded that the expression *infirmitas sexus* was not unfamiliar to the jurists of the 3rd century AD, however the sense of these expressions became gradually broadened by an intensifying negative connotation attributed to them. This phrasing was to support the fact that women were excluded from certain spheres of everyday life.[63] Besides the occurrence of *infirmitas sexus*, Beaucamp also

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55 Cf. Plin. Ep. 7, 21: *„Pareo, collega carissime, et infirmitati oculorum ut iubes consulo."* On this see also Dixon op. cit. 357.

56 Cf. Dixon op. cit. idem.

57 Cf. Solazzi op. cit. 3–31. (= Siro Solazzi: Infirmitas aetatis e infirmitas sexus. In: N. N. (ed.): *Scritti di diritto romano III.* Napoli, Jovene, 1960. 358–377.)

58 Correspondingly see Dixon op. cit. 358. With a sensitive but hyper-critical analysis of Solazzi's work cf. Zannini op. cit. *passim*, and especially 39., or 47.

59 See also Solazzi op. cit. 18., as well as 26., 28.

60 Solazzi op. cit. 29–31.

61 Beaucamp op. cit. 485–508.

62 Cf. Beaucamp op. cit. 486.

63 Cf. Beaucamp op. cit. 499. and 503–504.; Dixon op. cit. 358. It is worth referring to three passages of the Digest in Beaucamp's analysis. In an opinion by Neratius (Ner. D. 27, 10, 9 [1 membr.]) a case is presented when the heir of a *curator,* obliged to administer a property, is unable to tend to the affairs *propter sexus vel propter aetatis infirmitatem*. Similarly, the difference in *dignitas* between the original *curator* and his heir could also be an obstacle. The locution used in the text is in tandem with the commonplaces used in the texts by Gaius and Ulpian. On this, see in detail Beaucamp op. cit. 493–494. In another case, the jurist Paul examines the actual applicability of the principle in connection with legal and factual errors (Paul. D. 22, 6, 9 pr. [de i. et f. ign.]). Legal error is sometimes acceptable in case of *minores* and women; in the latter case the phrase *propter sexus*

discovered the appearance of locutions such as *infirmitas feminarum*, *imbecillitas sexus*, as well as *fragilitas*. Regarding female *intercessio* and *SC Vellaeanum,* she analysed a text by Ulpian (Ulp. D. 16, 1, 2, 3 [29 ad ed.]). In this excerpt the word *infirmitas* appears as the counterpart of *calliditas*: the jurist asserts that women should be protected on account of *infirmitas* and not because of *calliditas*. These two notions are not opposite to each other, it is more likely that Ulpian used them together to bring, the reader to a better understanding of the concept of *infirmitas*.[64] The term *imbecillitas sexus* appears in one text in the Digest (Ulp. D. 16, 1, 2, 2 [29 ad ed.]), and in one in *Codex Iustinianus* (C. 5, 4, 23 pr.). The phrase *fragilitas* could exclusively be found in postclassical compilations (C. Th. 4, 14, 1, 2 = C. 7, 39, 3, 1a; C. 4, 29, 22 pr.; C. 5, 3, 20; C. 5, 13, 1, 15b; C. 8, 17, 12, 2.).[65]

4. Conclusions in connection with *levitas animi*

From the dictionary corpora, it is apparent that primary sources do not link *levitas* (*animi*) to womanhood (Totius Latinitatis Lexicon, Finály, Heumann – Seckel), or references to women do not serve as exclusive examples for restrictions (Oxford Latin Dictionary). Consequently, these findings underpin the premise that there was no "gender issue" in the background of regulations related to women. The next question reasonable to ask is if there was any "gender issue" at all.

The general Roman law stance on women cannot be separated from the institution of lifelong tutelage over women. Originally, this institution must have been established in order to keep family property together, and it was only later that its protective character gained emphasis. With regard to *tutela impuberum,* primary sources of the late Republic unanimously put this protective character in the centre.[66] As a result of all these, it is reasonable why the definition by Paul in the Digest (which stems originally from Servius Sulpicius) focuses on this protective character (cf. Paul. D. 26, 1, 1 [38 ad ed.]).[67]

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infirmitatem serves as an explanation. On this cf. Beaucamp op. cit. 496. A passage by Marcianus on the applicability of *SC Turpillianum* (Marci. D. 48, 16, 1, 10 [1 ad SC Turpill.]) show different cases when charges could and could not be brought against a person. Again, bringing charges against women is unavailable *propter sexus infirmitatem*. Other cases of inadmissible charges are *propter status turpitudinem* and *[propter] temporis finem*. Cf. Beaucamp op. cit. 494–495. On these texts see also Zannini op. cit. 46., and footnote no. 4.

64 Cf. Beaucamp op. cit. 491.

65 Cf. Beaucamp op. cit. 486.

66 See also Gellius Noct. Att. 5, 13, 2, 5: *"[...] defendi pupillos quam clientem non fallere [...]"*. Similarly, in Cicero's *De officiis* the author compares the tasks and duties of a *tutor* to a *res publica* (cf. Cic. off. 1, 25, 85).

67 Cf. Paul. D. 26, 1, 1 (38 ad ed.): *[pr] Tutela est, ut servius definit, vis ac potestas in capite libero ad tuendum eum, qui propter aetatem sua sponte se defendere nequit, iure civili data ac permissa. [1] Tutores autem sunt qui eam vim ac potestatem habent, exque re ipsa nomen ceperunt: itaque appellantur tutores quasi tuitores atque defensores, sicut aeditui dicuntur qui aedes tuentur. [2] Mutus tutor dari non potest, quoniam auctoritatem praebere non potest. [3] Surdum non posse dari tutorem plerique et Pomponius libro sexagesimo nono ad edictum probant, quia non tantum loqui,*

As János Zlinszky pointed out on several occasions, it was common in ancient Roman law to use two or three parallel notions to designate the very same entity. Good examples of this are notions used to refer to property *(familia pecuniaque),* theft *(furtum – peculatus),* money *(aes – as – pecunia)*, and marriage *(connubium – matrimonium).* In some cases, these duplicated notions resulted in parallel institutions the double origins of which had long been forgotten; a typical example of this is the institutions of *tutela* and *cura*.[68] The original aim was to ensure a substitute for paternal care and to secure the integrity of family property – an effort reflected in the hereditary rules of the Law of the Twelve Tables.[69] Another token of this endeavour is the regulation applicable before the reign of Emperor Claudius on *tutores feminarum*, according to which *tutores* should have belonged to the *agnatio*.[70] This fact and the linguistic background of *cura* and *tutela*[71] may lead us to conclude that supplementary institutions of paternal care were originally not separated upon whether they referred to underage persons or women. The basic institution could be *tutela impuberum*; the difference between the tutelage over underage persons and women is traced in the fact that an underage person was entitled to ancient *actio de rationibus distrahendis* against a fraudulent *tutor*; this aid was unavailable to women.[72] According to Gaius, the reason for this difference is that tutelage was a mere formality for women.

Quoting the rule in the Law of the Twelve Tables, it is safe to say that the origins of tutelage could also be connected to the ancient hereditary circumstances. After the death of the *paterfamilias*, family heirloom was divided in the first place amongst *sui heredes*.[73] This consisted of the children of the deceased (regardless of their sex!), and his widowed wife *in manu*. Still, tutelage was applicable for the period of impuberty or permanently, as for women.[74]

This latter institution, tutelage over women fell gradually into oblivion by the postclassical era: neither *Codex Theodosianus*, nor the books of Justinian's codification contain the term *tutela mulierum*.[75] Regarding the origins of power over women, we

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sed et audire tutor debet. On this see also Zannini op. cit. 50–51.; Dixon op. cit. 350., as well as 356., with a critical approach.

68 Zlinszky János: Állam és *jog az ősi Rómában* [State and Law in Ancient Rome]. Budapest, Akadémiai Kiadó, 1997. 100–110., and mainly 106., with abundant literature.

69 Cf. *lex XII tab.* 5,3 and 5,4; Gai. 2, 224; Pomp. D. 50, 16, 120 (5 ad Quint. Muc.); cf. also Zlinszky op. cit. 195.

70 On this see also Ulp. D. 26, 4, 1 pr. (14 ad Sab.); Gai. 1, 157 and 171; Ulp. 11, 8; Dixon op. cit. 345. and 348.

71 Cf. Ernout–Meillet s. vv. "cura", "tutela"; Alois Walde – Johann Baptist Hofmann: *Lateinisches etymologisches Wörterbuch*. Heidelberg, Carl Winter's Universitätsbuchhandlung, 1910. s. vv. "cura", "tueor"; Zlinszky op. cit. 106.

72 Cf. Gai. 1, 191–192.; Dixon op. cit. 349.

73 See also *lex XII tab.* 5, 4.

74 On this see also Dixon op. cit. 345.; Zlinszky op. cit. 195–197. On the content of *tutela* cf. Dixon op. cit. 345–346., with literature.

75 Tellegen-Couperus op. cit. 424.

should turn to one of Cicero's orations. In his speech held in defence of Lucius Licinius Murena (*Pro Murena*) there is a passage to quote an Aristotelian idea.

> Arist. Pol. 1260a
> ὁ μὲν γὰρ δοῦλος ὅλως οὐκ ἔχει τὸ βουλευτικόν, τὸ δὲ θῆλυ ἔχει μέν, ἀλλ᾽ ἄκυρον, ὁ δὲ παῖς ἔχει μέν, ἀλλ᾽ ἀτελές.

The core notion of the Aristotelian passage is the word βουλευτικός, the Latin counterparty of which *(consilium)* is used by Cicero as well. Both locutions designate "intellect", "reason", "understanding". Aristoteles differentiates between slaves, women, and children on the basis of the extent of βουλευτικός they possess; since slaves lack this, in case of women it is imperfect (ἄκυρος), and in case of children itis undeveloped (ἀτελής). The Greek term ἄκυρος equals the Latin *infirmus*. Consequently, when Roman authors or jurists make reference to *infirmitas* in connection with women that has clear Aristotelian origin. Thus, *levitas animi*, and *infirmitas sexus* are rhetorical phrases used even in everyday language. When we read Cicero, Gaius, Ulpian, it is evident that they all rely on these notions as part of their reasoning: all these preclassical and classical authors aspire to give a plausible explanation why the ancestors introduced the institution of tutelage over women.[76] Schulz points out that the original reason for the protection of women was not the female nature, but rather in the fact how society was arranged and organised.[77] Initially, the rules of Roman hereditary law reflect the endeavour to avoid the fragmentation of family property, and as the importance of *agnatio* had gradually changed, so did the meaning and the actual content of tutelage over women. Though traditions rooted in ancient law still subsided, by the end of the Republican Age the rearrangement of ancient society had brought about the transformation of certain institutions, such as tutelage.[78] As already seen above, the Institutes of Gaius contains a passage, which derives tutelage over women from the commonplace of *levitas animi* (Gai. 1, 144), whereas there is another fragment in which the jurist argues for the inexistence of any good reason to underpin the institution of tutelage over women. There and then, any reference to *levitate animi* is regarded as totally useless (Gai. 1, 190).[79] In this latter text, Gaius underlines that women who are of age administer their affairs by themselves; *auctoritas tutoris* asenforced by the *praetor* in many cases was mere formality. It is also certain that restrictions on women to administer their own affairs was not an all-out constraint, but it was applicable in business transaction exceeding a certain

[76] Correspondingly cf. Schulz op. cit. 181.; Dixon op. cit. 352–353.

[77] Cf. Schulz op. cit. 182–183. Essentially agrees Tellegen-Couperus op. cit. 434–435.

[78] Cf. Dixon op. cit. 347–348.

[79] Cf. Schulz op. cit. 182., who also mentions certain doubts with regard to the originality of the passage. Similarly cf. Dixon op. cit. 352–353.

value regarded as regular or customary in everyday practice.[80] During the time of Emperor Augustus, a woman was exempt from the limitation constituted by *tutela perpetua* on them *iure trium liberorum*, or if the woman was a *libertina,* then *iure quator liberorum*.[81] The argument by Schulz is well-grounded, according to which if the commonplace of *infirmitas sexus* had been genuine, then the favour granted to women with three or four children would have actually resulted in jeopardising their interests because *infirmitas* would have existed despite the statutory concessions.[82] All these considerations leave us to conclude that the characteristics of tutelage over women originate from the ancient order of society. In the scope of this social order, the role of men and women were different, they had all different tasks on a social scale, all pointing towards maintaining the integrity of the community. However, these different roles never aimed to segregate the members of the community based on sex, it was rather a functional differentiation. Yet these different functions added up to the Roman community, the Roman society as such. As the composition of society changed depending on overall circumstances, these ancient social functions were gradually obscured by new expectations, and these were underpinned by an idea taken from Greek philosophy. This is the point when locutions like *levitas animi*, *infirmitas sexus*, *imbecillitas sexus* and *fragilitas* make their first appearances, all of them referring to the understanding or the nature of women. In addition to this, primary sources clearly show that even the meanings attributed to these "borrowed" designations also changed eventually.[83] True as it may be that public offices were unavailable to women by the end of the Republican Age, however they were free to administer their own affairs, even if it was not altogether exempt from restrictions.[84] The idea by Cicero in his *Pro Murena* speech[85] is even more interesting because Cicero's wife, Terentia was likewise famous for her independence to the extent that she could have been the classic example of a self-reliant woman;[86] her strong and unyielding mindset left even Cicero in awe.[87] Similarly, the appearance of *infirmitas sexus* by Tacitus (Tac. Ann. 3, 33) is a report on a tense speech by Severus Caecina *senator* in front of his fellow senators. He suggested that provincial magistrates and

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80 Cf. Gai. 1, 190: *"[...] mulieres enim, quae perfectae aetatis sunt, ipsae sibi negotia tractant, et in quibusdam causis dicis gratia tutor interponit auctoritatem suam; saepe etiam invitus auctor fieri a praetore cogitur".* Correspondingly see also Schulz op. cit. 182.; Dixon op. cit. 346.

81 Cf. Gai. 1, 145: *"[...] tantum enim ex lege Iulia et Papia Poppaea iure liberorum a tutela liberantur feminae".* See also Plut. Num. 10, 5; Gell. 1,12, 9; Sacchi op. cit. 321. and 326.

82 Schulz op. cit. 182.

83 Dixon's idea is noteworty, when saying that this explains Solazzi's remarks on interpolation. In detail cf. Dixon op. cit. 358.

84 On female business administration cf. Tellegen-Couperus op. cit. 426–434.

85 When considering the speech as a whole, , it is common sense that the argumentation essentially aims to underline that the ancestors' original intent was different, and due to the interpretation of jurists, it had gradually developed its new content known by the age of Cicero. In detail cf. Dixon op. cit. 343.

86 On this see also Cic. Ad fam. 7, 21; Tellegen-Couperus op. cit. 431–434.

87 Cf. Cic. Ad fam. 14, 7: *"Cohortarer vos, quo animo fortiore essetis, nisi vos fortiores cognossem quam quemquam virum".* Correspondingly cf. Schulz op. cit. 184.

governors should not be allowed to get accompanied by their wives. He supported his argument by long lamenting on the manifold problems women caused.[88] This report by Tacitus, or Livy's account on the abrogation of *lex Oppia* both show that the change took place in how women themselves regarded the world around them. Nevertheless, this was far from a general tendency in society: not all women were intriguing and greedy of power as Tacitus puts it. There were still many to leave themselves to supportive contribution when doing business, who were ready to ask for help or advice. In other words, female attitude towards tutelage was personal; therefore, it varied greatly how and to what extent they relied on the contribution of their *tutor*.[89]

5. Summary: SC Claudianum as a gender issue?

„Nach dem SC Claudianum […] wird die Bürgerin versklavt, die mit einem Sklaven wider Willen seines Herrn trotz dessen (dreimaliger?) Warnung geschlechtlich verkehrt".[90] Max Kaser's short overview in the columns of his monumental work "Das römische Privatrecht" is a good indication of how secondary literature tends to approach *SC Claudianum*. Secondary authors classify this senatorial decree as a case of enslavement. Not even those authors who do research in the field of womanhood in Roman law mention this SC amongst the rules imposing restrictions on women.[91] Itwould nevertheless be possible that this SC (through its limitative character) was aiming to introduce discriminative measures on women.

On the grounds of our analysis of the phrases *levitas animi* and *infirmitas sexus*, as well as sketchy examination of tutelage over women, we believe that the most apparent experience is the constant change in the approach towards women in Roman society. This attitude goes hand in hand with the social and economic development in Rome. Legal measures merely follow the realignment of social roles and the change of economic conditions. The only solid point of reference was *mores maiorum*. Changes affecting rules and regulations applicable to women render it inconclusive to pose questions with regard to a "gender issue" in ancient Rome and Roman law. We tend to view ancient Rome as a still picture, unfortunately failing to notice the course of lengthy centuries of Roman history. However, the course of time itself leads to a vast trial and error vis-à-vis any reference to a potential "gender issue".

Roman society was famous for the different male and female roles played by men and women, and even expectations of these roles based on traditions and conventions varied from age to age. Instead of applying notions and concepts of our age to Roman history and society, it seems more adequate to interpret phenomena, events, and measures through their own contemporary concepts, otherwise we find ourselves

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88 Correspondingly cf. Péter op. cit. 84., with literature in the footnotes.

89 Correspondingly cf. Tellegen-Couperus op. cit. 434.

90 Kaser op. cit. 292.

91 Suffice it to cite the contemporary works by Orsolya Péter and Birgit Feldnernek who both set out to present the restrictions on women: neither of them mentions *SC Claudianum*.

reprimand the Romans for something of which they were surely unaware. Primary sources never attribute a restrictive character to this SC: Suetonius, whose approach is generally critical towards this decree, asserts that *libido* and *luxuria* are the two main reasons for this regulation. Tacitus is very laconic on this topic labelling it as *poena feminarum*, while jurists merely see an example of *capitis deminutio*, or the issue of the social status attributed to the child to be born. Of course, our modern approach may lead to new findings, but the simplistic labelling of *SC Claudianum* as a "gender issue" is a vast anachronism to say the least. Its direct result is that any debate on this statement hardly ever lead to any conclusive scientific achievement.