

SC CLAUDIANUM – HALFWAY BETWEEN INSTITUTIONALISM AND NATURAL LAW THINKING

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1. Introductory remarks

The senatorial decree¹ dating back to the age of Emperor Claudius is often referred to as a piece of legislation penalizing any Roman woman with enslavement, should

¹ On this topic see amongst others 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. et al.; 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: Henri LÉVY-BRUHL (ed.): *Droits de l'antiquité et sociologie juridique*. 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 GAUDEMET: 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.; Elisabeth HERRMANN-OTTO: *Ex ancilla natus. Untersuchungen zu den "hausgeborenen" Sklaven und Sklavinnen im Westen des Römischen Kaiserreiches*. Stuttgart, Steiner, 1994. 29 et al.; 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 anthropologique, économique, juridique. Ati del XXI colloquio internazionale GIREA. Lacco Ameni, Schia 27–29 ottobre 1994*. Napoli, 1999.

she cohabit with the slave of another, unless she quit the relationship after the formal denouncement of the slave's master.² These rules in general do not leave the slightest amount of incomprehensibility; however, after a deeper scrutiny, a less unanimous image is beginning to take shape with regard to the details of this senatorial legislation. The first difference occurs in connection with the date of this SC: there are some who date it to 52 AD, whereas others believe that it stems from the year 54 AD.³ Any attempt to decide for any of these opinions seems to lack probability, let alone necessity at all. What seems to be sure is that this SC dates back to the mid-1st century AD, more specifically, to the reign of Emperor Claudius.⁴

Besides certain issues regarding the determination of the proper date, the actual content is also debated (mostly in aspects of slavery, or the social status of the affected children). Terminology describing the relationship between the slave and the free woman is also challenging enough to be analysed. There are some hot points, such as *denunciatio*, *pactio*, equally worth examining.

2. SC Claudianum: different approaches and evaluations in secondary literature

Despite categorised as a probably low-profile issue, still there is one related to the systematic classification of SC Claudianum. The question arises amongst secondary authors whether the rules of SC Claudianum, according to *ius civile* or *praetorium*, constitute a sub-category for becoming a slave. Certain authors (e.g. Földi – Hamza in Hungarian literature)⁵ consider these cases belonging to the group of *ius praetorium*,

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. Mélanges W. Wolodkiewicz 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. 226. sq.

² Cf. SMITH (ed.): *Dictionary of Greek and Roman Antiquities*. Boston, 1870. s. v. 'senatusconsultum'.

³ The date 52 AD is suggested 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 (1994) op. cit. 29.; HERRMANN-OTTO (2017) op. cit. 226.; STORCHI MARINO op. cit. 399.; MASI DORIA (2000) op. cit. 507.; Carla MASI DORIA: 'Ancilla efficitur'... 'in eo statu manebit'. Le conseguenze del SC. Claudianum per le donne di status libertino. In: R. R. LÓPEZ – M. J. B. BOSCH (ed.): *Mulier. Algunas historias e instituciones de derecho romano*. Madrid, Dykinson, 2015. 158. The year 54 AD is stated by the following authors: Max KASER: *Das römische Privatrecht*. Bd. 1. Handbuch der Altertumswissenschaft. München, C. H. Beck, 1971. 289.; WIELING op. cit. 20.; whereas Albanese and Robinson simply omit issues of dates; cf. ALBANESE op. cit. 29–39.; ROBINSON op. cit. 242. and 245.

⁴ In connection with this statement, however, an excerpt by a primary author, Suetonius is by all means to be referred to. In his biographies of certain emperors, Suetonius, mentions this decree with a tie-in to Emperor Vespasian (cf. Suet. Vesp. 11). This fact is going to be dealt with later on.

⁵ Cf. FÖLDI, András –HAMZA, Gábor: *A római jog története és intéstitúciói*. Budapest, Nemzeti Tankönyvkiadó, 2013. 214.

whereas other authors (e.g. Buckland Albanese, Hoetnik, Wieling, Hermann-Otto)⁶ expressly qualify it as belonging to *ius civile*. Max Kaser's approach seems to resolve the apparent dissent; the renowned Romanist enumerates cases of enslavement in a chronological order, and in this list SC Claudianum is mentioned amongst the cases pertaining to the Principate.

With regard to the topics of the decree, it is notable how secondary authors reflect to its actual content, with reference mainly to the relationship between the woman and the slave of another. Hungarian works refer to such a connection as a carnal relationship⁷, whereas others refer to it simply as a partnership.⁸ Again, another interpretation focuses on the fact that the slave and the woman live together without putting an emphasis neither on the carnal, nor the conjugal nature of their relationship.⁹

On the international level, translations are worth lingering at: all of them contain a certain level of interpretation quite useful in the overall comprehension of the primary sources. First, when citing the often criticised translation by William P. Scott¹⁰, we have to admit that there are manifold mistakes and doubtful formulations in the text. Nevertheless, it exists as a version of translation, thus it cannot be set aside as such. At some instances, the term "intercourse" (Gai. 1, 91) and "sexual intercourse" (Gai. 1, 84) comes up, whereas the expression "forms a union" also occurs on two occasions (cf. Paul. 2, 21a, 1; Ulp. 11, 11). In comparison with this, Poste's translation¹¹ unanimously applies the term "intercourse" (Gai. 1, 84 és 91). Amongst secondary authors, Buckland¹² uses the general term "live with a slave", Berger, however, is more precise in this topic; "living in a conjugal union with a slave".¹³ Sirks applies the term "cohabit" in the English version of his paper in the topic.¹⁴ In a rather recent paper, Kyle Harper refers to the "union between free female citizens and slave men".¹⁵ He then uses a broader term than the previously cited authors, though his reference to female citizens may be misleading. In German literature, Max Kaser covers the topic

⁶ Cf. BUCKLAND op. cit. 412. sqq.; HOETNIK op. cit. 153. sqq.; ALBANESE op. cit. 29. sqq.; WIELING op. cit. 81.; HERRMANN-OTTO (2017) op. cit. 226.

⁷ FÖLDI-HAMZA op. cit. 214.

⁸ MOLNÁR, Imre – JAKAB, Éva: *Római jog*. Szeged, Leges Kiadó, 2004. 3. 125.

⁹ BENEDEK, Ferenc – PÓKECZ KOVÁCS, Attila: *Római magánjog*. Budapest–Pécs, Dialóg Campus Kiadó, 2014. 113.

¹⁰ Cf. W. P. SCOTT: *The Institutes of Gaius*. Cincinnati, 1932.

¹¹ Cf. E. POSTE: *The Institutes of Gaius*. Oxford, 1904.

¹² Cf. BUCKLAND op. cit. 412. This approach is also reflected by Weaver and Crook; see also WEAVER op. cit. 138.; CROOK op. cit. 7.

¹³ See also Adolf BERGER: *Encyclopedic Dictionary of Roman Law*. New Jersey, The Lawbook Exchange Ltd., 2010. s. v. "Senatusconsultum Claudianum". This idea is reflected in a later work by Weaver, where he repeatedly mentions marriage; cf. Paul R. C. WEAVER: *Familia Caesaris. A Social Study of the Emperor's Freedmen and Slaves*. Cambridge Univ. Press, 1972. 162. sqq.

¹⁴ Cf. SIRKS op. cit. 436. It is also notable, however, in his German paper, in which he seeks to find the goal of SC Claudianum, he doesn't even mention this aspect of the regulations. On this see SIRKS op. cit. 138–149.

¹⁵ Cf. Kyle HARPER: The SC Claudianum in the Codex Theodosianus: Social History and Legal Texts. *The Classical Quarterly*, LX. (2010) 610.

as follows: „[n]ach dem SC Claudianum wird die Bürgerin versklavt, die mit einem Sklaven wider Willen seines Herrn trotz dessen (dreimaliger?) Warnung geschlechtlich verkehrt.“¹⁶ In another instance he uses the expression „Geschlechtsverkehr“.¹⁷ The manual by Kaser – Knütel translates the register *contubernium* with the German term “Lebensgemeinschaft”.¹⁸ A moral evaluation seems to be reflected from a work by Munzinger, because, on following Tacitus’s report, he presents the content of the senatorial decree as follows: “[...] eine Frau, die so weit gesunken ist, sich mit einem Sklaven zu verbinden, zur Strafe versklavt wird[...]”.¹⁹ Elisabeth Herrmann-Otto uses the verb “verkehren” when she describes the relationship between the woman and the slave.²⁰ Amongst Italian authors, both Talamanca and Guarino specify in depth the background for this case of becoming a slave. As Talamanca sees it, this SC “[...] faceva diventare la donna schiava del proprietario del *servus* con cui la donna stessa aveva una relazione sessuale [...]”.²¹ Guarino seems to be somewhat nuanced when he states as follows: “[u]no dei casi di riduzione in schiavitù del *civis Romanus* è quello della cittadina romana che avesse avuto un figlio da uno schiavo contro l’esplicito divieto di padrone costui [...]”.²² Buongiorno’s approach is different from that of other authors; he always uses the appropriate Latin term when analysing the report given by certain primary authors. Consequently, he refers to the relationship between the woman and the slave as *contubernium* when analysing Tacitus, whereas he applies the term “*se iunxerit*” presenting Paul’s description.²³ This approach is all the more important because via this a fundamental problem is avoided: namely, that translations also imply interpretations at the same time. Such an expert attitude is also characteristic of Carla Masi Doria, who also uses the Latin terms, however, she describes the situations falling under the regulation of SC Claudianum with the reserved expression “unioni”.²⁴

French literature, in comparison, takes a more distant stance when Gaudemet claims: “[...] la disposition du sénatus consulte Claudien (52 après J. C.) en vertu duquel la femme libre qui vit avec l’esclave d’un tiers, malgré la défense de ce tiers, devient l’esclave de ce dernier”.²⁵

¹⁶ KASER (1971) op. cit. 292. He notes that the threefold denunciation is based on the text by Paul (Paul. 2, 21a, 17), the originality of which is doubtful. Besides Paul, he also has reference to Gai. 1, 191, Tac. Ann. 12, 53 as well.

¹⁷ Cf. KASER (1971) op. cit. 289.

¹⁸ Cf. MAX KASER: *Römisches Privatrecht*. Kurzlehrbücher für das Juristische Studium. München, Beck, 2014. 20., überarb. u. erw. Aufl. 101.

¹⁹ Cf. MUNZINGER op. cit. 49.

²⁰ Ld. HERRMANN-OTTO (2017) op. cit. 226.

²¹ Cf. Mario TALAMANCA: *Istituzioni di diritto romano*. Milano, Giuffrè, 1990. 90.

²² Cf. Antonio GUARINO: *Diritto privato romano*. Napoli, Editore Jovene, 1992. 681.

²³ Cf. BUONGIORNO op. cit. 314. and 317., respectively.

²⁴ Cf. MASI DORIA (2015) op. cit. 159. sqq. A similar approach is reflected in another work by the same author; cf. MASI DORIA (2000) op. cit. 507–519., even though in the introduction, she uses the term “congiunte”, that is kinswomen. Cf. MASI DORIA op. cit. 507.

²⁵ Cf. Jean GAUDEMET: *Le droit privé romain*. Paris, Librairie Armand Colin, 1974. 42.

Even this brief and general outline points out clearly that modern views and approaches do contain a certain amount of interpretation; even when it comes to translations. It seems highly likely that all authors are right insofar as all views can be maintained by a set of sources, data and conclusions. What we can see at this point is that secondary authors consider the union between “a free woman and the slave of another” differently. The original Latin terms not only enable but also even encourage such a diversity of perceptions, views and concepts. One might as well say that each and every author holds a shard of the philosophers’ stone; none errs, primarily due to the fact that even the primary sources on this topic use rather vague formulations. Consequently, the analysis of the primary sources always plays a preponderant role in the process of understanding a particular regulation.

In the primary sources, there are three topics emerge frequently as legally relevant issues linked to this SC: one is the legal status of the child born from a relationship between a Roman woman and a slave, another is the institution of *denuntiatio*, and a third one is the possibility of *pactio* and the status of the woman in this context.

Pertaining to the status of the child, secondary authors claim that primary sources report on an exception from the rule in accordance with which a child born from an extra-matrimonial relationship should follow the mother’s status.²⁶ If a child is born from a Roman marriage, paternal authority applies, therefore the child is bound to follow the father’s status. If, however, the child isn’t born from a legitimate marriage, they won’t have a father, thus lack paternal authority, consequently can only follow their mother’s status.²⁷

In his monograph on *Senatus Consulta Claudiana*, Pierangelo Buongiorno²⁸ explicitly mentions two major topics related to SC Claudianum. One is *denuntiatio*, that is the slave’s master should denounce the behaviour carried out by the Roman woman in order that she should be enslaved. Kaser mentions a presumably threefold denunciation.²⁹ In connection to this, he also examines the procedural steps towards the enslavement of the woman in question. After examining mainly the works by Carla Masi Doria, he asserts that *denuntiatio* as such was nothing else but a “prodromal” step towards enslavement.³⁰

Pactio is also an interesting element in the sources to contemplate about: the term refers to an opportunity of the woman to conclude an agreement with the slave’s master to avoid enslavement. The result of such an agreement is that the woman remains free, yet she gives birth to a slave.³¹

In addition, there are some instances when the whole topic of SC Claudianum is regarded as a gender issue. This approach is to be taken into account later, in connection

²⁶ Cf. e.g. KASER (1971) op. cit. 279–280., and specifically footnote 11.; SIRKS op. cit. 138.

²⁷ In the primary sources cf. for instance Gai. 1, 65–96 with regard to the diversity of cases.

²⁸ See reference in footnote 1.

²⁹ KASER (1971) op. cit. 292.: “[...] (dreimaliger?) Warnung [...]”. See also HERRMANN-OTTO (2017) op. cit. 226.

³⁰ Cf. BUONGIORNO op. cit. 319–322.

³¹ See for instance Gai. 1, 84.; WEAVER op. cit. 138.

with Roman institutionalism and natural law thinking; not because of its importance (if any), but because of the fact that such views are becoming more and more widespread ideas.

3. Primary sources at a glimpse: Tacitus and Suetonius; the legal texts

Primary sources come into two main groups: the first are those by *auctores*, mainly Tacitus, senator and historian in imperial Rome, as well as Suetonius, a historian in favour of Emperors Trajan and Hadrian. These sources are also referred to as non-legal sources.³² The other group contains legal sources, mainly the treatises by Gaius and Paulus. Additionally, Ulpian and certain excerpts from the Codex Theodosianus, Codex Iustinianus and the Institutes of Justinian are also taken into account; the latter ones are extremely useful for the analysis of postclassical changes.³³

3.1. Tacitus and Suetonius

Historian and biographer Tacitus gives a brief glimpse of the content of this decree in his work *Annales*.

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.

Probably one of the most famous accounts³⁴ given by Tacitus is substantially different³⁵ from the one in the legal sources, as it claims that the Emperor submitted a motion to the senate, penalizing women who cohabited or married slaves. From this excerpt it turns out that even the consent given by the slave's master results in the fact that the woman becomes a *libertina*, a freedwoman. According to Gaius' report (Gai. 1, 9–11), men could be freemen or slaves. Again, freemen obtain freedom by birth (freeborn) or by manumission (freedmen). Consequently, an *ingenua* and a *libertina* both fall into the category of *homines liberi*; yet if we consider the measures of *lex Pappia Poppaea*, for instance, a differentiation between *libertinae* and *ingenuae* is distinct.³⁶

In addition to this, the substantial difference mentioned above can be traced in three instances. The first one lies in the fact that Tacitus is the only author to explicitly mention

³² Cf. e. g. RADO op. cit. 45., using the term “littérature extrajuridique”.

³³ WIELING op. cit. 22.; BUONGIORNO op. cit. 311–314.; MASI DORIA (2015) op. cit. 162.; STORCHI MARINO op. cit. 391. On the postclassical “afterlife” the primary readings are HARPER op. cit. 610–638.; MUNZINGER op. cit. 49–87.; as for the abolition by Justinian specifically 79 sqq.

³⁴ Cf. MASI DORIA (2015) op. cit. 162.

³⁵ SIRKS op. cit. 139.; BUONGIORNO op. cit. 314.; MASI DORIA (2015) op. cit. 162–163.

³⁶ Cf. e.g. Gai. 3, 42–53.

a *poena* in connection with the activity described in the decree (though enslavement as such could be regarded as a *poena*). The second one is the term “*ignaro domino*”, which implies that the master was unaware of the relationship. Thirdly, the clause introduced by “*sin consensisset*”, that is if the master isn’t against the relationship, the woman will be a *libertina*.³⁷ Again, the term “*coniungerentur*” won’t help us to better understand the nature of the relationship between the woman and the slave. In addition, the historian then states that, according to the senate’s resolution, if anyone maintains such a relationship without the knowledge of the slave’s owner, that person should be regarded as a slave; whereas, if the master consented, the woman was to be classed as a freedwoman.

Suetonius deals with this SC in connection with Emperor Vespasian:

Suet. Vesp. 11

“Libido atque luxuria coercente nullo invaluerant; auctor senatui fuit decernendi, ut quae se alieno servo iunxisset, ancilla haberetur [...]”

In this text, Suetonius examines the reasons for this senatorial decree. He claims that licentiousness and extravagance had flourished without any restraint, therefore the Emperor Vespasian convinced the senate to pass measures; that any woman who entered into a relationship with the slave of another person should herself be treated as slave herself.

Interestingly, Suetonius is the only primary author to attribute SC Claudianum to Emperor Vespasian (69–79 AD), whereas all other literary and legal sources link it to the reign of Emperor Claudius (41–54 AD). It could easily be treated as a mistake or a misconception, however, in secondary literature Sirks regards this report totally consistent with other sources. He basically regards this coverage as the description of a reinforcement of the former measures by Emperor Claudius a generation earlier.³⁸ In addition, the presumable reason for this regulation is explicitly declared here. Suetonius mentions *libido* and *luxuria* as direct decisive factors, as a result it is safe to conclude that the *senatus consultum* was generally aiming to halt the moral fall in society, more specifically, to prevent certain sexual offences and abuses. Amongst primary sources, Suetonius is the only author to deal with the aims and background of this decree, whereas secondary authors hasten to surpass other opinions in this particular topic. At this point, suffice it to cite the generally accepted contemporary approach according to which the main effort behind the regulation was to defend the interest of the slave’s master.³⁹ This opinion seems all the more grounded because there are primary sources to directly underpin such a view.⁴⁰ However, it should also be noted that secondary

³⁷ Similarly see MASI DORIA (2015) op. cit. 162–163.

³⁸ Cf. SIRKS op. cit. 142.; correspondingly STORCHI MARINO op. cit. 411–412.

³⁹ Cf. WIELING op. cit. 20.; HERRMANN-OTTO (2017) op. cit. 226.

⁴⁰ See mainly Gai. D. 22, 1, 28, 1 (2 rer. cott.). In detail see also below in connection with Gai. 1, 91, with literature included.

opinions practically thrive in connection with this topic; as a consequence, it may be worthwhile outlining this diversity of views as well.

With regard to the terminology used in the literary sources, we can see that Tacitus uses the verb *coniungerentur*, Suetonius applies the terminus *se iunxisset* when it comes to the description of the relationship between the woman and the slave. As a result, approaches in secondary literature cannot be discarded on the basis of primary source terminology at this point.

3.2. Paulus and the Sententiarum Libri

In Paul' work⁴¹, a long text covers the topic of SC Claudianum: a whole title is dedicated to women related to the slave of another, whatever the actual form of this relation might be.⁴² The text focuses mainly on the position of the free women and *servi alieni*, and, due to the possible combinations, it contains several case variations.⁴³ Additionally, the institution of *denuntiatio* is specifically taken into account.

Paul. 2, 21a, 1–5

[1] Si mulier ingenua civisque Romana vel Latina alieno se servo coniunxerit, si quidem invito et denuntiante domino in eodem contubernio perseveraverit, efficitur ancilla. [2] Si servo pupilli ingenua mulier se coniungat, denuntiatione tutoris efficitur ancilla. [3] Mulier et si [deferre non possit], tamen ei quae se servo iunxerit denuntiando acquirit ancillam. [4] Procurator et filius familias et servus iussu patris aut domini denuntiando faciunt ancillam. [5] Si peculiari servo filii familias libera se mulier coniunxerit, nulla disquisitione paternae voluntatis iure sollemni decurso adquiret ancillam.

The SC Claudianum, as a regulation pertaining to *ius civile*, was applicable exclusively to Roman and Latin women. First, the text contains the basic, well-known rule, then §§ 2–5 discuss the legal status of the woman and the slave. If the slave's master is a *pupillus*, then the denunciation should be performed by the guardian. On the occasion, however, if the relationship is sustained with the slave of a woman under guardianship, then the woman under guardianship is also entitled to denounce the free

⁴¹ Concerning Pauli Sententiarum Libri V the literature is copious; suffice it to refer to works by Detlef Liebs. On this see mainly Detlef LIEBS: *Römische Jurisprudenz in Africa. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CVI. (1989) 210–247.; Detlef LIEBS: *Römische Jurisprudenz in Africa. Mit Studien zu den pseudopaulinischen Sentenzen*. [Antike in der Moderne] Berlin, Akad.-Verl., 1993.; Detlef LIEBS: *Die pseudopaulinischen Sentenzen I. Versuch einer neuen Palingenesie. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CXII. (1995) 151–171.; Detlef LIEBS: *Die pseudopaulinischen Sentenzen II. Versuch einer neuen Palingenesie, Ausführung. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CXIII. (1996) 132–242.

⁴² On this see also MASI DORIA (2015) op. cit. 161.

⁴³ Correspondingly see also MASI DORIA (2000) op. cit. 507–508., and especially footnote n. 3 with abundant literature.

woman. In addition, by denouncing the free woman who has formed a union with the slave of the woman under guardianship, she will acquire the free woman as her slave. By the order of the *pater familias*, the *filius familias* or even the slave is permitted to denounce the woman.⁴⁴ If, however, the slave in question is part of a *peculium* handed down by the *pater familias* for administration, then the *filius* is free to denounce the woman regardless of his father's consent, despite the fact that the components of the *peculium* belong *ex iure Quiritium* to the *pater familias*. The following excerpt, § 3 of the text is incomplete: „*Mulier et si [...], tamen ei quae se servo iunxerit denuntiando adquirit ancillam*”. The suggested substitution for the lacunae is as follows: *tutorem habeat, or sub tutela sit*.⁴⁵

Paul. 2, 21a, 6–10

[6] *Liberta sciente patrono alieni servi secuta contubernium eius qui denuntiavit efficitur ancilla. [7] Liberta si ignorante patrono servo se alieno coniunxerit, ancilla patroni efficitur ea condicione, ne aliquando ab eo ad civitatem Romanam perducatur. [8] Filii familias servo, quem ex castrensi peculio habet, si se ingenua mulier coniunxerit, eius denuntiatione efficitur ancilla. [9] Filia familias si invito vel ignorante patre servo alieno se iunxerit, etiam post denuntiationem statum suum retinet, quia facto filiorum peior condicio parentum fieri non potest. [10] Filia familias si iubente patre invito domino servi alieni contubernium secuta sit, ancilla efficitur, quia parentes deteriore filiorum condicionem facere possunt.*

If a *libertina* pursues a relationship with the slave of another, then she becomes a slave as a result of denunciation on the proviso that the *patronus* knew about the relationship. If this isn't the case, the *libertina* cannot become the slave of another, because, due to her becoming the slave of another, her *patronus* would lose his *ius patronatus* over the *libertina*. Consequently, if the relationship was pursued without the *patronus*' knowledge, the *libertina* is more likely to become his slave again.⁴⁶ Should he free her again, the woman would be unable to achieve Roman citizenship, only *ius Latii*.⁴⁷

If a freeborn woman forms a union with a slave included in the *peculium castrense* of a son under paternal control, she becomes his female slave if he denounces her. If a daughter under paternal control, without the consent or knowledge of her father, forms a union with a slave belonging to another, she will retain her position even after being denounced, for the reason that the condition of a parent cannot become worse through any act of his children. If all this took place by the father's order, the daughter becomes a slave, as parents can render the condition of their children worse.

⁴⁴ ROBINSON op. cit. 242.

⁴⁵ WIELING op. cit. 81.

⁴⁶ Cf. ROBINSON op. cit. 245.

⁴⁷ On this cf. KASER (1971) op. cit. 282.

Paul. 2, 21a, 11–14

[11] *Liberta servi patroni contubernium secuta etiam post denuntiationem in eo statu manebit, quia domum patroni videtur deserere noluisse.* [12] *Errore quae se putavit ancillam atque ideo alieni servi contubernium secuta est, si postea liberam se sciens in contubernio eodem perseveraverit, efficitur ancilla.* [13] *Si patrona servo liberti sui se coniunxerit, etiam denuntiatione conventam ancillam fieri non placuit.* [14] *Mulier ingenua, quae se sciens servo municipum iunxerit, etiam citra denuntiationem ancilla efficitur: non item si nesciat. Nescisse autem videtur, quae comperta condicione contubernio se abstinuit, aut libertum putavit.*

A *libertina* pursuing relationship with the slave of her own patron will remain a *libertina* after having been denounced because she isn't supposed to abandon the house of her *patronus*. In comparison with the general rule, Masi Doria regards this case as an exception, the reason of which is that manumission wouldn't ruin the link between the *libertina* and the *domus* of her *patronus*.⁴⁸

Any woman who believes erroneously to be a female slave, and on this account forms a union with the slave of another, and, after having become aware of being free, wouldn't abandon the relationship, becomes a slave.

If a *patrona* pursues a relationship with the slave of her own *libertinus*, she won't become the slave by his denunciation, as a result of the *reverentia*, the *libertinus* is due to his formal mistress.⁴⁹

Paul. 2, 21a, 15–18

[15] *Libera mulier contubernium eius secuta, qui plures dominos habuit, eius fit ancilla, qui prior denuntiavit, nisi forte ab omnibus factum sit.* [16] *Si mater servo filii se iunxerit, non tollit senatus consultum claudianum erubescendam matris etiam in re turpi reverentiam exemplo eius, quae se servo liberti sui coniunxerit.* [17] *Tribus denuntiationibus conventa etsi ex senatus consulto facta videatur ancilla, domino tamen adiudicata citra auctoritatem interpositi per praesidem decreti non videtur: ipse enim debet auferre qui dare potest libertatem.* [18] *Filia familias mortuo patre si in servi contubernio perseveraverit, pro tenore senatus consulti Claudiani conventa efficitur ancilla.*

⁴⁸ “[...] la manomissione non avesse rotto la relazione tra l'ex schiava e la *domus* [...]”. See explicitly MASI DORIA (2000) op. cit. 508–510. As she sees it, the text hints at *contubernium*, that is a quasi-matrimonial link between the slave and the freedwoman. She also notes that it is highly unlikely to be able to determine whether the passage in question made its original appearance in the *senatus consultum* itself, or its content is merely due to subsequent interpretations, though she personally deems this excerpt to stem from classical times. Cf. in details MASI DORIA (2000) op. cit. 508–511. See specifically footnote 10, where she gives plenty of references to archeologic findings to underpin her idea.

⁴⁹ As for *reverentia* cf. KASER (1971) op. cit. 299., where he mentions this institution in the list of morally established obligations bearing direct legal consequences; amongst such notions as *obsequium* and *honor* as legally binding obligations of a *libertinus*.

A free woman in relationship with a slave belonging to multiple masters becomes the slave of the first one who denounces her, unless this is done by all of them at a time.

If a mother forms a union with the slave of her son, *reverentia* is also taken into account by the provisions of the decree.

As a postclassical reference, the last fragment of this title mentions the institution of the threefold denunciation, as well as a hint to the fact that enslavement won't take place *eo ipso*.

3.3. Other legal sources: Gaius and the Institutes of Justinian

The text of this senatorial decree is only available to us due to republications in subsequent juridical works: on the one hand, the previously examined excerpts by Paulus are to be taken into account here, as well as the Gaius' and Justinian's Institutes. Additionally, *Tituli ex corpore Ulpiani* also mentions some aspects of this decree.⁵⁰ These texts are important because through them we can get access to a detailed and nuanced picture of what the actual content of SC Claudianum was or could be, with special reference to those so-called institutional nodes where other legally relevant problems may have a tie-in.⁵¹

Gai. 1, 160

Maxima est capitis diminutio, cum aliquis simul et civitatem et libertatem amittit; quae accidit incensis, qui ex forma censuali venire iubentur: quod ius [...], qui contra eam legem in urbe Roma domicilium habuerint; item feminae, quae ex senatus consulto Claudiano ancillae fiunt eorum dominorum, quibus invitis et denuntiantibus cum servis eorum coierint.

This first text by Gaius treats the topic *capitis deminutio*, more specifically *capitis deminutio maxima*.⁵² As the text states, it occurs when someone loses citizenship and freedom at once. The excerpt then enumerates many examples, amongst which SC Claudianum is also mentioned with regard to women.

⁵⁰ These texts cover the classical and early post-classical rules, however, there are further primary sources, mainly imperial constitutions, such as for example C. 6, 59, 9; C. 7, 16, 3 and C. 7, 24, 1. In the secondary literature cf. mainly MUNZINGER op. cit. 49–87.; HARPER op. cit. 610–638.

⁵¹ With regard to the textual criticism concerning the Paulian text, see Detlef LIEBS: Die pseudopaulinischen Sentenzen I–II. Versuch einer neuen Palingenesie. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, CXII–CXIII. (1995–1996)?? 167., and 161–162.

⁵² See also STORCHI MARINO op. cit. 405., and specifically footnote n. 46.; MASI DORIA (2015) op. cit. 164.

Gai. 1, 91

Item si qua mulier civis Romana praegnas ex senatus consulto Claudiano ancilla facta sit ob id, quod alieno servo invito et denuntiante domino eius coierit, conplures distinguunt et existimant, si quidem ex iustis nuptiis conceptus sit, civem Romanum ex ea nasci, si vero volgo conceptus sit, servum nasci eius, cuius mater facta esset ancilla.

The text describes a potential case where a Roman woman becomes a slave under the SC Claudianum while being pregnant. As the fragment describes it, this could occur when the woman had intercourse with the slave of another, and she is denounced by the slave's master. The result is that the woman becomes a slave. Yet, the Gaian text isn't about the woman and her enslavement, instead it focuses on the child born from such a relationship.⁵³ According to Gaius, there's a common view (*conplures distinguunt et existimant*) according to which if a child was conceived in lawful marriage, he/she will be born a Roman citizen. If, however, was conceived in a promiscuous intercourse, the child will be born as the slave of the person to whom his mother belongs. Beyond the actual content, this text is particularly useful because here we can trace a glimpse of institutional attitude, similar to the case where an owner and a usufructuary of a pregnant female slave contested for whom the child of the female slave should belong.⁵⁴ In this latter case, the central institution analysed was *fructus*, examined from the point of view of both the female slave's owner and her usufructuary. When Gaius was to give a response on this particular issue, he examined this complex case exclusively from a legal aspect, using legal arguments and legal institutions. When it comes to institutional thinking, Gaius reduced the whole complex issue to one simple question: whether the offspring of a female slave could be regarded as *fructus*, or not.⁵⁵

Gai. 1, 84

(84) Ecce enim ex senatus consulto Claudiano poterat civis Romana, quae alieno servo volente domino eius coit, ipsa ex pactione libera permanere, sed servum procreare; nam quod inter eam et dominum istius servi convenerit, ex senatus consulto ratum esse iubetur. sed postea divus Hadrianus iniquitate rei et inelephantia iuris motus restituit iuris gentium regulam, ut cum ipsa mulier libera permaneat, liberum pariat.

⁵³ Correspondingly see also STORCHI MARINO op. cit. 405., and footnote n. 45.

⁵⁴ Cf. Gai. D. 22, 1, 28, 1 (2 rer. cott.): *Partus vero ancillae in fructu non est itaque ad dominum proprietatis pertinet: absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparaverit.*

⁵⁵ See also Max KASER: *Partus ancillae. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, LXXV. (1958) 157–158.; Max KASER: *Ius gentium. Forschungen zum römischen Recht* 40. Köln-Wien-Weimar, Böhlau, 1993. 79–80.; ERDŐDY, János: *In rerum natura esse videtur. Egy klasszikus római jogi toposz margójára*. Budapest, Pázmány Press, 2018. 114–117., with literature.

From among the three texts by Gaius, this one gives a brief summary of the content of the *senatus consultum* however, this description outlines a situation different from those described in other sources. As the text puts it, if a Roman woman has sexual intercourse⁵⁶ with a slave belonging to another, she will remain free herself while she gives birth to a slave, should she conclude an agreement (*pactione*) with the slave's master.⁵⁷ Logically, the agreement serves as the expression of the master's consent.⁵⁸ This rule seems somewhat astonishing, as children born from an extra-matrimonial relationship are to follow the mother's status *iure gentium*. In this case we still experience that an exception is constituted by means of the senate's decision, resulting in a solution which was abolished by Emperor Hadrian, who deemed this regulation as injustice and impropriety.⁵⁹

Inst. 3, 12, 1

Erat et ex senatus consulto Claudiano miserabilis per universitatem adquisitio, cum libera mulier servili amore bacchata ipsam libertatem per senatus consultum amittebat et cum libertate substantiam: quod indignum nostris temporibus esse existimantes, et a nostra civitate deleri et non inseri nostris digestis concessimus.

Justinian's Institutes cites the famous rule of the senatorial decree, mentioning that 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. Justinian generously adds that he considers this measure to be unworthy of his times, therefore he has determined to abolish this decree omitting it from the Digest as well.

Ulp. 11, 11

Maxima capitis diminutio 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.

Just like Gaius, Ulpian mentions SC Claudianum as an example of *capitis deminutio maxima*.⁶⁰ As other sources, he talks about the enslavement of a woman, should she live with the slave of another (*se iunxerit*). In addition, he also emphasises the fact that enslavement takes place as a result of a denunciation by the master (*denuntiante domino*).⁶¹

⁵⁶ The verb "*coiit*" could be understood in this sense here, especially if the text is about the status of the child born from such a relationship.

⁵⁷ SIRKS op. cit. 141.; BUONGIORNO op. cit. 314.; MASI DORIA (2015) op. cit. 163.

⁵⁸ A similar approach appears in STORCHI MARINO op. cit. 418.

⁵⁹ On this text see also WEAVER (1964) op. cit. 137–138.; Jospech PLESCIA: The Development of the Doctrine of Boni Mores in Roman Law. *Revue Internationale des Droits de l'Antiquité*, XXXIV. (1987) 297. és 302.; MICHEL op. cit. 190., 214.; GAUDEMET (1982) op. cit. 138.

⁶⁰ Correspondingly BUONGIORNO op. cit. 314.; MASI DORIA (2015) op. cit. 164–165.

⁶¹ In details see also STORCHI MARINO op. cit. 403.

4. Concluding deliberations

After the examination of the sources pertaining to this senatorial decree, the content of the decree is apparently referred to unanimously. However, few thoughts are linked to the actual background and reason for this legislation. This might be one of the factors which result in the constant appearance of the implication of an intrinsic gender issue; this approach is becoming increasingly popular these days.⁶² Those who sense a “gender issue” here state that this senatorial decree was applicable to women only as culprits. This statement is true. However, from this point on it still remains obscure what seems problematic. There are many measures in the history of Roman law in the scope of which different rules are applicable to both men and women, respectively. Attempting to examine this question from an ancient perspective, it is safe to conclude that the whole gender question is nothing more than storm in a teacup. Mainly because the Romans surely had no such thing as “gender concept”; but at least definitely not in our contemporary sense. In addition, they never considered these instances as “gender issues”, but rather as a certain way of life. Where there’s a case, for example, in which three midwives were appointed to examine a lady called Domitia if she was pregnant or not, everyone fails to label this case as a matter of “gender issue” and cry out for doing away with discrimination. Yet, midwives were women and no man could take that job. Not because the Romans were a loathsome lot who separated men and women at every step, but because that’s the nature of things. It is in accordance with nature that, if there are men and women, there are bound to be jobs, social circles, legal measures, etc. which are applicable partly to men only, and partly to women only.

When it comes to the true reasons for this *senatus consultum*, it is already stated that Suetonius is the sole author amongst literary sources to outline a straightforward reason for this enactment. The aim of this decree, as he puts it, is to restrain luxury and licentiousness (*libido atque luxuria coercente*). Besides this hint, there aren’t any further indications as to what the Senate was supposed to achieve here, at least in the primary sources.

This, however, hasn’t deterred secondary authors to speculate on the possible reasons of the enactment. Amongst these speculations, there are some far-fetched ones, to say the least. In Cambridge Ancient History it is supposed, for example, that sort of an incentive could have been the fright of contamination of free by slave blood.⁶³ This supposition is appalling because manumission was a legally regulated institution; consequently, slaves eventually “produced” Roman citizens.

Another fear as motivation could have been, as Weaver sees it, the fear from less home-born slaves.⁶⁴ This assumption is based on false pretences, though.⁶⁵ Again, there are ideas which cite sound reasons, at least from one aspect or another. Pólay believed

⁶² Cf. e.g. LIN FOXHALL: *Studying Gender in Classical Antiquity*. Cambridge University Press, 2013.

⁶³ Cf. *Cambridge Ancient History*, Vol. X. (1934) 693. Critically see CROOK op. cit. 137.; SIRKS op. cit. 143.

⁶⁴ WEAVER (1972) op. cit. 163.

⁶⁵ Cf. SIRKS op. cit. 144., and specifically footnote n. 27.

that the Senate was aiming to sanction any unsolicited influence on private property.⁶⁶ Crook speculated that the reason for this enactment was to secure the property rights of masters over the slave's offspring.⁶⁷ In one of his early works, Weaver sustained the opinion that the point for *senatus consultum* here was to penalize women by enslavement, giving women the opportunity for an agreement with the master, thus keeping their freedom.⁶⁸ Herrmann-Otto emphasises the economic aspects of the regulation, as it was always deeply related to financial issues, or inheritance interests in comparison to the less likely moral grounds.⁶⁹

There could be many other instances to cite here with ideas concerning the reasons for the SC. If we take time to think over those mentioned above, it is easy to see which are scandalous, or based on false preconceptions, or may be plausible. Still, the answer lies close to the approach of SC Claudianum as a gender issue: many instances in Roman life were regarded and accepted as being in accordance with the nature of things. The Romans were natural law thinkers in this sense never getting far from their roots. On the other hand, however, if there was any issue likely to provoke an ample range of emotions, they were keen to stick to institutions as means of staying lucid in the scope of decision making.

These two approaches combined lead to what we know today as the everlasting alloy of Roman law thinking.

⁶⁶ Elemér PÓLAY: Die Sklavenehe und das römische Recht. *Acta Universitatis Szegediensis de Attila József Nominatae. Acta Juridica et Politica*, Tom. XIV. Fasc. 7., 1967. 33 and 48.

⁶⁷ CROOK op. cit. 137.

⁶⁸ WEAVER op. cit. 138–139. As one additional remark to be made here, Weaver's statement is perfect when it comes to covering what this SC was about, but what he says here is not a reason it's the outcome.

⁶⁹ Cf. HERRMANN-OTTO (2017) op. cit. 226–227.

