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# ROMAN WOMEN: SOMETIMES EQUAL AND SOMETIMES NOT

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## 1 Introduction

The *senatus consultum Velleianum* (hereafter SCV) was probably enacted in AD 46.<sup>1</sup> This decree determined that women should not intercede on behalf of anyone,<sup>2</sup> and effect was given to it by the *exceptio senatus consulti Velleiani*.<sup>3</sup> Some years earlier, Augustus and Claudius had issued edicts in terms of which wives were forbidden to intercede for their husbands.<sup>4</sup> The same emperors had, however, also weakened the institution of *tutela mulierum* by the *ius liberorum* (Augustus) and the abolition of the *tutor legitimus* (Claudius). One may well ask: “Why, during a period when women were independently taking part in economic life, and after intercession on behalf of husbands had been expressly forbidden, was it necessary to extend their legal protection with regard to intercession?”<sup>5</sup> At first sight it appears that although women were

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1 There is no certainty about the date (see Kaser *Das Römische Privatrecht* Vol 1 (1971) 667; Honsell, Mayer-Maly & Selb *Römisches Recht* (1987) 292; Crook “Feminine inadequacy and the *Senatusconsultum Velleianum*” in Rawson (ed) *The Family in Ancient Rome. New Perspectives* (1986) 86. On the force of law of a *senatus consultum*, see Gaius 1 4 and *D* 1 3 9. According to Schulz *Principles of Roman Law* (1936) 11 the Senate, during the Principate, was empowered to enact legal rules within prescribed limits, one of which was that it only acted as lawgiver when social evils were to be reformed. The SCV was one such example. At 80 he notes that the language of the *senatus consulta* was more simple and plain than the ordinary *leges* of the magistrates. Cf too Daube *Forms of Roman Legislation* (1956) 50ff on the use of the subjunctive. It is also important to note that the *senatus consulta* of the early empire were technically not legislative acts, but only instructions to the magistrates: see Daube at 78-79 and Lee *The Elements of Roman Law* (1952) 439.

2 *D* 16 1 1pr: “It has been very fully prescribed by the SCV that women should not intercede on behalf of any person.” See also *D* 16 1 2 4: “Every kind of obligation is embraced by the *senatus consultum Velleianum* ... .” (All translations of texts from the *Digest* are by Watson.) It is important to note that the SCV prohibited women from entering any form of *intercessio*, not only from becoming sureties. This means that they were also, eg, prohibited from discharging a debtor by means of a novating *stipulatio*, or from creating a mortgage or accepting a loan in the interests of a third person. According to Crook (n 1) 86 *intercedere* means “to intervene, interpose oneself between a debtor and a creditor, that is to undertake a debt on someone’s behalf (i.e. in the commonest case to guarantee someone’s debt, to be a guarantor or surety)”. A woman who was therefore sued in respect of an *intercessio* of any kind – whether suretyship or any other – could plead the *exceptio senatus consulti Velleiani*. Cf *I* 3 20pr-8. See also Kaser (n 1) 667.

3 *D* 16 1 6; *D* 44 1 7 1. See Kaser (n 1) 250 667.

4 *D* 16 1 2pr: “Now, first in the reign of the deified Augustus, and then soon afterward in that of Claudius, it was forbidden by imperial edict for women to intercede on behalf of their husbands.” The SCV thus extended the protection granted to women, and many centuries later Justinian declared invalid any act by which a wife bound herself for her husband except in cases where she used money which was intended for her use personally (*Nov* 134 8). It is usually quoted as the “*Authentica si qua mulier*”. These two enactments passed on through the centuries, and many exceptions were admitted: usually when a woman renounced the benefit of both laws provided she fully understood what she was doing (see Lee (n 1) 363).

5 Crook (n 1) 83 regards the SCV as “a piece of legal discrimination as between men and women”. See also 88 where he says that women were “de-emancipated” by this decree.

generally considered to be quite capable of undertaking economic transactions which were to their benefit, they apparently needed protection when a transaction was to their detriment.<sup>6</sup> In order to find more clarity on this, attention will be paid to the following: the nature and content of the SCV, the reasons attributed to its enactment, the social and legal position of Roman women during the first century, their role in economic life at the time of the enactment of the SCV, and Roman pragmatism and legal conservatism. I shall conclude with a brief discussion of the position in South Africa today.

## 2 The nature and content of the *senatus consultum Velleianum*

Originally, Roman law determined that every woman who was not *in patria potestate* or *in manu mariti* was subject to the guardianship of a tutor.<sup>7</sup> A *tutor legitimus* was appointed to take care of the family interests and balance the husband's power.<sup>8</sup> Although guardianship over females theoretically remained in place until the fifth century AD, it had become eroded over centuries.<sup>9</sup>

By the first century, tutelage over *sui iuris* women had become a burden on men who acted as guardians, but who no longer had any significant power over them and were often ignored. This allowed women independently to exercise extensive control over property although there existed legislation forbidding them to do so.<sup>10</sup> Augustus' legislation (*ius liberorum*<sup>11</sup>) provided women with a way to free themselves officially from formal supervision. Women thereafter

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6 *D* 16 1 13pr.

7 All references in this article to women participating in business affairs are to women who were independent, that is *sui iuris*, and not subject to the *manus* of a husband. See Gaius 1 144: "For the early lawyers held that women even of full age should be in *tutela* on account of their instability of judgement"; Gaius 1 157; and *Ulpiani Tituli* 11 1, 11 22, 11 25 and 11 27. Buckland *A Text-Book of Roman Law from Augustus to Justinian* Stein (rev) (1975) 165; Ledlie *Sohm's Institutes of Roman Law* (1935) 490; Kaser (n 1) 87-88 352 367-368; Van Warmelo *An Introduction to the Principles of Civil Roman Law* (1976) 53.

8 According to Kaser (n 1) 352 the *tutela mulierum* was a legal institution remaining from primitive times. With typical Roman talent for adjustment the right and duties of the tutor were gradually and continuously shrunk and limited. Since it showed no development, characteristics of ancient law remained ingrained in this institution. See also Crook (n 1) 165 who emphasises that the original purpose of guardianship was to protect family property. Women, however, no longer needed the protection, and it was only retained to protect the interests of the tutor. See Buckland (n 7) 165; and Arjava *Women and Law in Late Antiquity* (1996) 140, who agrees with this view.

9 Already in the late Republic women gained a large measure of independence. This was the result of the humanitarian ideas prevalent in that time, the growth of their economic and social actions, the relaxing of rules regarding family ties and the increase in marriages *sine manu*. The *tutela mulierum* existed officially, but in practice it was not much adhered to. See Kaser (n 1) 277; Schulz (n 1) 209.

10 Pomeroy *Goddesses, Whores, Wives and Slaves* (1975) 163.

11 *Lex Papia Poppaea* of AD 9. See Gaius 1 145 and 194. In terms of this right, released freeborn women who had borne three children and freedwomen who had borne four could conduct all their business affairs without a tutor. Pomeroy (n 10) 151-152 mentions that many Egyptian women, who were not as sophisticated, proudly announced that they had gained

had practically full contractual and proprietary capacity. Furthermore, during his reign, Claudius abolished the authority of the *tutor legitimus* for most women.<sup>12</sup>

By the mid-first century AD, there remained no real restrictions on the freedom of legal and commercial action of Roman women. *Tutela mulierum*, the legal institution which originally served to protect the interests of both the woman and the tutor, had practically fallen away. During the classical period it neither constituted power over the woman nor over her property, since she effectively managed her own affairs.

However, it seems that husbands still had to be prevented from abusing their influence and that wives' property needed to be protected. This follows from the edicts issued by Augustus and Claudius, prohibiting women from interceding on behalf of their husbands.<sup>13</sup> Until that time husband and wife had been able to stand surety for each other's debts. This protection granted to the wife was extended some years later when the SCV was decreed, advising all *sui iuris* women not to intercede on behalf of anyone.

The jurists of the *Digest* put forward a number of reasons for the enactment of the SCV.<sup>14</sup> According to Paul, since women were by custom denied civil duties and family property needed to be protected, they needed protection when they were deceived.<sup>15</sup> Ulpian, quoting the text of the decree, mentions two reasons, namely the protection of women and the fact that intercession was regarded as a male duty.<sup>16</sup> Although these reasons are explicitly stated and often repeated,

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the *ius liberorum*, but nevertheless made use of male assistance when transacting legal business.

12 By means of the *lex Claudia*. Clark *Women in Late Antiquity: Pagan and Christian Lifestyles* (1993) 60 says that the SCV was probably linked to this decree of Claudius since the *auctoritas tutoris* had previously been necessary to ratify a transaction concluded by a woman in order to make it effective in law. See Crook (n 1) 90-91 and Kaser (n 1) 87.

13 Cf n 4.

14 Although the jurists Paul and Ulpian in the *Digest* title devoted to the SCV wrote in the third century, Kaser (n 1) is of the opinion that the text is classical.

15 See Paul *D* 16 1 1pr-2: "*Pr*. It has been very fully prescribed by the *senatus consultum Velleianum* that women should not intercede on behalf of any person. 1. For just as by custom the undertaking of civil duties by them has been denied to women, and these [undertakings] for the most part are not valid by operation of law, so much the more had that power to be taken away from them in which not only their work and mere employment was concerned but even the risk of family property. 2. And, indeed, it seems just to give assistance to a woman in this way, in order that the action is given against the original debtor or against him who rendered the woman liable on his own behalf; for he, more than the creditor, has overreached the woman."

16 Ulpian *D* 16 1 2 1: "Thereafter a *senatus consultum* was enacted by which help was given in a very full manner to all women; the wording of the *senatus consultum* follows: Because Marcus Silanus and Velleus Tutor, the consuls, had written what ought to be done concerning the obligations of women who became debtors on behalf of others, the senate lays down the following: Although the law seems to have said before what pertains to the giving of verbal guarantees and loans of money on behalf of others for whom women have interceded, which is that neither a claim by these persons nor an action against the women should be given, since it is not fair that they perform male duties and are bound by obligations of this kind, the senate considers that they before whom the claim would be

they do not fully explain the need for such legislation in the light of circumstances prevailing at the time.

Although the SCV might have excluded women from most business and commercial activities and thus had serious consequences for business practice, in view of the fact that no creditor would have been able to sue a woman guarantor for recovery, its effect was not so drastic. Intercession by women was not declared void by the SCV.<sup>17</sup> The Senate did not, in fact, forbid women to intercede: the SCV merely states that women *ought not to take on such responsibility*. The magistrates were given discretion to refuse the creditor an action, and they could grant women an *exceptio* against a creditor wishing to institute an action against them.<sup>18</sup> In practice their intercessions were accepted if it was clear that they had experience of financial matters and were not acting under constraint. The decree could not be used against women. If they wished to fulfil an obligation nobody could prevent them from doing so. Furthermore, to make it possible for women to take part in economic affairs, and for people to continue doing business with them, the praetor could refuse their requests for an *exceptio* if any of the exceptions to the operation of the SCV were present.

No *exceptio* would be granted, for example, where the intercession was made to benefit a woman's father,<sup>19</sup> where it was made to provide a dowry for her daughter,<sup>20</sup> where it was made on behalf of an insolvent debtor whose creditor was a minor,<sup>21</sup> where she acted as guarantor for her sons' tutors,<sup>22</sup> where the transaction was her own,<sup>23</sup> where she had deceived the creditor (acted *callide*),<sup>24</sup> or where the creditor did not know that the guarantor was a woman.<sup>25</sup> In short, she was allowed to do something from which she might benefit or to make a donation,<sup>26</sup> but she was not allowed to do something which might prejudice her.<sup>27</sup> It was only when she had been deceived and the family property was prejudiced that she could successfully request the *exceptio*. It is

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brought on this matter would act rightly and consistently if they took care that with regard to this matter the will of the senate was observed."

17 Cf, however, Dixon "Infirmity of sex: Womenly weakness in Roman law" 1984 (52) *Tijdschrift voor Rechtsgeschiedenis* 366-367.

18 In the actual cases which are referred to in C 4 29 2, C 4 29 5 and C 4 29 12 women themselves appealed to the decree because they had assumed an obligation they did not wish to comply with. See Crook (n 1) 86-88.

19 D 16 1 21 1.

20 C 4 29 12.

21 D 4 4 12.

22 D 16 1 8 1.

23 D 16 1 25; D 16 1 21pr.

24 D 16 1 2 2-3.

25 D 16 1 4pr.

26 D 16 1 4 1.

27 D 16 1 13pr.

obvious that otherwise no one would have concluded financial transactions with a woman. The creditor could thus sue for recovery once it was established that the woman had been aware of the consequences of her intercession and none of the exceptions was applicable. Creditors were therefore protected, and the praetor was instructed to use his discretion in each case.

If women were really considered incapable of handling financial matters on their own, it would have been better to forbid them to take on an obligation on their own behalf, or any obligation at all. The fact that this SCV only determines that they *ought not* to intercede on behalf of others indicates that this was not the case. The enactment of such a decree also implies that women often interceded on behalf of others and that it was an accepted business practice.<sup>28</sup>

Considering the above, it is remarkable that the SCV was issued at a time when women were being granted more and more economic freedom and independence. In other words, there must have been a specific reason for this protective measure. Release from tutors was undoubtedly beneficial to women who wished to take part independently in economic affairs, but it certainly put them and their property at risk. Crook opines that the enactment of the SCV was the result of women's release from tutelage after the emperors' legislation which made them and their property more vulnerable to unscrupulous persons, including their husbands.<sup>29</sup> If the institution of *tutor mulierum* had still been in force, there would have been no need for this enactment since women needed the *auctoritas tutoris* to bind themselves through *stipulatio*. Furthermore, if they had not been active in commercial matters, there would have been no need for it. The discontinuation of *tutela mulierum* apparently meant that women now again needed protection.<sup>30</sup> This decree of the Roman senate was seen, not as a restriction on women's actions, but as an aid to them.<sup>31</sup>

It is submitted that women were originally *allowed* to intercede on behalf of everyone (with or without the tutor's *auctoritas*), then they were *forbidden* to intercede on behalf of their husbands, and thereafter, with the SCV, *advised* not to intercede on behalf of anyone. It is apparent that women enjoyed more

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28 Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 496-497 is of the opinion that the enactment of the SCV delivers proof that women actively took part in commercial affairs at the time. Cf also Crook (n 1) 83 and n 5 above.

29 Crook (n 1) 89-91; Evans-Grubbs *Women and the Law in the Roman Empire. A Sourcebook on Marriage, Divorce and Widowhood* (2002) 56. But see Dixon (n 17) 363-369. Cf, too, Gardner *Being a Roman Citizen* (1993) 97-100.

30 It is not clear from the SCV why specifically intercessions were forbidden, and not all actions which benefited others.

31 Evans-Grubbs (n 29) 56.

protection than men. But, creditors were protected too, since the SCV ensured that normal business affairs could continue undisturbed as long as business partners acted *bona fide*. The classical jurists interpreted this decree restrictively because business practice of the day indicated that women needed protection only in exceptional circumstances, and it was thus provided only in those cases. This was, of course, in the interest of women since it ensured their freedom to contract and to conduct business. Consequently, in the normal course of affairs they would have acted as equal partners in business transactions.

### **3 Reasons attributed to the enactment of the *senatus consultum Velleianum***

#### **3.1 Introduction**

Clark states that “(t)he law codes of any society tell us something about actions the society wishes to prevent and persons it wishes to protect”.<sup>32</sup> Upon reading the Roman jurists’ statements about the SCV, it appears that it was regarded as a positive measure to protect and assist women in the case of all intercessions.<sup>33</sup> Today this may seem patronising, but at the time it was not regarded as discriminatory.

Who and what were protected by the SCV? According to Paul, family property was endangered if a woman was deceived by reason of her weakness.<sup>34</sup> The imperial decrees had reduced the authority of tutors, and women were increasingly taking part in financial transactions without their assistance. Moreover, Ulpian states that it had until then been the practice that claims or actions were not allowed against women.<sup>35</sup> It is consequently possible that the intercessions of women had negative results both for women (because they suffered financial damage) and for the debtors on whose behalf they had interceded (since no action was allowed against the woman), and advice was now sought from the Senate in order to boost confidence in credit.<sup>36</sup>

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32 (n 12) 6.

33 *D* 16 1 2 2.

34 *D* 16 1 1.

35 *D* 16 1 2 1. This does not necessarily mean that no actions were allowed, although it is possible that praetors often refused creditors’ claims.

36 Gardner (n 29) 99.

### 3 2 The weakness of women

The concept of “the weakness of women” was generally accepted in Roman legal and literary sources. Since women were weaker than men, they were apparently in greater need of protection, and there was a belief that certain types of transactions and responsibilities were “men’s business” and should not be engaged in by women.<sup>37</sup> These appeared to be the underlying reasons for the SCV. The purpose of this law was therefore first to advise women not to intercede on behalf of others, thus protecting them against their *imbecillitas* and the damage it might cause to the family property, and secondly, to compel them to act the way custom demanded, in other words, to refrain from “men’s business”.<sup>38</sup>

The restrictions laid on them by the SCV were explicitly stated to be for their safeguarding.<sup>39</sup> They probably did not perceive this as unequal treatment since it actually worked to their benefit.<sup>40</sup> For many women it must have been a relief to make use of the protective measures offered by the law. Although their active role was restricted mainly to the private sphere, in practice their financial independence and high social status afforded them the reality of independence.

Because of their perceived weakness, women had been subjected to *tutela mulierum* from the time of the Twelve Tables.<sup>41</sup> By the time of Gaius, the original purpose of *tutela mulierum* had been forgotten, and he and other jurists thus turned to traditional, popular ideas about women’s weakness and light-mindedness, and their consequent need for supervision.<sup>42</sup> Gaius explains *tutela*

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37 Cf Honsell, Mayer-Maly & Selb (n 1) 292. Evans-Grubbs (n 29) 52-53 states that “womanly weakness”, coupled with the Roman belief that certain kinds of transactions and responsibilities were “men’s business”, led to the enactment of the SCV. It attempted to discourage women from “interceding” on behalf of others. According to Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 328-329 the SCV determined that women, because of their weakness and their lack of business experience, were prohibited from interceding on behalf of anyone. See Crook (n 1) 83.

38 Crook (n 1) 86.

39 *D* 16 1 2 2.

40 Robinson “The status of women in Roman private law” 1987 *The Juridical Review* 161. It should be noted that this discussion focuses on the private-law competencies of women from the higher social class since our sources are largely restricted to women of financial means.

41 *Tabula* 5 1; Gaius 1 165.

42 According to Ulpian (*Tituli* 11 1) women were given guardians because of the weakness of their sex and their ignorance of the law. See also *Tituli Ulpiani* 11 25 & 27; *D* 16 1 2, *D* 49 14 18*pr.* Gardner (n 29) 92-93 believes that guardianship over women was originally instituted as a result of the concern arising from the inevitable conflict of loyalties to which women were subject, namely to their cognate families and those into which they married. The institution of guardianship mainly persisted to be called upon when a woman’s actions were likely to endanger her economic situation.

*mulierum* in historical terms, saying that the ancients wanted women to be in permanent tutelage because of their *levitas animi*,<sup>43</sup> but elsewhere he says:

But hardly any valid argument seems to exist in favour of women of full age being in *tutela*. That which is commonly accepted, namely that they are very liable to be deceived owing to their instability of judgment and that therefore in fairness they should be governed by the *auctoritas* of tutors, seems more specious than true. For women of full age deal with their own affairs, the interposition of their tutor's *auctoritas* in certain cases being a mere matter of form; indeed, often a tutor is compelled to give *auctoritas* even against his will.<sup>44</sup>

The concept of "womanly weakness" may, however, still be found in legal texts of the third and fourth centuries.<sup>45</sup> Nevertheless, although it is clear that Roman jurists had ambivalent feelings about women, it was generally accepted that they were capable of looking after their own interests.

The rational force behind the institution of *tutela mulierum* is found in Cicero's speech *Pro Murena* where it was said that the ancestors had determined that women should remain under the power of a tutor because of their weakness of judgement (*propter infirmitatem consilii*).<sup>46</sup> Although it was neither a sincere nor a realistic statement, it was true that this opinion was used as late as the third century as the basis on which legal protection was granted to women.<sup>47</sup> Cicero himself knew very well that this dictum was not true: his own wife administered her property independently, as did many other women of that time.<sup>48</sup>

The concept of female weakness may originally not have been inherent to Roman law yet it was useful for explaining legal restraints on their public actions.<sup>49</sup> *Tutela mulierum* was in the interest of the tutor even though he was not necessarily the nearest heir of the woman,<sup>50</sup> and the principal design was to keep the property in the family.<sup>51</sup> There is consensus among many legal

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43 1 144.

44 1 190.

45 Legal texts of the Principate and later often mention feminine *ignorantia*, *levitas*, *imbecillitas* and *infirmitas*: cf Gaius 1 144; *Tituli Ulpiani* 11 1; *D* 16 1 2 and *D* 49 14 18pr.

46 12 27.

47 See Dixon (n 17) 343.

48 Valerius Maximus 9 1 3 (*imbecillitas mentis*); Seneca *Controversiae* 1 6 5 (*imbecillitas*); Seneca *ad Marciam* (pr) (*infirmitas muliebris animi*); Gaius 1 144 (*propter animi levitatem*); Seneca *De Ira* 2 30; Tacitus *Annales* 3 33-34. See also Van Zyl (n 37) 114 who says that *tutela mulierum* was the result of women's natural lack of judgement and mental instability.

49 Evans-Grubbs (n 29) 51; Clark (n 12) 56-62; Gardner (n 29) 85-109.

50 Gaius 1 192.

51 Robinson (n 40) 151 says, with reference to *tutela mulierum*, that although it is officially ascribed to a woman's frailty or weakness, the original ground for this institution was the protection of the family property. She also mentions two cases of women making wills: Pliny (*Epistulae* 2 20) describes Aurelia being cajoled by family members to bequeath as they

historians and Romanists that the origin of *tutela mulierum* was the protection of male proprietary rights rather than female weakness.<sup>52</sup> The institution was a historical relic which no longer related to reality. The fact that Augustus granted the *ius liberorum* meant that women's *infirmitas* or *imbecillitas* could not be a factor, for that could not be removed by the emperor's decree.

Ironically, the prevalence of the concept of "women's weakness" coincided with the decline of *tutela mulierum* and the increase in the number of financial transactions concluded by women.<sup>53</sup> By the time tutelage had disappeared, the concept of *infirmitas consilii* or *infirmitas sexus* could still be found in the jurists' writings. It was even referred to in imperial rescripts from the time of the Severans, and legislation from the time of Justinian based protective legislation of women on *sexus muliebris fragilitas*.<sup>54</sup> According to Dixon, female incompetence "passed from a rhetorical flourish into conventional wisdom, then juridic (sic) commentaries before attaining the status of law".<sup>55</sup> During the last two centuries of the Republic there were big economic changes in Rome, and the greater and more fluid wealth of the upper classes underlay the changes in patterns of marriages, inheritance and probably also the growing economic independence of women.<sup>56</sup> The law, however, changed and adjusted slowly, and did not always reflect reality. Despite all the references to female

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wished: thus an example of women's weakness and showing the need for protection. Verania, yet another woman, is described as the prey of a legacy hunter: illustrating that women had bad discretion and that they needed legal protection because of their poor judgement.

52 See Thomas *The Institutes of Justinian* (1975) 44 where he asserts that "the real reason for *tutela impuberum* and *mulierum* (of any age), in origin, was that neither class could have *sui heredes*", and that *tutela* was thus "a means whereby the person entitled in expectancy could watch over his own interests in the interim" (45). See also Buckland (n 7) 165; Thomas *Textbook of Roman Law* (1976) 454; Watson *The Law of Persons in the Later Roman Republic* (1967), discussing the definitions of *tutela* (at 103), says that "the rules ... are old, (and may) be seen as survivals from the time when *tutela legitima* was mainly in the interest of the family". Ulpian (*Tituli* 11 27) lists the situations in which women needed their tutors' authorization. Basically it may be said that it was needed in cases where the family property was in danger. Once again, she could act on her own behalf, but not on that of others, or where her acts would have an influence on other people. Schulz *Classical Roman Law* (1961) 180ff is of the opinion that the tutor's *auctoritas interpositio* was a mere formality in classical times and therefore the SCV did not distinguish between women *in tutela* and women who were set free of it. Dixon *The Roman Family* (1992) 28-29 points out that family solidarity was of special importance to the Romans and that this would explain why in certain cases exceptions were made, eg, although women were by law forbidden to act as guarantors, they were allowed to do so when a woman had pledged herself to protect a father from exile (*D* 16 1 21 1); to advance her husband (*D* 24 1 42) or to help him when he was at risk of exile (*D* 24 1 43), or to support a close relation in court. Lucretius *De Rerum Naturae* 3 895-896 and Cicero *Ad Atticum* 1 18 1 both give idealised versions of family life. Cf further Dio Cassius 56 8 2 and Tacitus *Annales* 3 34. It seems as if a sentimental representation of family life was accepted and that it had consequences in public and legal life. In cases like these the law thus reflected the generally-accepted view that relatives were expected to support each other as well as the family property.

53 Dixon (n 17) 344.

54 *I* 2 8pr.

55 (n 17) 344.

56 Dixon (n 17) 347-348.

“weakness”, everyday practice did not confirm this view. It was rather the case that this female defect became a “literary commonplace”.<sup>57</sup>

Ulpian, however, said that a woman would more easily intercede for someone on the basis of kind-heartedness or compassion than offer a gift to that person.<sup>58</sup> She did not have to perform at the moment of conclusion of the contract, and she would expect the debtor to do the correct thing and pay his own debt. These considerations would be based on her lack of experience and knowledge of human nature.<sup>59</sup> The question remains: “Why would they suddenly be regarded as weak and in need of protection in the case of intercession when their experience and knowledge were regarded as sufficient for the enactment of the imperial decrees regarding tutelage in the first century and when they were allowed to conclude all kinds of business transactions?”

It is interesting to note that women often pleaded feminine weakness when they appealed to a magistrate for assistance or explained why they could not do something.<sup>60</sup> This might have been a female ploy. In the papyri women were quick to invoke *sexus infirmitas* in their petitions to authorities.<sup>61</sup> They would claim that they had been taken advantage of because of their vulnerability and lack of protection. Claiming to be weak and liable to deception because of one’s sex was apparently a useful rhetorical device for attracting sympathy from officials. In a Greek document dating from the time when the SCV was issued,<sup>62</sup> a woman (Demetria), based her request on her “weakness” as a woman, and the fact that she used this excuse to avoid legal obligations at the very time when the SCV was issued, suggests that it was a standard excuse, one which might have been to a woman’s advantage. It probably was, for why else would it have been regularly inserted in legal documents and referred to in the jurists’ works? Ulpian actually confirms that women sometimes acted out of *calliditas* and not *infirmitas*.<sup>63</sup>

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57 Cf Dixon (n 17) 356 and Schulz (n 52) 182. See Valerius Maximus 9 1 3. Even Gaius, who elsewhere says that women are capable, refers (1 144 and 1 190) to the contemporary belief that women’s gullibility left them open to exploitation in money matters.

58 *D* 16 1 4 1.

59 Dixon (n 17) 367 says that a woman’s position made her more vulnerable to certain kinds of obligations, that some obligations were more masculine, and that women were more prone to deception because they were less equipped to understand business than men. But see Crook (n 1) 87: “[S]uretyship is more perilous. If you make a gift you know what you are spending, and when it is done it is done; but even nowadays people do not always realise what they are letting themselves in for when they agree to be sureties or guarantors.” He thereupon quotes from Megarry *A Second Miscellany-at-Law* 332-333: “Almost all who sign as surety have occasion to remember the proverb of Solomon ‘he that is surety for a stranger shall smart for it and he that hateth suretyship is sure!’.”

60 Arjava (n 8) 232.

61 Evans-Grubbs (n 29) 52-53.

62 See *Oxyrhynchus Papyri* 1 71, 2 261 & 34 2713 as quoted by Evans-Grubb (29) 53-55.

63 *D* 16 1 2 3.

### 3 3 Men's business

Ulpian explicitly states that the SCV decreed, with reference to intercession, that it is not fair that women "perform male duties and are bound by obligations of this kind".<sup>64</sup> Dixon confirms that the text of the SCV is more concerned with the proper sphere of women than their financial capabilities and, while it may be paternalistic to term them masculine obligations, it is not the same as saying that women are incompetent.<sup>65</sup> Men were seen as being more able to protect the *res familiaris*, while women, because of their "weakness", were more likely to endanger family property. It was feared that the wife might be influenced by her husband (or another party) or that her affection for her husband, and not sound business sense, might be the cause of her intercession. In doing so, she would endanger the property in which her family had an interest. Whilst the emperors' edicts gave some protection for the families' interests against the exploitation of women by their husbands, the SCV extended protection to all other persons.

Schulz regards the decree as an outspokenly reactionary enactment of the Senate which was at that time the centre of reaction.<sup>66</sup> It proclaimed the old Roman principle that women should not perform the duties of men, and consequently prohibited legal acts whereby women rendered themselves liable for the debts of other people. He considers the SCV as the beginning of a reaction against the emancipation of women which had been achieved at the end of the Republic.<sup>67</sup>

### 3 4 *Mos maiorum*

From early on, Roman women enjoyed high status and were accorded an important position in the home and in society.<sup>68</sup> A Roman wife had extensive powers at home and was in fact equal to her husband.<sup>69</sup>

The high social position Roman women enjoyed influenced the institution of *tutela mulierum* even in the early Republican times, and one may now ask why the institution nevertheless survived so long. For Schulz the answer is apparent:<sup>70</sup> During the troubled period of the late Republic there was simply no time to abolish it, and Augustus' reactionary legislation made no provision for

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64 *D* 16 1 2 1.

65 Dixon (n 17) 368.

66 (n 52) 569.

67 (n 52) 570-571. See, however, Crook (n 1) 89 who does not agree with Schulz.

68 Cornelius Nepos *Pr* 6. Cf the formula used in marriage: *Ubi tu Gaius, ego Gaia*. See further Laurie *Historical Survey of Pre-Christian Education* (1970) 310; Marrou (n 84) 232.

69 Schulz (n 52) 193-194.

70 (n 52) 180-181.

such legal action. The *lex Iulia* and the *lex Papia Poppaea* were based on this institution, and it was the close connexion with the rules inspired by Augustus' population policy which kept it alive throughout the classical period. Dispensation was, however, frequently granted. After the *leges Iulia* and *Papia* this reasoning could not be accepted any longer.<sup>71</sup> Schulz argues that tutelage of women was neither the result of the weakness of women nor regard for family interests. According to him women did in fact need protection, but not by nature. The need was a consequence of the social order in Rome. The *mos maiorum* determined that a woman's place was at home<sup>72</sup> and that she should not take part in public life.<sup>73</sup>

Tradition was a great power in Roman life, and *gravitas* and *constantia* were the cardinal virtues of the Romans.<sup>74</sup> According to Schulz the Romans "[s]eriously and cheerfully ... [abided] by the customs of their forefathers, [referred] to them often and [felt] themselves safe and sheltered when they [adhered] to them".<sup>75</sup> This conservative attitude of the Romans is especially clear in the field of law.<sup>76</sup> The Romans were not inclined to interrupt the even flow of legal development with radical changes. Abuses in the law were abolished slowly in order to ensure that it was the correct thing to do.<sup>77</sup> Rather than abolishing any valid law, they would allow it to lapse through disuse. A new rule was often introduced side by side with an older one which was no longer applied, to be used by choice, and in this way old laws gradually died a natural death.<sup>78</sup> The legal process moved slowly to ensure legal progress.<sup>79</sup>

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- 71 If women were indeed weak, the *ius liberorum* would have been a punishment and not a reward, since it could not remove such infirmity. It was in fact an acknowledgement of their ability to act independently.
- 72 See Schulz (n 52) 182; Van den Bergh "The role of education in the social and legal position of women in Roman society" 2000 *RIDA* 363.
- 73 See *infra* 4.
- 74 Schulz (n 1) 83. Humanitarian ideas had little influence on women's legal status. In spite of the emancipation of women in the last century of the Republic, the idea of equal rights did not agree with the Romans' fixed ideas and ancient customs. Cf Cicero *Pro Sestio* 67 141 and *Tusculanae Disputationes* 1 1 2.
- 75 Schulz (n 1) 83-84. See also the censors' edict from 92BC (quoted by Schulz (n 1) 83) which exposes this fundamental attitude in terms of which new ideas were neither pleasing nor seemed to be correct to the Roman forefathers: *Renuntiatum est nobis esse homines, qui novum genus disciplinae instituerunt ... Maiores nostri, quae liberos suos discere et quos in ludos itare vellent, instituerunt. Haec nova, quae praetor consuetudinem ac morem maiorum fiunt, neque placent neque recta videntur.*
- 76 Cf Tacitus *Annales* 14 43.
- 77 Schulz (n 1) 84.
- 78 Schulz (n 1) 85.
- 79 See Schulz (n 1) 85-86: "At the base of this inertia their lies the profound recognition of the fact that the law cannot fulfil its function if it does not manifest a constant and permanent will to law and that law does not spring complete from the head of an inspired lawgiver, but demands the constant co-operation of the community." See also *D 1 1 10pr*; Cicero *De Re Publica* 2 1 2.

Both Paul and Ulpian ascribe the prohibition on intercession by women (that is, to undertake one of the acknowledged civil duties) to custom (*mos maiorum*).<sup>80</sup> It was not that women did not have judgment, but rather that it had been accepted for ages that they did not perform civil duties. The SCV, advising women not to intercede, was – like the fact that they could not serve as judges or hold public office – thus also the result of restrictions instituted centuries earlier by the *patres*. The respect that the Romans had for the *mos maiorum* was so great that it continued to override contemporary social realities. Consequently women were in principle debarred from activities which were regarded as befitting men only, and from public life generally.

#### 4 The social and legal position of Roman women in the first century AD

Although existing Roman legal texts dealing with women might give the impression that women were only relevant as members of families, it is important to note that when they acted as individuals, outside their families, they were covered by the same rules as men, and were not separately mentioned in legal sources. A statute which read “*Si quis ...*” should thus be read as “If a man or a woman ...”, and words like “*homo*”, “*libertus*”, “*servus*” and “*puer*” meant females as well.<sup>81</sup> Most Roman legal statutes were gender neutral and applied to both women and men.<sup>82</sup> In principle adult women who were *sui iuris* could perform most legal activities within the sphere of private law. Evidence for this may be found in many imperial rescripts and in Egypt in existing papyri. Roman private law thus presented few obstacles as far as women’s affairs were concerned,<sup>83</sup> and at the time of the enactment of the SCV Roman women were actively involved in all forms of business practice. An important factor to be taken into consideration in this regard is their education. In Rome, the ideal standard for education was set by the *mos maiorum*.<sup>84</sup>

It may be said that, by the late Republic, Roman girls usually received the same cultural education as boys, and that at pre-school, elementary and even

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80 In *D 5 1 12 2* Paul says that women and slaves were prohibited by custom: that is, not because they do not have judgement, but because it had been accepted that they do not perform civil duties. See also *D 16 1 1 1*.

81 During the classical period. See, eg, *D 3 5 3 1*, *D 13 5 1 1*, *D 15 1 1 3*, *D 50 16 1*. See too Arjava (n 8) 230.

82 Arjava (n 8) 230-231.

83 Arjava (n 8) 230. See also Robinson (n 40) 155ff, Robinson “The historical background” in McLean & Burrows (eds) *The Legal Relevance of Gender. Some Aspects of Sex-Based Discrimination* (1988) 43-46; and Gardner *Women in Roman Law and Society* (1986) 233ff about their strong position in society compared to other societies.

84 Cf Suetonius *De Rhetoribus* 1. See also Wilkens *Roman Education* (1905) 3; Marrou *A History of Education in Antiquity* (1956) 231; Rawson “The Roman family” in Rawson (ed) *The Family in Ancient Rome. New Perspectives* (1986) 39.

at grammar school level, they received the same education as boys.<sup>85</sup> Roman boys and girls from the lower classes were usually educated by schoolmasters at elementary schools,<sup>86</sup> while those from the upper class were educated at home by private tutors since private education enjoyed tremendous prestige as late as the second century.<sup>87</sup> Higher education in Rome was usually confined to the higher classes.<sup>88</sup> References to educated girls from wealthy, upper-class families seem to indicate that girls were often educated with their brothers.<sup>89</sup> Roman authors also mention cases where teachers were employed specially for the females in a family.<sup>90</sup> Many women married early, and their education often continued after marriage when they received further education from their husbands<sup>91</sup> and private tutors.<sup>92</sup> They also made use of private libraries.<sup>93</sup> Highly educated women are often mentioned by Roman authors from the time of the Republic to the late Empire.<sup>94</sup> Upper-class women were sufficiently educated to take part in daily intellectual life.<sup>95</sup> Our sources show that the society of imperial Rome included many women who were capable of holding their own in educated conversation, both about literature and current affairs. Roman women were considered to be enhanced by education and other accomplishments. By the time they married, women were as literate, and knew as much about arithmetic and the law, as any man. In practice this meant that when they had to take charge of familial legal and financial matters, they were as well prepared as their male counterparts.<sup>96</sup>

Despite the involvement of Roman women in financial matters<sup>97</sup> and the fact that their conscientious attendance to household responsibilities were praised and glorified throughout Rome's history, they were still excluded from public

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- 85 Cf Van den Bergh (n 72) 351ff esp 364. See also, eg, Sallust *Catilina* 25; Cicero *De Legibus* 2 59; Pliny *Epistulae* 5 16; Horace *Saturae* 1 10 91; Ovid *Tristia* 2 369-370; Juvenal *Saturae* 14 209; Martial *Epigrammaton Libri* 3 69 8 & 8 3 15-16 and 9 68 2.
- 86 Ovid *Tristia* 2 369f; Sallust *Catilina* 25 2.
- 87 See Van den Bergh (n 72) 355. The story of Verginia furthermore gives evidence that it was not unusual for the daughter of a lowly plebeian centurion to be educated at an elementary school in the Forum (cf Livy 1 26; Diodorus 12 24; Dionisius Halicarnassus *Antiquitates Romanae* 11 28-49 and Pliny *Epistulae* 5 16 3).
- 88 See Wilkens (n 84) 29; Marrou (n 84) 274.
- 89 Van den Bergh (n 72) 355.
- 90 See Cicero *Ad Atticum* 12 33; Pliny *Epistulae* 5 16.
- 91 Hemelrijk *Matrona Docta: Educated Women in the Roman Elite from Cornelia to Julia Domna* (1999) 31-36.
- 92 Hemelrijk (n 91) 36-41.
- 93 Cf Varro *Rerum Rusticarum Libri* 3 5 9; Cicero *Ad Familiares* 9 4; Pliny *Epistulae* 2 17 & 4 19.
- 94 Cicero *Brutus* 211; Sallust *Catilina* 25 2; Claudius *Fescennina* 232ff; Martial *Epigrammaton Libri* 7 69; Pliny *Epistulae* 1 16 6, 4 19 2-3; 5 16 3; Quintilian *Institutio Oratoria* 1 1 6. See also Juvenal 6 185-193, 242-245, 398-412 and 434-456 who did not approve of educated women fluent in Greek and who could rival men in their knowledge of the law, current affairs, literature and rhetoric.
- 95 Plutarch (*Pompeius* 552), talking of Cornelia, says that she was educated, could hold her own on mathematics and philosophy, and was no bluestocking.
- 96 Cf Van den Bergh (n 72) 354ff and esp 361.
- 97 See, eg, Tacitus *Dialogus de Oratoribus* 28.

duties at the time of the enactment of the SCV.<sup>98</sup> According to social conventions they were therefore subordinate to men although they were not legally discriminated against as far as private-law matters were concerned.<sup>99</sup>

The restrictions on women (*cives Romanae*) to hold public office cannot easily be explained.<sup>100</sup> According to Paul, although they were not by nature incapable of acting as judges and they did not lack sufficient judgement, it was nevertheless generally accepted that they could not hold public office.<sup>101</sup>

Women were allowed neither to act as judges nor to bring civil suits on behalf of others since they were expected not to involve themselves in other people's cases. The praetor's edict said that it was not acceptable for a woman to act for another in court for "to involve themselves in masculine business ran counter to the modesty suitable to their sex".<sup>102</sup> An independent woman could appear in court on her own behalf but she would need her tutor's formal authorisation during the time when it was still required.<sup>103</sup> This incapacity was based on established custom (*mores*), and not on a lack of judgement. Concern for the preservation of women's modesty and good reputation may thus also have been behind laws restricting their right of public action and protecting them from dishonour.<sup>104</sup>

With reference to moral duties, it is important to mention that the Romans preferred personal security to real security.<sup>105</sup> By the end of the Republic, providing guarantees for debts by means of stipulatory suretyship was an important legal and social institution in Rome.<sup>106</sup> This was the result of the Romans attaching great value to the duties of friendship (*amicitia*) and it was

98 Cf *D* 50 17 2: "Women are debarred from all civil and public functions and therefore cannot be judges or hold a magistracy or bring a lawsuit or intervene on behalf of anyone else or act as procurators."

99 Robinson (n 40) 143.

100 Robinson (n 83) 43-44 stresses that although Roman women were Roman citizens (*cives Romanae*), they had private rights but no public rights.

101 That is, they could not vote, they could not take part in the popular assemblies, they could not be magistrates, or serve on criminal court juries. Paul adds that women were customarily excluded from the exercise of public functions (*D* 5 1 12 2; *D* 16 1 1 1). See too Dixon (n 17) 356-371 especially 370, Gardner (n 29) 85-89 on the duties of a Roman citizen, and Watson *Roman Law and Comparative Law* (1991) 55.

102 *D* 3 1 1 5; *D* 5 1 12 2; *D* 50 17 2. See Valerius Maximus 8 3 2 where he mentions a woman whose nature and sense and shame did not avail to restrain her so that she would be silent in the forum and in legal cases. This was in a case where she was undertaking legal action on her own behalf, and it was considered improper and unfeminine behaviour. See also Gardner (n 83) 263.

103 Robinson (n 83) 50-51. Evans-Grubbs (n 29) 60 discusses the restrictions and rights of women in court, and emphasises that although they could not represent others in court, they could appear on their own behalf. See also Gardner (n 29) 85-109 and Thomas *Institutes* (n 52) 126-137.

104 Evans-Grubbs (n 29) 48.

105 Watson *Roman Private Law around 200BC* (1971) 84 119ff.

106 See Horace *Saturae* 2 6 1 23 from which it may be deduced that it was a social obligation to stand surety for a friend. A personal guarantee, constituted by a *stipulatio*, was regarded as a moral duty (see Watson (n 101) 55).

generally accepted that a friend would act as guarantor when needed.<sup>107</sup> In ancient times *fides* was defined as keeping one's word, *fit quod dicitur*.<sup>108</sup> It was an important and highly respected characteristic. The large number of relationships based on fidelity explains the fact that personal security played a larger role than real security.<sup>109</sup>

The Romans never questioned the reasons for the exclusion of women from public activities. There are a few legal texts, dating from the late second century and later, in which the jurists try to explain these incapacities of women, but they do not really supply reasons and merely confirm the existing state of affairs. Consequently, when Paul states that they are barred by custom (*moribus*) from exercising public duties, he merely confirms that it was received practice (*receptum est*) that they did not perform civil duties.<sup>110</sup>

## 5 The role of Roman women in economic life at the time of the enactment of the *senatus consultum Velleianum*

By way of introduction it should be mentioned that husbands were allowed to assist their wives in financial or legal matters.<sup>111</sup> However, the protection of separate properties was apparently regarded as a good idea since it worked in favour of the woman's father and her other cognates. There was a general feeling that wealth should stay in the family, and in Roman society, where daughters inherited substantial properties, this gave rise to many problems. It was in the interest of brothers, uncles and cousins that women did not alienate property which would revert to their families after their death. That was why a woman's nearest agnate automatically became her tutor unless someone else had been appointed by her father in his will.<sup>112</sup> Attempts to curtail the husband's powers relate to this too.

A wife who owned property could have it administered by her husband or she could administer it herself through her agents and slaves.<sup>113</sup> During the late Republic and the early Empire women were *de facto* independent: guardians took their duties very lightly, and women who were not satisfied with interfering

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107 Watson (n 105) 119ff.

108 Cicero *De Officiis* 1 7 23; *De Re Publica* 4 7; *Ad Familiares* 16 10 2. Schulz (n 52) 223.

109 Schulz (n 52) 237.

110 *D* 5 1 12 2. See too *D* 16 1 1; *D* 50 17 2. It is important to keep in mind that *mos* was one of the accepted sources of the law, and that the older an institution was the less likely it was that it would have been reduced to writing.

111 See *D* 46 7 3 3.

112 Gaius 1 157.

113 Hallett *Fathers and Daughters in Roman Society* (1984) 276.

guardians, could apply to the praetor to have them replaced. Tutors, where they still officiated, mainly had a restrictive function in that they prevented women from actions which might reduce the property. The women were often also widows who took over control of their husbands' financial affairs, since one of the results of the Second Punic War was that in a large number of wealthy Roman houses the male line became extinct and the family estate was concentrated in the hands of women, who consequently had to take charge of the management of the family property. In practice they managed without the tutors' authority.<sup>114</sup>

Although it is difficult to determine the extent of women's direct involvement in Roman economic life, we know that *sui iuris* women could own property and administer it themselves, and from our sources it is clear that they could buy, sell, lease and conduct many other financial activities.<sup>115</sup> By the time the SCV was issued, *sui iuris* women usually conducted their business affairs independently and accepted legal liability for their actions. In the late Republic therefore, the woman's property was kept apart from that of her husband, and this was strengthened by the prohibition on the wife to stand surety for her husband. The wife's independence in managing her property was confirmed by legislation of Augustus and Claudius. In law, therefore, a couple married *sine manu* was not one financial entity, but two.<sup>116</sup>

It is therefore surprising that the edicts and decrees mentioned above came at a time when Roman women had reached a high plateau of emancipation, property-owning and participation in every part of social life.<sup>117</sup> There was no obvious need for these protective measures at the time. They were coping well in business matters, as is confirmed by the abolition of the institution of tutelage, and of course also by the fact that they were able to do as they liked with their own money: they were only in need of protection when their actions had an effect on other people's interests.

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114 Pomeroy (n 10) 149 describes the background of the late Republic as follows: "[E]normous wealth, aristocratic indulgence and display, pragmatism permitting women to exercise leadership during the absence of men on military and governmental missions of long duration."

115 See Gardner (n 83) 233 who refers to women owning large ships and other large-scale business concerns.

116 Cf Garnsey & Saller *The Roman Empire. Economy, Society and Culture* (1987) 130; Van Zyl (n 37) 99.

117 Crook (n 1) 83.

## 6 Roman pragmatism and legal conservatism

As early as the *Twelve Tables* a Roman woman was not legally excluded from business life or from appearing and acting in court. It was, however, not proper for her to engage in public life which was exclusively for men and formed part of their *officia*. The conservative Romans held on to the rigid *mos maiorum* which determined these customs for centuries, publicly pleading that women could not fulfil these duties which were considered “men’s business”.<sup>118</sup> This attitude flew forth from the great respect they had for the customs of the ancients. This is a characteristic of Roman pragmatism, and also of the conservatism of the law in all ages. The SCV was, in fact, a good example: Whilst it granted women protection which they could make use of if they so wished, they could, at the same time, continue interceding. The decree therefore made provision for protection while adapting to the demands and economic practices of the times.

As stated above, an independent woman had proprietary and contractual capacity in the sphere of private law although she was for a long time limited in her actions by being, at least in name, under some kind of tutelage.<sup>119</sup> The whole issue of tutelage disappeared in the fourth century, if not earlier, and this was typical of the conservatism of the law: It was not officially abolished but merely left to fall into desuetude. Legal criteria usually tend to be conservative and rooted in the past.<sup>120</sup>

It should also be kept in mind that the Romans idealised their past and that during the first century the traditional *matrona* was still upheld as the example for Roman women although many were in fact living a quite different life.<sup>121</sup>

## 7 South African law

The SCV survived with small modifications in Justinian’s law, with further modifications in continental law from the Middle Ages down to modern times. It was in force in, for example, France (until 1606), Sri Lanka (until 1924), and

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118 Evans-Grubbs (n 29) 270-271.

119 The retention of *tutela mulierum perpetua* was testimony of Roman conservatism (see Dixon (n 17) 371.

120 Robinson (n 83) 58.

121 Social myths created tension between the ideal and the real Roman matron and were responsible for the praise awarded a woman like Cornelia who had lived in the second century BC. She was the wife of Tiberius Sempronius Gracchus. As a widow, she remained faithful to her husband’s memory, and took care of their twelve children. She took care of the household and the children’s education. She herself was an educated woman, and politically active in the sense that she entertained foreign and learned guests at her home. See Plutarch *Tiberius Gracchus* 1 4 and *Gaius Gracchus* 4 19; Appian *Civil Wars* 1 20; Pliny *Naturalis Historiae* 34 31.

Zimbabwe (until 1959).<sup>122</sup> In South Africa the *Suretyship Amendment Act*<sup>123</sup> abolished the two benefits available to female sureties and other interceders, namely the *SCV* and the *Authentica si qua mulier*. These two decrees, respectively dating from about 46 AD and 556 AD, thus ceased to apply after almost two millennia.

Until 1971, every South African woman enjoyed protection in respect of acts of intercession under the *SCV* and, in the case of a married woman, under the *Authentica si qua mulier* which prevented her from binding herself as a surety or guarantor for her husband.<sup>124</sup> According to Boberg, these two Roman statutes, forbidding a woman to undertake a suretyship for another's debt, were "the last instances of discrimination on the ground of sex".<sup>125</sup> The benefits under both these institutions could be renounced by the woman after their meaning had been explained to her, and it became customary for almost every contract signed by a woman to incorporate a clause renouncing such benefits.

The final abolition of these benefits in 1971 was preceded by a long *bellum iuridicum* (reflected in the reports of commissions, parliamentary debates, academic text books, articles and case law) regarding their retention or abolition. Some of the opinions will now briefly be touched upon.

The Commission of Inquiry into Inequalities or Disabilities as Between Men and Women,<sup>126</sup> for example, was split on the question of the abolition of the benefits. In practice only women of means married with antenuptial contract would enter into contracts of intercession and normally they would be sufficiently educated and intelligent to avoid being unduly influenced. Most of the women's organizations who gave evidence before the Commission were, however, in favour of abolition of the benefits. The group in favour of retention was motivated by the opinion that women who had no business experience would be protected by the defences. It was no great burden to explain the exceptions to a woman, and the benefits could not have been useless if they had survived through the centuries. Caney J, a member of the Commission, opposed abolition on the ground that a woman tended to be too kind-hearted

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122 See Kahn "Farewell *Senatusconsultum Velleianum* and *Authentica si qua mulier*" 1971 *SALJ* 364-365.

123 57 of 1971: "s (1) The rules of law known as the *Senatusconsultum Velleianum* and the *Authentica si qua mulier* shall as from the commencement of this Act cease to have the force of law." The Act was promulgated in *Government Gazette* 3149 of 16 June 1971.

124 Hahlo *The South African Law of Husband and Wife* (1973) 102.

125 *The Law of Persons and the Family with Illustrative Cases* (1977) 228-229.

126 Report UG 18 of 1949 pars 201-204 and par 27 of the Summary of Recommendations as quoted by Kahn (n 122) 365-366.

and sentimental, too optimistic about the likelihood of her being called in practice to make good her promise, of which advantage was taken by the unscrupulous and the well-meaning alike, to her financial prejudice.<sup>127</sup> These words echo those written by Ulpian almost two thousand years ago.<sup>128</sup> The other group, in favour of abolition of the benefits, was mainly concerned with the adverse effect it had on the free flow of business.

In 1950 the Law Revision Committee recommended, to no avail, the repeal of these two benefits since they had been, inter alia, “rejected by all modern codes”. Moreover, “their continued existence in South Africa is a legal anomaly in modern times”.<sup>129</sup> In later reports of 1959, 1962, 1965 and 1968 the Law Revision Committee maintained that there were insufficient grounds for the abolition of the benefits.

Amongst those in favour of abolition were Van den Heever J who, in *Van Rensburg v Minnie*, declared as follows:<sup>130</sup>

One of the incongruities of this inconsequent age is the fact that women, while enjoying full rights of citizenship, including that of making or marring policies of the State as effectively as any male, are able in their private affairs to invoke a defence based on their innate fecklessness and incapacity and so avoid liability in respect of obligations which they have deliberately assumed. ... [O]ur law in this respect is a recognised anomaly, a fossil left over from a dispensation in which it was deemed reprehensible in a woman to engage in anything so masculine as the undertaking of suretyship.

This opinion was echoed by Sir John Wessels, according to whom the Roman statutes belonged to the dead past, and who felt that it was high time that they should cease to form part of the law of South Africa since “[t]hey hinder trade, interfere with credit and are often the source of trickery”.<sup>131</sup>

Hepple, too, supported abolition of the benefits. With reference to the *Report of the Commission of Inquiry into the Inequalities or Disabilities as Between Men*

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127 According to Voet 16 1 1 the reasons advanced by the Romans were that women were to be protected on account of the weakness of their sex, their facile optimism and because they could not withstand the importunacy of their husbands or friends. See Hepple “Women sureties” 1959 SALJ 323; Wessels *The Law of Contract* (1951) par 3818.

128 See *D* 16 1 4 1. Note too that par 2398 of the *Louisiana Civil Code* (1942) prohibits a woman from interceding on behalf of the husband, mainly because of the great moral pressure that she might otherwise be subject to.

129 See ID “The *Senatusconsultum Velleianum* and the *Authentica si qua mulier*” 1969 SALJ 239.

130 1942 OPD 257 at 259.

131 Cf (n 127) par 3872.

and *Women* he mentions that few of the members of the Committee still held that women had these characteristics, and suggests that “in this age of feminine emancipation it may be suggested that the ground is falling away from the arguments for the statutes adduced by Paulus”.<sup>132</sup> He concludes with the following statement:

The statutes have become no more than a nuisance and an irritant: a nuisance because the renouncing of them is a waste of time and an unnecessary expense; an irritant because they still serve as a reminder of the older, less enlightened days when women were regarded as legally inferior to men.<sup>133</sup>

The title of this article suggests that women were “sometimes equal and sometimes not”, and it is interesting to note that Van Niekerk had the following to say with reference to the benefits:

It is said that all men (and women!) are born equal but that some are more equal than others. In most civilized legal systems the equality of men and women in the eyes of the law is something which is axiomatically accepted. Although South African law still knows several instances of inequality between the sexes, most to the ‘detriment’ of women, it also has the unequalled distinction of giving women more than equal rights with men in the realm of suretyship.<sup>134</sup>

According to him it appears from the decision in *Papageorgiou v Kondakis*<sup>135</sup> that the benefits “constitute blatant anachronisms which should be interpreted in the way which is least oppressive to a creditor who may be prejudiced”, and he continues by saying that the “tendency should be towards abolishing these obnoxious relics of an age in which the female sex was regarded as inherently inferior to the male sex”.<sup>136</sup>

However, as late as 1970, Caney J still proclaimed that it could be deduced from South African case law that the benefits had often afforded women an equitable defence.<sup>137</sup> Although the sophisticated woman may not need these benefits, and the business woman may be denied them, unsophisticated women do need them. According to him much of the reason behind the benefits was as good in his day as it had been in Rome. Caney opined that the

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132 Hepple (n 127) 323.

133 Hepple (n 127) 324. See also ID (n 129) 241.

134 “Free state oil on Byzantine waters” 1968 SALJ 132.

135 1968 1 SA 92 (O).

136 Van Niekerk (n 134) 133.

137 *The Law of Suretyship in South Africa* (1970) 161.

benefits were mainly intended for the protection of women, but also involved an element of respect for them.<sup>138</sup> The reasons for the benefits were therefore twofold. In the first instance it was regarded as unseemly that women undertake men's work, and in the second instance the aim was to protect women against their inclination to respond to calls for assistance. Although women needed no special protection as far as ordinary business contracts were concerned, it was different in the case of intercessions:

But when it came to binding herself for the future fulfilment of the debt of another, whether by suretyship or intercession, it was easy for her to assume that she would never be required to fulfil this; with confidence in the person concerned, she would readily bind herself, assured that he would never fail her. It was easy for women to become involved, for their feelings to be played upon, not only by unscrupulous persons, but also by well-meaning genuine persons, over-optimistic about their own affairs, and so a woman's natural inclination to help another in need had to be curtailed and she be protected by the law.<sup>139</sup>

When, in 1971, the benefits were finally abolished, Kahn stated with approval that the legislation was "commendable, the culmination of a process over centuries, through the work of jurists, judges, and legislatures, of weakening the benefits through creating exceptional situations where they were not applicable".<sup>140</sup>

## 8 Conclusion

From the discussion above, it appears that the text of the SCV mentions various reasons for its enactment, and that Romanists, ancient historians and sociologists have discussed these extensively through the ages. From their discussions it appears that the reasons which have been advanced were not conclusive. I would consequently like to focus on another statement in the text of the SCV. It is, namely, briefly stated that *previously it had been the practice*

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138 Caney (n 137) 163.

139 Caney (n 137) 163-164. Cf too *D* 16 1 2 1; *D* 16 1 4 1; Voet 16 1 1.

140 (n 122) 367. He refers (at 367-368) to *Katzen v Mguno* 1954 1 SA 277 (T) as an example where the benefits and economic demands had the result that a 90-year old African woman, deaf and almost blind, completely illiterate, undertook to stand surety for her grandson's obligations as a lessee. She renounced the benefits of the SCV and declared that she was "fully acquainted with the meaning and force thereof". The renunciation was accompanied by the usual notarial certificate in which the notary stated that he had fully explained the meaning and effect of the exception and the woman's renunciation of its benefits. This case illustrates the extremities to which lawyers were (in the interest of economic demands) willing to go to avoid the benefit provided by the SCV.

of the courts that neither a claim by the creditors nor an action against the women was to be granted in cases of *intercession*. Nothing more was said about this practice, but it probably had a restrictive effect on the normal flow of business and it is possible that the opinion was held that women were granted too much protection. However, despite the apparent importance and relevance of this statement, it has received little attention in the sources consulted and no real relevance seems to have been attached to it. I am of the opinion that the protection of business practice was in fact more important than would thus far have appeared from the discussions mentioned, and that it may be considered one of the main reasons for the enactment of the SCV. The importance of this neglected clause should therefore not be underestimated.

This clause is followed by an instruction to the magistrates to apply their discretion when requested to consider a creditor's request for an action or a woman's request for an *exceptio*. The magistrates were thus tasked with considering the circumstances of each case in terms of the SCV. If one of the exceptions was pleaded, and the creditor knew that the surety was a woman, an action would be instituted against the woman and she would be obliged to fulfil her obligation. This brought certainty in financial matters and ensured that men would continue doing business with her. It may therefore be deduced that the SCV was also decreed to protect sound business practices such as intercessions and to ensure that men could as a rule rely on women who interceded.

The protection granted in terms of the decree might thus be interpreted in two ways. First, it could protect the woman if she was inexperienced, or had been overreached. Secondly, it could also protect her reputation as business partner as well as the economy as a whole.

The motives directly attributed to the decree in the text of the SCV were the result of Roman conservatism and pragmatism. Fortunately, as a result of the way in which the decree was formulated by the Senate and applied by the magistrates, the interests of business practices were protected and maintained. For the sake of a healthy economy it was necessary that women acted as honourable citizens, and not be permitted to act cunningly and hide behind the "weakness of their sex". Normal financial transactions thus continued undisturbed.

It is furthermore interesting to note that almost two thousand years later, in South African legal literature, the issue of protection of business practice was also one of the main arguments advanced in favour of the abrogation of the

benefits enjoyed under the SCV. This would strengthen my point that the reasons usually discussed were not conclusive, and it would explain why the SCV was enacted at a time when women were competently, and on a large scale, partaking in business.

Human nature has not changed much during the past two thousand years. The same paternalistic sentiments held by the Romans about women were still in vogue in South Africa at the time of abolition of the benefits women enjoyed in terms of the Roman statutes. Furthermore, the same awareness of good faith and the maintenance of sound business practices were evident. Consequently, after approximately two millennia, sound business sense and pragmatism triumphed at last. Public acknowledgement of the importance of sound business practices and free trade as well as the equality of women finally led to the abolition of the benefits accorded to women in terms of the SCV and the *Authentica si qua mulier*.