

HONESTE VIVERE: ULPIAN'S PRAECEPTUM IURIS AS MANIFESTED IN THE ROMAN LAW OF MARRIAGE

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Abstract: *In this contribution we explored the influence of the precept of honeste vivere in the writings of the Roman classical jurists, within the context of marriage. Honeste vivere is one of the praecepta iuris that appear in D.1.1.10 and that are regarded as the foundational precepts of Roman law. Although they are not always in accord with the regulae iuris, which are brief statements of the law deduced from the existing positive law, there are instances in which the praecepta and the regulae iuris correspond. This is evident, among others, in the classical texts relating to the prohibition of marriages on social and moral grounds.*

Keywords: *Praecepta iuris; honeste vivere; live honourably, injure no one; give everyone his due; justice; Roman law of marriage; materfamilias; classical Roman jurists; boni mores; foundational postulates; prohibited marriages; senatorial aristocracy*

1. Introduction

The classical jurist Ulpian's famous *praecepta iuris* are prominently introduced in the *Corpus iuris civilis* in the Digest and appear also in the Institutes¹. In D. 1.1.10, Ulpian links the concept of *praecepta iuris* with that of justice. He defines *iustitia* in D. 1.1.10*pr.* as the constant and perpetual desire to give to everyone what he is entitled to². He then continues in D. 1.1.10.1 to state that the *praecepta iuris* encompass the following, to live honourably, to injure no one and to give everyone his due³, the third precept aligning with the definition of justice.

It is generally accepted that Ulpian's definition of justice and his *praecepta iuris* have their origins in Greek natural-law philosophy, specifically in Stoic doctrine⁴. Interestingly, Ulpian merely mentions the *praecepta iuris* but nowhere explains their content. It is not surprising, then, that later scholars contemplated their meaning and that the concept of *praecepta iuris* has been variously defined. Among others, the *praecepta iuris* have been described as "definitions of justice"⁵; "basic principles"⁶; "precepts of law"⁷; "grondbeginselen van het recht"⁸; and as "maxims of law"⁹. The gist of these descriptions appears to be that the *praecepta iuris* are not legal rules derived from positive law, but rather ethical principles or morals¹⁰.

A question that comes to mind is how the *praecepta iuris* differ from the *regulae iuris* which are also prominently placed in the last title of the Digest, D. 50.17 *De diversis regulis*

iuris antiqui? According to Paul, a *regula* is a brief statement of the law as it is¹¹. From this definition it is apparent that the *praecepta* form the foundation of legal reasoning¹² and, by contrast, that the *regulae* are rules deduced from the existing positive law.

There are scholars who maintain that the *praecepta iuris* had no significant impact on the writings of the classical Roman jurists whose interpretations of Roman law often conflicted with the ethos of the *praecepta*¹³. These scholars generally found their views on the fact that there are instances where Roman law is not in accord with the *praecepta*. The existence of such a dissonance is confirmed in a number of the *regulae iuris* that conflict with the *praecepta*¹⁴. One such example is the apparent dissonance of the notion of *honeste vivere* and the *regula iuris* in D. 50.17.144: "Everything which is permissible is not always honourable"¹⁵. Other instances of the apparent conflict come to the fore in Pomponius, Paul and Ulpian's statements concerning freedom of contract, that allow for conduct contrary to the concept of *honeste vivere*¹⁶.

Equally, one has to bear in mind that there are indeed instances where Roman law corresponds with the *praecepta* and that the *praecepta* and *regulae iuris* are often in accord with each other¹⁷. Thus the *regula* against unjust enrichment in D. 50.17.206 is in line with the principle of *alterum non laedere*. Further, the principle of *honeste vivere* corresponds with the *regula*: "In matrimonial unions, not only what is lawful but also what is honourable should be considered." It is interesting that also the Accursian gloss used the example in marriage of the wife who lives chastely, honouring her vows in accordance with the *mores* of the day, to illustrate the concept of *honeste vivere*¹⁸.

It is this gloss that prompted us to explore the influence, if any, of the precept of *honeste vivere* in the writings of the classical jurists, within the context of marriage.

2. *Honeste vivere* and the prohibition of marriages on social and moral grounds

A perusal of various texts, not all of which deal specifically with the *institution* of marriage, yielded several references to the notion of *honeste vivere*. A number of the texts that explicitly mention the concept of *honestas* also evidence the connection of this concept with the prevailing *boni mores*.

The first text of interest is D. 23.2.42*pr.* in which Modestinus comments on the rite or formation of marriage, explicitly alluding to the notion of *honestas*:

Modestinus libro singulari de ritu nuptiarum pr. Semper in coniunctionibus non solum quid liceat considerandum est, sed et quid honestum sit. (... In [marital] unions, it should always be considered not only what is legal, but also what is honourable).

In D. 23.2.42.1 this comment is contextualised when it is explained that a senator's female descendants could not marry freed persons and other people considered to be engaged in morally dubious activities such as acting¹⁹. D. 23.2.42 *pr.* must thus be seen against the background of prohibited marriages, specifically the prohibition of marriages of the senatorial order on social and moral grounds, dictated by public policy. This will be the focus of this contribution.

It is trite that so-called "status-consciousness"²⁰ permeated Roman society from very early on and there are ample examples in the Twelve Tables of inequality based on

status, or position. It is generally accepted that this ethos of class differentiation played no small role in legal development. Its influence in personal laws is evidenced, among others, by the prohibition of marriages between plebeians and patricians²¹. Although the *lex Canuleia* abolished this prohibition in 445 BC, class differentiation remained a significant determinant in the prohibition of marriages by members of the senatorial order to freed persons or persons who led dishonourable lives or were descended from parent(s) who were perceived to lead or to have led dishonourable lives.

2.1 Augustus' marriage legislation

The regulation on suitable marriage partners for the senatorial order originated in the various marriage laws that formed part of the Augustan endeavour to intervene in the general moral decline in Rome and the decline in population numbers. The *lex Iulia de maritandis ordinibus* was promulgated in 18 BC and was succeeded by and included in the *lex Papia Poppaea* in AD 9²². Verbatim quotations from these legislative prescripts are rare, but one of the few direct quotations occurs in D. 23.2.44*pr*²³. Interestingly, this text forbids marriages of senators' daughters as well as other descendants to unsuitable marriage partners, but only in the male line. A senator's grandchildren descending from his daughter are not included in the prohibition of marriages with people of inferior rank²⁴:

A Senator, or his son, or his grandson by his son, or his great-grandson by his son, or grandson, shall not knowingly or with malicious intent become betrothed to, or marry a freedwoman, or a woman whose father or mother practices, or has practiced the profession of an actor. Nor shall the daughter of a Senator, or a granddaughter by his son, or a great-granddaughter by his grandson marry a freedman, or a man whose father or mother practices, or has practiced the profession of an actor, whether they do so knowingly, or with malicious intent. Nor can any one of these parties knowingly, or with malicious intent become betrothed to, or marry the daughter of a Senator²⁵.

Unlike Modestinus in D. 23.2.42.1 and Paul in D. 23.2.16*pr.*, who explicitly state that such forbidden marriages would be void, Paul's text in D. 23.2.44*pr.* does not attach specific consequences to a marriage in contravention of this prohibition²⁶.

Also Ulpian in his *Regulae* 13.1 by implication refers only to a senator's children in the male line under this prohibition, but he, too, does not state what the outcome of such a prohibited marriage would be²⁷:

1. By the Lex Julia Senators, as well as their children, are forbidden to marry their freedwomen or any women when either they themselves, or their fathers or mothers were professional actors.

2. The same persons, and others who are freeborn, are forbidden to marry women who were public prostitutes, or procuresses, or any women manumitted by a procurer or a procuress; or one (who) had been taken in adultery or convicted of a crime, or who had belonged to the theatrical profession; and to these the Maurician Decree of the Senate adds a woman who has been convicted by the Senate.

In D. 23.2.44.6, Paul observes that the prohibition does not have an *ex post facto* effect on a marriage honourably contracted:

Paulus libro primo ad legem Iuliam et Papiam... 6. Si postea ingenuae uxoris pater materve artem ludicram facere coeperit, iniquissimum est dimittere eam debere, cum nuptiae honeste contractae sint et fortasse iam liberi procreati sint. ("If the father or mother of a freeborn woman, after the marriage of the latter, should begin to exercise the profession of the stage, it would be most unjust for the daughter to be repudiated by her husband, as the marriage was honourably contracted, and children may already have been born²⁸").

One should bear in mind that unlike the modern institution of marriage, the Roman marriage in pre-classical and classical law was a social fact with legal consequences, founded on the morality of the day. It was not a legal institution²⁹. At first, it was a private family affair, but it entered the public arena with the Augustan marriage legislation³⁰. It is only in the post-classical era, under the influence of Christianity it became a religious and juridical institution³¹.

2.2 Constantine's approach

Evans Grubbs points out that it is a fallacy that Constantine's marriage legislation³² of the fourth century generally reflects a noticeably Christian character. His legislation was rather informed by his dissatisfaction with the social order of his time. There was a so-called "status-confusion" in the time of Constantine. It has to be borne in mind that the *Constitutio Antoniniana* of AD 212 conferred citizenship on all inhabitants in the Empire. However, this Law did not equalise the status order and there remained a distinct status difference between the *honestiores* and the *humiliores*, a new class distinction that emerged in later Antiquity. Senatorial families, which formed part of the *honestiores*, held the highest status³³. During the third century, their power declined and they no longer played the primary role in government as they did in the past.

Constantine endeavoured to re-institute the Roman societal class structure of old and rebuild the traditional society. This is reflected in his attempts to revive the stature of the senatorial aristocracy and the stratification of Roman society³⁴. It is then not surprising that while most of the prohibitive laws under discussion fell into desuetude, or were abolished by Constantine, the prohibition on senatorial marriages remained on the law books. In fact, Constantine extended the class of women who were regarded to be unsuitable for such marriages³⁵. Moreover, he regarded the proscription as important enough to determine explicitly that persons of high rank would be visited with *infamia* should they treat their offspring born from undesirable unions as legitimate children³⁶; this was certainly not in the spirit of Christianity. Interestingly, Constantine's prohibition referred only to the marriages of men of rank, the office holders themselves, and did not extend to their descendants.

More than a century later, in AD 454, the Emperors Valentinianus and Marcianus yet again confirmed the prohibition on marriages between senators and other men of rank and so-called degraded women, to wit "a slave, a woman on the stage or daughter of a woman

on the stage, a female inn-keeper, or the daughter of an inn-keeper, of a procurer or of a gladiator, or a woman who publicly prostitutes her person for gain³⁷. This text does not explicitly state whether a marriage in breach of this prohibition would result in *infamia*, as in the case of Constantine's rescript, or would be void.

It appeared that the courts had difficulty with the interpretation of Constantine's constitution and that there was some uncertainty whether "degraded women" also included poor freeborn women. C. 5.5.7*pr.*-1 clarified this and determined that no freeborn woman should be regarded as "abject and degraded", irrespective of whether she was poor, and that senators and all persons of high rank were permitted to marry a poor freeborn woman. It stressed that freeborn women should not be differentiated on account of their wealth. In Nov. Marc. 4.1.3, it was pertinently decreed that "low and degraded women" were only those specifically enumerated in Constantine's law that prohibited senators and other men of rank to marry certain people. Significantly, it is stated in this decree: "We believe without any doubt that this is what Constantine ... meant in the sanction ... and therefore he prohibited such marriages, in order that not so much the marriages as the vices of these women whom we have just enumerated might not be connected with Senators³⁸." In other words, men of rank should not be tainted by the reputation of women who lived dishonourably or were descendants of parents who lived thus. The emphasis here is then on the status of the senatorial order rather than on the honourability of the institution of marriage. The notion of *honestas* is confirmed again in the *interpretatio*³⁹ to this law:

Hac lege permissum est, ut exceptis vilibus infamisque personis, quas lex ista commemorat, pauperes et sine ulla dignitate natalium, dummodo honestas et honestis parentibus procreatas, senatores, si voluerint, uxores eligendi et ducendi habeant potestatem. Quod et omnibus exemplo legis huius sine dubitatione permittitur. ("By this law it is permitted that with the exception of vile and infamous persons, whom this law mentions, Senators shall have the power to choose as wives and to marry women who are poor and without any high rank of birth status provided that such women are honourable and born of honourable parents. This practice without doubt is permitted to all persons, according to the precedent of this law.")

2.3 Later developments

It took a further century for Justinian's uncle, Emperor Justin, to relax this rule, under the influence of Christianity, by providing that the Emperor could be petitioned to allow such marriages under certain circumstances. This paved the way for Justinian to marry the infamous Theodora. According to this Law, also, the lives of the degraded women were characterised as dishonourable⁴⁰. It is noteworthy that this was not the first time that the injunction on certain classes of people as marriage partners was relaxed. According to Ulpius's comments on Book VI of the *lex Julia et Papia* in D.23.2.31, a senator could marry a freedwoman by the consent of the Emperor.

It is not surprising that, in line with the changing convictions of society, Justinian eventually abolished this rule completely⁴¹. Underlying the prohibition of marriages on social grounds, was the view that a person of rank was not allowed to marry a person who lived dishonourably (*inhoneste vivere*), or was related to such a person. In line with this reasoning, women who married before the termination of the *tempus lugendi/annus luctus* after their husbands' death, were not regarded as living dishonourably and their marriages were never regarded as void, but the widow was visited with infamy⁴². Further, from the fourth and fifth century, in line with the prevailing mores, the prohibition of marriages on social grounds was watered down to the extent that such marriages resulted not in invalidity but in property disadvantages and infamy⁴³.

2.4 The yardstick of the *materfamilias*

The perception that a man of higher rank (and here specifically a person of the senatorial order) should marry a woman of exceptional honourability, a characteristic feature lacking in all the degraded women that they were forbidden to marry, brings one to the obvious question: what were the characteristic features of the woman honourable enough to marry into the senatorial order? The answer would be a woman who could fulfil the role of a *materfamilias*.

The concept of a *materfamilias* evolved over time. The *materfamilias* was the mother of the family and wedded wife of the *paterfamilias*. Her position was associated with honour, dignity, modesty, prudence and chastity⁴⁴, all of which were informed by her behaviour⁴⁵. These attributes are highlighted in both literary and legal texts. The good wife's standard of honest living was characterised by features that were not present in the so-called "debased" women that the senatorial order were forbidden to marry.

Cicero narrowly defined "*materfamilias*" as a wife *in manu*, while other wives were merely *uxores*⁴⁶. The *in manu* marriage, however, was not popular in Cicero's time and had virtually disappeared by the time of Augustus. Nevertheless, in some literary texts *materfamilias* was used in a wider sense⁴⁷. Also the jurists started using *materfamilias* in a wider context, but the bottom line remained that marriage bestowed on her the position of *materfamilias* and then not necessarily an *existing* marriage. A text in point is D. 50.16.46.1, which also emphasises the honourability of the *materfamilias*⁴⁸:

De verborum significatione. Ulpianus libro 59 ad edictum pr. ...1. "Matrem familias" accipere debemus eam, quae non inhoneste vixit: matrem enim familias a ceteris feminis mores discernunt atque separant. Proinde nihil intererit, nupta sit an vidua, ingenua sit an libertina: nam neque nuptiae neque natales faciunt matrem familias, sed boni mores. (We ought to regard as "mother of a family" a woman who has not lived dishonourably; for her behaviour separates and distinguishes a mother of the family from other women. It will make no difference whether she is still married or a widow, freeborn or freed; for neither the state of being married nor birth makes a wife of a head of a household, but good morals.)

The notion of the honourability of the *materfamilias* also crops up in D. 43.30.3.6. This text relates to a praetorian interdict for the production of children in custody disputes upon divorce, and the regulation of temporary custody⁴⁹ pending the hearing of the case.

The text states that under certain circumstances the child should be left in the care of the mother of the family. Ulpian then observes that “[t]he mother of a family is understood to be a woman of acknowledged good repute”⁵⁰.

It appears that, for women, the *materfamilias* became the accepted standard of living honourably⁵¹. This is, for example, evident from D. 23.2.41.1:

Et si qua se in concubinato alterius quam patroni tradidisset, matris familias honestatem non habuisse dico. (And if a woman should live in concubinage with someone other than her patron, I say that she does not possess the virtue of the mother of a family.)

Importantly, the designation “*materfamilias*” refers to the married woman in a private context of husband and household. In the public sphere she was referred to as “*matrona*”⁵².

The *stola*, a long robe worn in public, was distinctive of the honour of the *materfamilias* or *matrona*⁵³. In the *Thesaurus linguae Latinae*⁵⁴ it is referred to as the woman’s robe of honour. Festus defines, “*matronas*” as follows: *matronas appellabant eas fere, quibus stolas habendi ius erat*⁵⁵. This also resounds in D. 47.10.15.15:

Si quis virgines appellasset, si tamen ancillari veste vestitas, minus peccare videtur: multo minus, si meretricia veste feminae, non matrum familiarum vestitae fuissentiarum si igitur non matronali habitu femina fuerit et quis eam appellavit vel ei comitem abduxit, iniuriarum tenetur. (If anyone should speak to young girls who are attired in the garments of slaves, he will be considered to be guilty of a minor offence; and still less, if they are dressed as prostitutes, and not as respectable women. Therefore, if a woman is not dressed as a respectable matron, anyone who speaks to her or takes away her female attendant will not be liable to the action for injury.)

The delict of *iniuria* that encompasses *contumelia*, or insult, is illustrated in D. 47.10.1.2 with, among others, reference to the honour of the married woman:

Omnemque iniuriam aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere: in corpus fit, cum quis pulsatur: ad dignitatem, cum comes matronae abducitur: ad infamiam, cum pudicitia adtemptatur. (Every injury is inflicted on the body or relates to dignity or reputation. It pertains to the body when someone is struck; it pertains to dignity when a matron’s companion is abducted; and to reputation when an attempt is made upon a person’s chastity.)

Importantly, though, an *iniuria* relates not only to abduction of a companion, but manifests itself also when a person is accosted or followed. In this regard Ulpian remarks in D. 47.10.15.19:

Tenetur hoc edicto non tantum qui comitem abduxit, verum etiam si quis eorum quem appellavisset adsectatusve est ...

Inst. 4.4.1 elaborates and explains that an injury is committed also where anyone has followed a married woman, a boy, or girl, or generally when the modesty of someone has been infringed⁵⁶.

However, it appears that while the abduction of a matron’s companion itself amounts to *iniuria*, the other instances above have to be against the *boni mores* to constitute an *iniuria*⁵⁷.

In late Antiquity, Constantine held the honour of the matron in such high esteem that he decreed that if a person attempted to drag a *materfamilias*, residing in her home, into public for an outstanding debt, his action should be visited with capital punishment "or he shall be done to death with exquisite tortures"⁵⁸.

3. Conclusion

Hanbury⁵⁹ once noted that the "morality of the pagan Ulpian" as expressed in the "three lofty precepts" of the *praecepta iuris* is of a "more durable material than is commonly supposed". Although the *praecepta iuris* are merely foundational ethical principles or morals, distinct from legal rules and the *regulae iuris* that appear in D. 50.17, these precepts have played no small role in the shaping of Roman law. Despite the fact that some scholars maintain that the *praecepta* had no significant impact on the writings of the classical jurists, there are clear indications that the precept of *honeste vivere* had a bearing on the development of certain aspects of marriage law.

The institution of marriage developed over the centuries along with the changing mores of Roman society. Whereas initially marriage was merely a private family affair, it entered the public domain with Augustus' legislation. In the post-classical era, under the influence of Christianity, it became a religious and juridical institution, but it was not Christianity that underscored the importance of *honeste vivere* in its development. The notion of *honestas* is a recurring theme in the texts of the classical jurists relating to the regulation of marriages in this regard and the *materfamilias* became the yardstick of the ideal woman and the essence of female honourability. Throughout its history, Roman society was conscious of status. Dictated by public policy and in line with the ethos of class-consciousness, the prevailing perception of the inequality of different classes of people informed the prohibition on marriages of men of rank to women who led what was perceived at the time to be dishonourable lives.

It should be borne in mind, though, that in this contribution we explored but one theme in which the jural postulate of *honeste vivere* impacted on the development of Roman law of marriage as expounded by the classical jurists. There are also other instances, not related to the choice of a marriage partner, where the concept of *honestas* comes to the fore in relation to marriage, more specifically to the institution itself. The texts relating to the prohibition of donations between spouses are particularly significant for their moralising undertone, one that focuses on the ethical principle that the purity of marriage should be preserved⁶⁰. Other texts in this vein deal with the *dos*⁶¹ and verbal contracts⁶².

It is likely that further investigation will yield more examples of the influence of the *praecepta iuris* on the writings of the classical jurists, supporting the premise that these foundational principles indeed formed the foundation of legal reasoning in Roman law.

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- ¹ See, generally, Duard Kleyn and Gardiol van Niekerk "Ulpian's *praecepta iuris* and their role in South African law Part 1: Historical context" in *Meditationes de iure et Historia. Essays in Honour of Laurens Winkel* (2014) 20(1) *Fundamina Editio Specialis* 437-445.
- ² *Justitia est constans et pertua voluntas ius suum cuique tribuendi*. Ulpian's definition of *iustitia* appears also in Inst. 1.1.pr.
- ³ *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*. This notion of *praecepta iuris* is repeated in Inst. 1.1.3.
- ⁴ See, eg, Laurens Winkel "Die stoische oikeiosis-Lehre und Ulpian's Definition der Gerechtigkeit" (1988) 150 *ZSS(R)* 669-679 at 669-672; Ernst Levy "Natural law in Roman thought" in Wolfgang Kunkel & Max Kaser (eds.) *Ernst Levy: Gesammelte Schriften* vol. 1 (Köln, 1963) 1-19 at 5, 16; Fritz Schulz *History of Roman Legal Science* (Oxford, 1967) at 69-72; Ulrich Manthe "Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes I: Die Mathematisierung durch Phythagoras und Aristoteles" 1996 (113) *ZSS(R)* 1-32 at 1; Ulrich Manthe "Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes II: Stoische Würdichkeit und die *iuris praecepta* Ulpian's" 1997 (114) *ZSS(R)* 1-26 *passim*; D.H. van Zyl *Justice and Equity in Cicero. A Critical Evaluation in Contextual Perspective* (Pretoria, 1991) at 44, 198; and see the discussion in Kleyn & Van Niekerk (n. 1) 440-442.
- ⁵ Laurens Winkel "The role of general principles in Roman law" (1996) 2(1) *Fundamina* 103-120 at 104.
- ⁶ See Alan Watson's English translation of *The Digest of Justinian* vol. 1 (Philadelphia Penn, 1985).
- ⁷ J.A.C. Thomas *The Institutes of Justinian. Text Translation and Commentary* (Cape Town, 1975) at 3.
- ⁸ J.E. Spruit *et al. Corpus iuris civilis. Tekst en vertaling* vol. 2 ('s-Gravenhage, 1994) at 91; cf. A.C. Oltmans *De Instituten van Justinianus. Vertaling, tabellen en register* (Haarlem, 1967) at 5, who refers to it as "grondregels van het recht", bringing to mind the distinction between *praecepta* and *regulae iuris*.
- ⁹ T.C. Sandars *The Institutes of Justinian* (London, 1934) at 6.
- ¹⁰ Cf. Winkel (n. 5) at 104; J.B. Moyle *Imperatoris Justiniani institutionum* (Oxford, 1955) at 98-99; H.R. Hahlo & Ellison Kahn *The South African Legal System and its Background* (Cape Town, 1968) at 9; H.G. Hanbury "The realisation of Ulpian's *iuris praecepta*" 1958 *Acta Juridica* 200-202 at 202.
- ¹¹ D. 50.17.1: *Paulus libro 16 ad Plautium. Regula est, quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis rerum narratio traditur...* (A rule is something which briefly describes how a thing is. The law may not be derived from a rule, but rule must arise from the law as it is. By means of a rule, therefore, a brief description of things is handed down ...); cf., Peter Stein's "The Digest title, *De diversis regulis iuris antiqui*, and the general principles of law" in his *The Character and Influence of the Roman Civil Law: Historical Essays* (London, 1988) 53-72; Derek van der Merwe "Regulae iuris and the axiomatization of the law in the sixteenth and early seventeenth centuries" (1987) 3 *TSAR* 286-302; Laurens Winkel "A note on *regulae iuris* in Roman law and on Dworkin's distinction between rules and principles" in John W. Cairns & Olivia F. Robinson (eds.) *Critical Studies in Ancient Law, Comparative Law and Legal History* (Oxford, 2001) 413-418.
- ¹² Accordingly, the *praecepta iuris* are not justiciable: see Malte Diesselhorst "Die Gerechtigkeitsdefinition Ulpian's in D,1,10pr. und die Praecepta iuris nach D. 1,1,10,1 sowie ihre rezeption bei Leibniz und Kant" in Okko Beherens, Malte Diesselhorst & Wulf Eckart Vos (eds.) *Römisches Recht in der europäischen Tradition. Symposium aus Anlaß des 75. Geburtstages von Franz Wieacker* (Ebelsbach, 1985) 185-211 at 199.
- ¹³ See, eg, Diesselhorst (n. 12) at 195ff. It appears that Ernst Levy n. 4) at 16-19 in fact denies any influence of these *praecepta* on the "imposing system of the Roman law" (at 17); for a contrary

view, see Hanbury (n. 10) at 202 who notes that “we can detect an intense preoccupation, on the part of the Roman jurists, with the task of keeping the law as a whole from deviating too far from morality, as expressed in Ulpian’s three *juris praecepta*”.

¹⁴ Compare, eg, the inconsistency of “*alterum non laedere*” and D. 50.17.55: “No one is considered to commit a fraud who does what he has a right to do”; see, also, D. 39.3.1.1 where it is stated that a person would not have an action against his neighbour who had redirected water from his land, and so deprived him of its use. Likewise, according to D. 39.2.24.12, there is no action against a person who intercepts his neighbour’s water by digging a well on his own property; and see, generally, Ernst Levy “Natural law in the Roman period” (1949) 2 *Natural Law Institute Proceedings* 43-72 at 68.

¹⁵ See Ernst Levy “Natural law in the Roman period” (1949) 2 *Natural Law Institute Proceedings* 43-72 at 68.

¹⁶ See, eg, D. 4.4.16.4: “Pomponius also states with reference to the price in a case of purchase and sale, that the contracting parties are permitted to take advantage of one another in accordance with natural law”; and D.19.2.22.3: “The nature of sale and purchase allowed buying for less what is worth more and selling for more what is worth less, the reciprocal taking of advantage; this is also the rule in leases and hires”.

¹⁷ See C. Wollschläger “Das stoische Bereicherungsverbot in der römischen Rechtswissenschaft” in Behrens, Diesselhorst & Vos (n. 12) 41-88 at 49-50.

¹⁸ Gloss “*honeste*” ad D. 1.1.10.1.

¹⁹ D. 23.2.42.1: *Modestinus libro singulari de ritu nuptiarum ... Si senatoris filia neptis proneptis libertino vel qui artem ludicram exercuit cuiusve pater materve id fecerit, nupsit, nuptiae non erunt* (“If the daughter, granddaughter, or great-granddaughter of a Senator should marry a freedman, or a man who practices the profession of an actor, or whose father or mother did so, the marriage will be void.”); See, also, D. 23.2.16*pr.*, which states that the marriage of a senator’s daughter to a freedman is void and D. 21.2.23 on the prohibition for senators and their children to marry freedwomen; and *cf.*, Marcellus D. 23.2.32 and the generic text, Inst. 1.10.11. Marriages contracted in contravention of these prohibitions were in accordance with the *ius civile* initially not void but subject to restrictions in the law of succession. Such marriages were declared void during the reign of Marcus Aurelius (AD 161-180) and his elder son Commodus (AD 180-193), who became joint ruler in AD 177: see D. 23.2.16*pr.*: *Paulus libro 35 ad edictum pr. Oratione divi Marci cavetur, ut, si senatoris filia libertino nupsisset, nec nuptiae essent: quam et senatus consultum secutum est; cf.*, also, D. 23.1.16 and D. 24.1.3.1; also Kaser *Das römische Privatrecht* vol. I (Munich, 1971) at 319; Kaser *Das römische Privatrecht* vol. II (Munich, 1975) at 165 n. 28; Susan Treggiari *Roman Marriage* (Oxford, 1991) at 50; Judith Evans Grubbs *Law and Family in Late Antiquity* (Oxford, 1999) at 96, 261-263. See, also, J.A.C. Thomas *Textbook of Roman Law* (Oxford, 1990) at 422-423, Paul van Warmelo *’n Inleiding tot die Studie van die Romeinse Reg* (Kapaastad, 1971) at 69 par. 198, D.H. Van Zyl *Geskiedenis en Beginsels vand die Romeinse Privaatreg* (Durban, 1977) at 95 esp. n. 102 and W.W. Buckland *A Text-book of Roman Law from Augustus to Justinian* (Cambridge, 1963) at 105, all of whom note that such marriages were void, but neglect to mention that these marriages were explicitly declared void only in the time of Marcus Aurelius and Commodus.

²⁰ See Evans Grubbs (n. 19) at 62.

²¹ Table XI.1. In delict, eg., Table VIII.3 (... If a person breaks a bone of a freeman with hand or by club, he shall undergo a penalty of 300 asses; or of 150 asses, if of a slave) and Table VIII.14 (In the case of all other ... thieves caught in the act freemen shall be scourged and shall be adjudged as bondsmen to the person against whom the theft has been committed provided that they have done this by

daylight and have not defended themselves with a weapon; slaves caught in the act of theft ..., shall be whipped with scourges and shall be thrown from the rock ...") evidence the discrepancy in the treatment of slaves and freemen.

²² Thomas A.J. McGinn *Prostitution, Sexuality and the Law in Ancient Rome* (Oxford, 1998) at 71-84; Paul du Plessis *Borkowski's Textbook on Roman Law* (Oxford, 2010) at 121, 130; Treggiari (n. 19) at 60-80; Marita Carnelly "Laws on adultery: Comparing the historical development of South African common-law principles with those in English law" (2013) 19(2) *Fundamina* 185-211 at 188 M.R. Lefkowitz & MB Fant "Legal status in the Roman world" in *Women's Life in Greece and Rome* in pars. 120-123 available at

<http://www.stoa.org/diotima/anthology/wlgr/wlgr-romanlegal120.shtml#pass121> (accessed 16 Feb 2016); Judith Evans Grubbs *Women and the Law in the Roman Empire. A Sourcebook on Marriage, Divorce and Widowhood* (London, 2002) at 84-85; 148-154; 166-170.

²³ See Treggiari (n. 19) at 61-62.

²⁴ This is in contrast with Modestinus's text in D. 23.2.42.1 which makes no mention whether the affected descendants are in the male or female line. The fact that men took preference here should not really surprise, as Papinianus inferred in D. 1.5.9: *Papinianus libro 31 quaestionum In multis iuris nostri articulis deterior est condicio feminarum quam masculorum*. ("... There are many points in our law in which the condition of females is inferior to that of males"): cf., further, Evans Grubbs (n. 22) at xi and 72-73 for a discussion of the status of the individual members of a senatorial family.

²⁵ *Paulus libro primo ad legem Iuliam et Papiam. Lege Iulia ita cavetur: Qui senator est quive filius neposve ex filio proneposve ex filio nato cuius eorum est erit, ne quis eorum sponsam uxoremve sciens dolo malo habeto libertinam aut eam, quae ipsa cuiusve pater materve artem ludicram facit fecerit. Neve senatoris filia neptisve ex filio proneptisve ex nepote filio nato nata libertino eive qui ipse cuiusve pater materve artem ludicram facit fecerit, sponsa nuptave sciens dolo malo esto neve quis eorum dolo malo sciens sponsam uxoremve eam habeto*. And see, generally, D. 23.2.44.

²⁶ Likewise Ulp. D. 23.2.43 does not specifically mention of the consequences of a forbidden marriage.

²⁷ *De caelibate orbo et solitario patre. 1. Lege Iulia prohibentur uxores ducere senatores quidem liberique eorum libertinas et quae ipsae quarumve pater materve artem ludicram fecerit, item corpore quaestum facientem. 2. Ceteri autem ingenui prohibentur ducere lenam et a lenone lenamve manumissam et in adulterio deprehensam et iudicio publico damnatam et quae arte ludicram fecerit: adicit Mauricianus et a senatam damnatam*. (FIRA 2.28) McGinn (n. 22) at 91-92 points out that this text is "deeply flawed" and that its heading ("On the unmarried man, childless man, and unmarried man with children") in fact has no bearing on what follows in the actual text. And see D. 23.2.43 where Ulpian discusses the *lex Iulia et Papia*, expanding on the notion of prostitution and related matters, in (10) again mentioning the prohibition on senators to marry women of inferior rank (here specifically convicts); It appears from Ulp. *Reg.* 16.2, that the prohibition of marriages between freeborn and public women was founded on the needs of decency, rather than equality: see Blume's note to D. 5.4.23.

²⁸ This is confirmed in C. 5.4.28.

²⁹ D. 23.2.1; D. 25.2.1; D. 42.1.52; See Max Kaser I at 72-73, 310-311; Kaser/Wubbe *Romeins Privaatrecht* (Zwolle, 1967) at 278; Barry Nicholas *An Introduction to Roman Law* (London, 1962) at 80.

³⁰ Evans Grubbs (n. 19) 54.

³¹ This influence of Christianity clearly comes to the fore in imperial legislation. See, eg., C. 8.47.10pr.: ... *Cum enim tanta fragilitas est adoptionis, ut possit in ipso die et filius fieri et extraneus per emancipationem inveniri, quis patitur iura patris naturalis nexu divino copulata ludibrio defraudari, cum in hoc casu et*

contradicendi filio ex iure vetere datur licentia et invitus transire ad aliam familiam non cogitur; cf., also, Max Kaser II at 158-160. This influence is visible also in Justin's law in C. 5.4.23pr. ... Nam ita credimus dei benevolentiam et circa genus humanum nimiam clementiam quantum nostrae naturae possibile est imitari ...

³² Excluding perhaps the law of AD 331 that penalised unilateral divorce and the law of AD 320 abolishing the penalisation of unmarried and childless persons; see, Evans Grubbs (n. 19) at 317.

³³ The senatorial family included the senator, his wife, children and grand-children by their sons. Senators were regarded as *clarissimi* and their wives and daughters as *clarrissima femina*. See D. 50.16.100; D. 1.9.8.

³⁴ Evans Grubbs (n. 19) at 5-7, 21, 54ff, 317ff; and see 260-316; Evans Grubbs (n. 22) at 7-9.

³⁵ C.Th. 4.6.3.

³⁶ C. 5. 27.1 "We order that senators or persons of the rank of prefect (*perfectissimus*) ... shall be branded with infamy and lose the privileges of the Roman laws if they treat children born to them of a slave, daughter of a slave, freedwoman, daughter of a freedwoman, actress, daughter of an actress, mistress of a tavern, daughter of a tavern keeper, or a low and degraded woman, or the daughter of a panderer or gladiator or a woman who offered herself to public trade, as their legitimate children, either pursuant to their own declaration to that effect or pursuant to the privilege extended by our rescript ..." (a 336); C.Th. 4.6.3pr.

³⁷ C. 5.5.7.2; in Nov. Marc. 4.2 (tr. Clyde Pharr *The Theodosian Code and Novels and the Sirmondian Constitutions* (New York, 1959; 1969 repr.), Constantine's law in C. 5.27.1 is interpreted: "But that famous man [Constantine], who clearly loved the honourable and who was a most conscientious judge of morals, judged to be "low and degraded persons" and considered unworthy of marriage with Senators those women who were polluted with sordid blots, either on account of the stigma of degenerate birth or a life dedicated to shameful occupations and who were corrupted either by the disgrace of their birth status or by the obscenity of their profession. Therefore We remove all doubt that had been injected into the minds of certain persons, and all those regulations shall remain and endure perpetually with the strongest validity which were sanctioned in regard to the marriages of Senators by the constitution of Constantine...".

³⁸ *Humiles vero abiectasque personas eas tantummodo mulieres esse censemus, quas enumeratas et specialiter expressas copulari matrimoniis senatorum lex praedicta non passa est ... Quod quidem haud dubie credimus ipsum divae memoriae Constantinum in ea, quam promulgavit, sanctione sensisse ideoque huius modi inhibuisse nuptias, ne senatoribus harum feminarum, quas nunc enumeravimus, non tam connubia quam vitia iungerentur.*

³⁹ The interpretations were precises of the constitutiones collated in the Theodosian Code, often containing additional remarks and sources. They are preserved in the *lex Romana Visigothorum*: see Adolf Berger *Encyclopedic Dictionary of Roman Law* (New Jersey, 2004) sv "interpretationes ad Codicem Theodosianum").

⁴⁰ C. 5.4.23.1: Blume's Annotated Codex: "...we grant them by this beneficent imperial sanction the right that, if they abandon their dishonorable conduct, and embrace a better and honorable mode of life, they may supplicate our majesty, and they will unhesitatingly be granted an imperial rescript permitting them to enter into a legal marriage. 1a. Persons who marry them need not fear that such alliance will be invalid under the provisions of our former laws, but may be confident that such matrimony shall be as valid as if their wives had not previously lived any dishonorable life, whether the husbands possess a title or are otherwise forbidden to marry women that have been on the stage, provided that such alliance must be proven by marriage documents, and not otherwise. 1b.

Such women shall be entirely cleansed of all stain as if they had been returned to their natal condition. No dishonor shall adhere to them, and we want no difference to exist between them and those who have not sinned in a similar manner." (a 520-523) See, further, C. 5.4.23.5-6.

⁴¹ See Nov. 117.6: "... We do not, however, want to keep in force the law of Constantine [C. 5.27.1] and the interpretation thereof made by Marcian [C. 5.5.7.2; Nov. Marc. 4] ... by which marriages of women, whom the Constantinian law calls abject, with men decorated with dignities are prohibited, but we give the right to those that wish, though decorated with one of the greater dignities, to enter into a marriage with these women by the execution of marriage documents. Others not decorated with one of the greater dignities shall have the right to marry such women either by the execution of documents or simply through conjugal affection, provided the women are free and such with whom they may (otherwise) contract marriages." (Blume); see, also, C. 5.4.29.6, Nov. 78.3, C. 1.4.33.2. *Cf.*, further, Paul du Plessis (n. 22) at 454; M. Kaser/F.B.J. Wubbe *Romeins Privaatrecht* (Zwolle, 1967) at 280.

⁴² C. 5.9.2.

⁴³ Kaser II at 167 esp. n 28.

⁴⁴ Kaser I at 59; Treggiari (n. 19) at 34; Evans Grubbs (n. 22) at 19-20; McGinn (n. 22) at 153; Annelize Jacobs "*Maritus v Mulier: The double picture in adultery laws from Romulus to Augustus*" (2015) 21(2) *Fundamina* 276-288 at 286.

⁴⁵ See, eg, D. 3.1.1.5: the reason for prohibiting a woman to act in law suits on another's behalf was that it would compromise "the modesty suitable for her sex"; *cf.*, also, C. 2.12.21; D. 26.10.1.7.

⁴⁶ *Top. 14: Genus enim est uxor; eius duae formae: una matrumfamilias, eae sunt, quae in manum convenerunt; altera earum, quae tantum modo uxores habentur.; cf.*, Treggiari (n. 19) at 28. See also Aul. Gell. 18.6.9: "... unde ipsum quoque "matrimonium" dicitur, matrem autem familias appellatam esse eam solam, quae in mariti manu mancipioque aut in eius, in cuius maritus, manu mancipioque esset, quoniam non in matrimonium tantum, sed in familiam quoque mariti et in sui heredis locum venisset.

⁴⁷ Treggiari (n. 19) at 34-35, 279. Treggiari points out at 34, eg., that in Plautus's *Stichus* (Pl. St. 98.), the concept of *materfamilias* had a wider meaning embracing also honourable wives who were not in *manu*. And see McGinn (n. 22) at 150-152.

⁴⁸ See, also, D. 48.5.11*pr.*

⁴⁹ See Thomas A.J. McGinn "Communication and the capability problem in Roman Law: Aulus Gellius as iudex and the jurists on child-custody" (2010) LVII *Revue Internationale des droits de l'Antiquité* 265-298 at 280-281. According to D. 43.30.1.3: Should a mother have a superior claim to custody, it would counter the father's claim.

⁵⁰ ... *Cum audis matrem familias, accipe notae auctoritatis feminam.*

⁵¹ *Cf.*, also, McGinn (n. 22) at 156; Evans Grubbs (n. 19) at 19-20; Jane F. Gardner *Family and Familia in Roman Law and Life* (Oxford, 1998) 209.

⁵² *Cf.*, McGinn (n. 22) at 150.

⁵³ See D. 34.2.23.2 for Ulpian's famous discussion of appropriate clothing relating to status, age and gender. McGinn (n. 22) at 154-155, notes that Ovid frequently refers to the matron's attire in light of probable liability under the *lex Iulia* (see Ovid's *Ars Amatoria* I.31-34); and, interestingly that the fallen adulterous *materfamilias* had to relinquish her *stola* and was forced to wear the prostitute's *toga*.

⁵⁴ Available at

https://books.google.co.za/books?id=rzLAAAACAAJ&dq=thesaurus+lingua+latinae&source=gbs_navlinks_s_ (accessed 5 Feb. 2016) *sv* "stola".

⁵⁵See Festus *De verborum significatione quae supersunt cum Pauli epitome* (Toronto, 1839) sv "matronas"; see, also, *FIRA* 3.51: *Aureliae Isidorae quae et Priscae, mecum iuveni uxori (matronae stolatae, quae bene et) convenienter in communi vita se gessit ...*

⁵⁶See, also, G. 3.220.

⁵⁷See D. 47.10.15.23; further, D. 47.10.15.16-19; *cf.*, also, Zimmermann Reinhard *The Law of Obligations. Roman Foundations of the Civilian tradition* (Cape Town, 1990) at 1054-1055.

⁵⁸C.Th. 1.22.1: ... *vel exquisitis potius exitiis supplicisque plectatur.*

⁵⁹(n. 10) at 200.

⁶⁰See, in general, D. 24.1 and C. 5.16, esp. D. 24.1.3*pr.*; D. 24.1.32.13; D. 24.1.51; see, also, D. 39.5.31*pr.*

⁶¹See, eg, D. 24.3.20.

⁶²See D. 45.1.134*pr.* It was conventional in Roman law to subject a stipulation to a penalty clause in order to force the debtor to perform and to facilitate proof of damages in the case of non-performance. In fact, Justinian recommended this practice. However, in terms of this text, on the facts and in accordance with good morals, it is clear that to subject the stipulation to a penalty clause dishonours the institution of marriage. Therefore "proceedings could not be instituted under the stipulation, an exception on the ground of bad faith might be pleaded against the party bringing the suit".