Double Standards
in the Ancient and Medieval World

Edited by Karla Pollmann
Double Standards within the Legal Profession?

In speaking of the profession of the Jurists one needs to be careful not to pass too quick a judgement about double standards within this circle. Since language is the essence of jurisprudence I define "double standards" for my present purpose as the conflict between the explicit explanation of a legal decision and the implicit justification of that reasoning: instead of presenting the ‘real’ reason for his decision the lawyer veils it under an artificial one (or – in a worse case – the lawyer is a prisoner of his prejudices and does not even realize the discrepancy). A striking example would be a different treatment of classes, sexes or political groups when the cases in question are more or less the same.

However, even though such discrepancies occur quite often in legal decisions they are seldom an emanation of double standards in the said – negative – meaning. This statement, at first sight contradictory, becomes explicable if one takes into account that the language of the Jurists is a professional language (Fachsprache): as such it deviates from ordinary or common language (Umgangssprache) to a considerable extent even if the words used are not completely unknown to the general public. This phenomenon may be confusing, but it is necessary and has manifest advantages,¹ for otherwise the professional language would be diluted by the multiplicity of meanings and connotations of the words and terms of the common language and would thereby lose its necessary precision. In order to preserve this precision it is reasonable that the lawyers generally do not mention the emotional background of the respective cases they are dealing with, not unlike the doctors in a hospital who are – at first sight: callously – talking about "the lung" or "the stroke" in room 605. Things like that are a legitimate protection of one's own emotions and a necessary means of keeping the distance which is indispensable for any objective judgement.

Therefore, one has to look very carefully at each decision and its reasoning before one is in the position to declare it the manifestation of a double standard. The interpretation of the following case shows how much care is needed; since this case – taken from Justinian’s Digesta – leads the reader into an area which seems to be

¹ Gipper, see also Posner 309-320.
particularly liable to the application of a double standard, at least on a superficial glance to the realities involved: *Digesta* 36,1,26 pr., Julian 39 dig.:

*Quidam iia testamento scripserat: 'a te, heres, peto fideique tuae committio, ut quidquid ex hereditate mea ad te pervenerit, filio meo prima quaque die aut, si prius quid ei acciderit, matri eius des reddas'. quaeritur, cum ante quem adeatur hereditas puer decesserit, an fideicommissum matri debeatur. respondi, si puer, ante quem dies fideicommissi cedat, decessisset, fideicommissum translatum esse ad matrem, postea autem quam dies fideicommissi cessit si decesserit, ad heredem pueri fideicommissum pertinere. sed an ea voluntas fuit patris familias, ut, si ante restitutum fideicommissum puer decessisset, matri potius quam hereditibus praestaretur, praetor astitibil ex persona matris et ex persona heredis pueri. MARCELLUS: sed testatoris voluntati congruam est, quandocunque puer decesserit, sive ante quem dies fideicommissi cedit sive postea, ad matrem transferri fideicommissum, si non iam puer hoc acceperit, eoque iure utimur."

("A testator had written thus: "I demand of you, my heir, and I commit it to your faith that you give and restore whatever shall come to you from my inheritance, as soon as and whenever you receive it to my son or, should anything before then befall him, to his mother." The boy had died before the inheritance had been accepted, and the question was whether the *fideicommissum* was due to the mother. I replied that if the boy had died before the *fideicommissum* vested, the *fideicommissum* was transferred to the mother; if, on the other hand, he died after the *fideicommissum* vested, the *fideicommissum* belongs to the heir of the boy. The praetor will decide, however, upon consideration of the mother’s person and the one of the boy’s heir, whether it were the intention of the *pater familias* that if the son should die before the *fideicommissum* had been restored, it should go to his mother rather than to his heir. MARCELLUS: But it accords with the testator’s intention that the *fideicommissum* should pass to the mother whenever the boy died, whether before the *fideicommissum* vested or afterward, if the boy has not received it already, and this is how we decide in practice").

What has happened? A testator has set up his will and – in compliance with the Roman law of testamentary succession – has installed someone as his heir (for a few more details about this person see below). This person is asked to transfer the complete estate to his son by means of a trust (*fideicommissum*)\(^3\); in case something

\(^2\) See for the following esp. Paulus (1992) 270-276.

\(^3\) For this legal institution see, in general, Johnston.
happens to the latter, he institutes his son’s mother as substitute heir. This is the ruling of the will, which reflects a quite widespread form of testation in those days: the heir is under such circumstances not much more than a transitory administrator. The facts are that the son does indeed die at an unspecified time, but seemingly before the heir accepts (adire) the heritage. This date – which is technically called the *dies cedens* – is obviously meant when the testator writes *prima quaque die*. This is the context in which the jurist Julian is asked whether or not the trust is to be given to the mother.

This question is astonishing, at least from a dogmatic point of view. Since the answer seemed at the times of Julian (that is, the first half of the second century AD) to be settled for more than one hundred years. Labeo and Iavoletus – and very likely even before them the Republican jurist Ofilius as well – had known and acknowledged the rule\(^5\) that this question is to be answered with respect to the *dies cedens*: if the beneficiary dies before this date, the bequest goes to the substitute heir; if thereafter, to his or her heirs. It is exactly that rule which Julian refers to in the first part of his answer.

Nevertheless, he deemed the case and the question important enough to include it in his written commentary on the digestes. This makes one wonder if there are some specific peculiarities in such a case which justify an exceptional treatment and therefore its inclusion in this book. This assumption is all the more likely since the statement of his contemporary Marcellus, *eoque iure utimur*, indicates that such a case was not unique. Thus we are forced to clothe the sober reasoning of the jurists with the flesh of the factual background; this appears to be the only way one can hope to find a hint of why the jurists deemed it necessary to depart from the general rule.

What we are told about the facts in this case is not much: a father wants his son to receive the estate; if the son dies, he wishes the son’s mother to get it. In addition, we get some more information through the legal way on which the father tries to reach his goal. I therefore suppose that the formulation of the testamentary clause is deliberately and carefully chosen and not just a standard formula taken over from some advisory book. Accepting this premise we can observe at least four peculiarities of the factual situation: (1) the father does not install his son as heir but rather as the beneficiary of the trust; (2) the son has obviously not been disinherited and

---


\(^5\) See *Digesta* 35,1,40,2.
does not get a bequest; (3) the mother is signified as "his mother" rather than "my wife"; (4) and finally the mother is obviously not the legitimate heir of her son – otherwise the question would not arise but the mother would be both: substitute and heir.

This information is like the pieces of a puzzle that we now have to set together in the correct order. The first point is astonishing, since Roman law intends the heirship as a means for transferring the complete estate – especially when the recipient is the testator’s child. The second point is striking since a will is void if the testator’s children are not explicitly disinherited right at the beginning of the document. The third point – the *mater eius* – needs not necessarily be a peculiarity; she could be the testator’s former wife or his concubine or lover. But in combination with the former points and the fourth a scenario emerges which must be known in any slaveholder society: namely, that the father is bequeathing his – natural – son (*spurius*) who is the offspring of the father’s former slave!⁶

This explains firstly why the son is not installed as heir – he is an *extraneus*. In Roman law (as in many modern laws until recently) there was neither an agnostic nor a cognatic relationship between a father and his extra-marital child. To be sure, this fact alone would not have prevented the father’s putting his son in his will as an heir. Quite the contrary – the idea behind the Roman invention of the will is that one could install as heir whomever one wanted to.⁷ If, however, the father in our will did not do so even though he wanted the whole estate to be transferred to his son, we are bound to conclude that there were legal obstacles for such a direct approach. Obviously, the father was for one reason or the other forced to go the more complicated way of a trust.

*Fideicommissa*, ever since they had been accepted by Augustus as legally binding, were a means to circumvent the boundaries of freedom of testation. But the initially broad possibilities of this institution were gradually narrowed. Nevertheless, we know from Julian’s time that the so called *Latini Iuniani* were prohibited by a certain *lex Iunia* from receiving estates or legacies, the only exception being through

---

⁶ See, for example, the will of C. Longinus Castor, *Fontes Iuris Romani Anetiusciniani* III 148 – especially with the explanation of the substitution in this will given by Watson 55-63. Additionally, see Vayne 64-65; 77-78.

⁷ For some corrections of this freedom in the first century BC see Paulus (1995).
This is pretty much the only difference at that time between testation according to *ius civile* and the law of trusts. Therefore, we might assume that our testator’s son was in fact a *Latinus Junianus*.

In order to understand what kind of legal status this is we have to look back at the said *lex Junia* and its background. It was probably promulgated in 19 AD and stated that freedmen would not receive full citizenship if they were freed in a way which was protected by the praetor but not acknowledged by *ius civile*. From Gaius we learn that the probably most typical manumission of this kind was the one *inter amicos*, for example, on the occasion of a banquet. Therefore, we have to do here in one way or another with slavery. The most likely interpretation of our case, therefore, is that the son’s mother was a slave of the testator and was freed by him *inter amicos* before the son was born. She then became a *Latina Juniana*. And since her son was not legally related to his natural father he followed his mother in his civil status.

The result we have reached so far is that our testator had one of his slaves as his lover. When she became pregnant he freed her in the informal way so that she had the status of a *Latina Juniana* when her son was born. In status the son followed his mother, but the father very likely cared for him and her. This might be concluded from his will, since a natural father had no legal obligation whatsoever to care for the maintenance of his offspring out of wedlock. Nevertheless, in our case he wants all his fortune to be transferred to his son or that son’s mother respectively. If this result should appear to be too strongly construed we can go even further and substantiate our evidence by looking at the aforementioned fourth peculiarity of the case – namely the succession after the son’s death. If a *spurius* dies, he is usually succeeded by his mother or a brother. But there is an exception to this general rule that is to be applied precisely in the case of *Latini Juniani*. Since they lack the legal capacity to make a valid and enforceable will, their estate – like a *peculium* – necessarily reverts to his or her patron. But a *Senatus Consultum Larginianum* pro-

---

8 Gaius, *Institutiones* 2,275: *Latini quoque, qui hereditates legataque directo iure lege Junia capere prohibentur, ex fideicommissio capere possunt* ("The Latini who are prohibited by the Iunian Law to receive inheritances and bequests directly might receive them through a trust").

9 *Institutiones* 1,41.

10 See also, e.g., Bradley, 154-173.

11 If he was born before the liberation of his mother he would have been a slave, too, and had himself to be freed by his master.

12 Gaius, *Institutiones* 1,79.

13 *Digesta* 38,8,2; 38,8,4; 38,8,8; 35,2,63pr.

vided that if this person should be already dead when the *Latinus lunianus* dies the estate of the *Latinus lunianus* should go to the patron’s heir. Thus, in such a case we have a split between the legitimate heir and the testate heir – between the *tu* in Julian’s case and the son’s mother. Therefore, the real question which the jurist had to answer was whether the estate is to fall to the mother or whether it should remain with the heir: accordingly our text states just *an fideicommissum matri debeatur* and nothing else like *an heredibus filii*.

Once again the answer is easy, seen from a dogmatic perspective: here everything depends on the *dies cedens*, the date on which the heir accepts the heirship. If the beneficiary of the trust dies before this date the substitute is to succeed; otherwise the beneficiary’s heir. And yet Julian decides that there might be an exception to this rule if the praetor, by taking into account the individual circumstances of the mother and of the heir, comes to the conclusion that the estate should go to the mother. We may possibly assume that the magistrate in making this judgement takes into account (for example) whether or not there was still a relationship between the testator and the freed slave, and whether or not he wanted to care for her maintenance through his will, for a *spurius* and his mother were mutually obliged to maintain each other.\(^\text{16}\) Marcellus goes even further by formulating a new rule – namely, that in such cases the decisive turning point is not the *dies cedens* but the date of the handing over of the estate to the beneficiary.

Both jurists try to help the mother. Thereby they make clear that they recognize the underlying facts and that they acknowledge the special relationship (or even: the love) between patron and freedwoman. And yet they do not say a word about this emotional background even though it is important enough for them to deviate from a given rule. A few decades later the eminent, prolific, and prominent jurist Ulpian turns the wheel back again and applies the general rule to our case at hand.\(^\text{17}\) And he, too, does not give the slightest hint as to the social and psychological facts behind the case.

What are we to conclude from such a silence? Seen from a modern perspective, the case is extremely interesting. It takes place on at least two borderlines: the first between social classes and the second between genders. Whereas Ulpian sticks to these lines with his strict dogmatic decision, Julian and Marcellus shift it to the

\(^{15}\) Gaius, *Institutiones* 3,63.

\(^{16}\) *Digesta* 25,3,5,4.

\(^{17}\) *Digesta* 34,4,3,2.
benefit of both – the lower class member and the other gender. Does any of these decisions have to do with double standard or with two moralities?

If I take my initial definition of a conflict between explicit explanation and implicit justification, the answer will be: yes. But this positive answer should be free of any modern negative connotations for several reasons. As a first step we could refer to the peculiarities of a professional language (see above) and assume that jurists do not need to refer to such details for technical reasons – whether because they know the facts anyway or because they purposely omit them for the sake of purity of argument. But even though this answer is very likely correct we might have to go one step further. The Romans were in general quite reluctant in expressing their emotions of love and affection\(^\text{18}\) and this might be especially true if the recipient of these feelings was a former slave. Everyone was familiar with this kind of relationship; Artemidorus informs us in his work on dream interpretation (oneir. 3,30) about the relevant dreams: drinking from a wash-basin indicates making love to a slave, and if you see yourself mirrored in this basin it means that you get a child from her.

Nevertheless, it would be ahistorical to blame (with its negative connotations) such a silence or reluctance as a double standard let alone as "doppelte Moral" – it is rather a simple habit or common usage. People live in their time and in their society and the Romans therefore took slavery with all its concomitants as a worldwide given and unalterable fact. It was just done that masters and mistresses had intercourse with their slaves. Therefore there was no reason to speak about it or – to put it a bit more sharply: one does not talk about what is already understood.\(^\text{19}\) A double standard of morals comes into existence only if such a habit is not just passed over in silence but if it becomes denied or at least veiled – in other words, if the deeds are treated or explained as something different from what they really are.

We thus have to question whether or not the above-mentioned jurists use such a tactic by passing over the real reason for their decisions. The answer is easily given in the case of Ulpian: he applies the general and centuries-old rule – no matter whether the factual background would apply to a female or a male in any situation. There is no duplicity. But is there any in the decisions of Julian and Marcellus? The latter formulates the general rule to the advantage of the mother, whereas the other

\(^{18}\) Veyne 14-17 (filial love), 40-42 (marital love).

\(^{19}\) Cf. the fundamental remarks in Daube 1277-1285. However, Musonius criticised intercourse with slaves, cf. the contribution by Nussbaum in this volume.
makes the result dependent on a case to case basis. This means that, if at all, they apply a second standard or a second morality only with the purpose of bridging the difference between the classes and the genders. To put this under the heading ‘double standard’ is – in my opinion – not justified.

Bibliography

BRADLEY, K.R.: *Slavery and Society at Rome* (Cambridge 1994)


