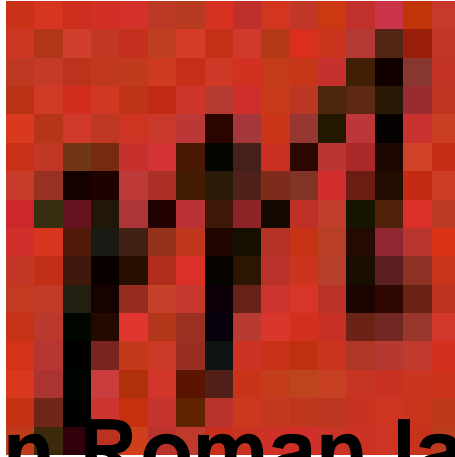


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XXIII.21 On Roman laws on the propagation of the species

- The Spirit of Law - Book XXIII. On laws in their relation to the number of inhabitants -

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The old laws of Rome tried hard to persuade citizens to marry. The senate and the people often made statutes about it, as Augustus says in his oration reported by Dio. [1]

Dionysius of Halicarnassus [2] cannot believe that after the death of three hundred five Fabii slaughtered by the Veientes, only a single child of that lineage remained, because the ancient law, which ordered every citizen to marry and raise all his children, was still in effect. [3]

Independently of the laws, the censors kept an eye on marriages, and according to the needs of the republic they promoted marriage [4] both by shame and by penalties.

Morals which were beginning to be corrupt contributed greatly to dissuading citizens from marriage, which has only troubles for those who have lost any sense of the pleasures of innocence. That is the spirit of the oration that Metellus Numidicus delivered to the people during his censorship. "If it were possible to have no wife, we would deliver ourselves of this evil ; but as nature has ordained that one can hardly live happily with them or subsist without them, we must pay more attention to our preservation than to passing satisfactions." [5]

The corruption of morals destroyed censorship, itself established to destroy the corruption of morals ; but when that corruption becomes generalized, censorship has no more force. [6]

Civil disputes, the triumvirates, and proscriptions weakened Rome more than any war she had yet waged ; there were few citizens remaining, and most were unmarried. To remedy this last dilemma, Cæsar and Augustus re-established the censorship, and even wanted [7] to be censors. They made various statutes : Cæsar recompensed those who had many children [8] ; he prohibited women under forty-five who had neither husbands nor children from wearing jewelry and using litters [9] : an excellent method for attacking celibacy through vanity. The laws of Augustus were more urgent [10] : he imposed additional penalties on the unmarried, and increased the recompenses for those who were married and those who had children. [11] Tacitus calls these laws Julian [12] ; there is reason to believe they had included in them the old rules made by the senate, the people, and the censors.

The law of Augustus encountered a thousand obstacles, and thirty-four years [13] after it was made the Roman knights asked him to revoke it. He had those who were married stand to one side, and to the other those who were unmarried : the latter seemed to be more numerous, which surprised the citizens and confounded them. Augustus, with the gravity of the former censors, addressed them as follows :

While diseases and wars take so many citizens from us, what will become of the city if we do not contract more marriages ? The state does not consist of houses, porticos, and public squares : it is men who make the state. You will not see, as in the fables, men arising from beneath the earth to look after your affairs. It is not in order to live alone that you remain celibate : each of you has ladies to grace his table and his bed, and you seek only peace in your dissoluteness. Will you cite here the example of the vestal virgins ? Then if you did not respect the laws of modesty, we would have to punish you, like them. You are equally bad citizens, whether everyone imitates your example or no one does. My sole objective is the permanence of the republic. I have increased the penalties of those who have not obeyed ; and as for recompenses, they are such that I doubt virtue ever had greater ones : there are lesser ones that incite a thousand men to risk their lives, and would these not persuade you to take a wife and feed children ? [14]

He made the law which was named Julia after him, [15] and Papia Poppæa from the names of the consuls for part of that year. [16] The extent of the dilemma appeared in their very election : Dio tells us that they were not married, and had no children. [17]

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This law of Augustus was properly a code of laws and a systematic corpus of all the statutes that could be made on this subject. The Julian laws were incorporated into it [18] and given greater force : they have so many purposes and such broad influence that they constitute the finest part of the Romans' civil laws.

Their scattered pieces can be found in Ulpian's precious fragments, [19] in the laws of the digest drawn from the authors who have written on the Papian laws, in the historians and other authors who have cited them, in the Theodosian code that abrogated them, and in the Church fathers who have censured them, with praiseworthy zeal, no doubt, for things of the afterlife, but with very little understanding of the affairs of this one.

These laws had several headings, and we know thirty-five of them. [20] But getting to my subject as directly as I can, I shall begin with the heading which Aulus Gellius [21] identifies as the seventh, and which regards the honors and recompenses granted by that law.

The Romans, most of whom came from Latin cities which were Lacedæmonian colonies, [22] and who had even taken part of their laws from those cities, [23] had, like the Lacedæmonians, that respect for old age that grants all kinds of honors and precedence. When the republic was short of citizens, the prerogatives that had been given to age were granted to marriage and to the number of children [24] ; some were attached to marriage alone, independently of the children it could produce : this was called the right of husbands. Others were granted to those who had children, and greater ones to those who had three children. These three things must not be confused. Some were privileges which married people always enjoyed, as for example a particular seat in the theatre, [25] and there were some which they enjoyed only when people who had children, or who had more than they did, did not get them first.

These privileges were very extensive. Married persons who had the most children were always preferred, [26] either in the pursuit of honors or in the exercise of those same honors. The consul who had the most children was the first to take the fasces [27] ; he had the choice of provinces. [28] The senator who had the most children was the first inscribed in the catalogue of senators ; he was first to state his opinion in the senate. [29] One could accede to magistracies before the prescribed age, because each child brought a year's dispensation. [30] To have three children in Rome was to be exempt from all personal charges. [31] Freeborn women who had three children, and freed women who had four, were released [32] from that perpetual tutelage in which [33] the ancient laws of Rome held them.

If there were rewards, there were also penalties. [34] The unmarried could receive nothing from the testament of a non-relative, [35] and those who, being married, had no children, received only half. [36] The Romans, says Plutarch, married to be heirs, and not to have heirs. [37]

The advantages which a husband and wife could give each other by testament were limited by law. They could leave each other everything if they had children by each other [38] ; if they had none, they could, because of the marriage, receive the tenth part of the succession ; and if they had children from another marriage, they could leave each other as many tenths as they had children.

If a husband absented himself from his wife for any reason other than the affairs of the republic, he could not inherit from her. [39]

The law allowed a surviving husband or wife two years [40] to remarry, and one year and a half in the case of divorce. Fathers who were unwilling to marry their children off or to endow their daughters were forced to do so by the magistrates. [41]

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Betrothals were not allowed if the marriage was to be put off for more than two years [42] ; and as one could not marry a girl under twelve, one could not betroth her before ten : the law did not permit them to enjoy fruitlessly, and under pretext of betrothal, the privileges of married persons. [43]

A man who was sixty was prohibited from marrying a woman of fifty. [44] Inasmuch as great privileges had been granted to married persons, the law did not encourage fruitless marriages. For the same reason, the Calvinian senatus consultum declares unequal the marriage of a woman who was over fifty with a man who was under sixty, [45] so a woman who was fifty years old could not marry without incurring the penalties of those laws. Tiberius added to the severity of the Papian law and forbade a man of sixty to marry a woman under fifty, [46] so that a man of sixty could not marry in any case without incurring the penalty ; but Claudius abrogated what had been done under Tiberius in this respect. [47]

All these provisions were more consistent with the climate of Italy than with that of the north, where a man of sixty still has some strength, and where women of fifty are not as a general rule infertile.

So as not to limit needlessly the choices a person could make, Augustus allowed all the freeborn who were not senators [48] to marry freed women. [49] The Papian law prohibited senators from marrying women who had been freed or who had appeared on stage [50] the freeborn were prohibited from marrying women who had led dissolute lives, or acted on the stage, or been convicted in a public trial. It must have been some senatus consultum that had established this. In the time of the republic, these sorts of laws were not made, because the censors corrected the disorders that arose in this regard, or prevented them from arising.

Constantine having made a law by which he included in the prohibition of the Papian law not only senators but also those who had a considerable rank in the state, [51] with no mention of those who were of inferior station : this constituted the law of that time ; there remained only the freeborn, included in the Constantinian law, to whom such marriages were forbidden. Justinian again abrogated the law of Constantine and allowed all sorts of persons to contract these marriages : that is how we have acquired such an unfortunate freedom. [52]

It is clear that the penalties applied against those who married despite the law's prohibition were the same as those applied against those who did not marry at all. Those marriages gave them no civil advantage [53] ; the dowry [54] was null and void after the wife's death. [55]

Augustus having assigned to the public purse the successions and legacies of those whom these laws declared ineligible to receive them, [56] these laws appeared more fiscal than political and civil. The disaffection they already felt for a burden that seemed overwhelming was increased by the disaffection of finding themselves continually a prey to the avidity of the treasury. The result was that under Tiberius they had to modify these laws, [57] that Nero lowered the recompenses to informers of the treasury, [58] that Trajan put a stop to their banditry, [59] that Severus modified those laws, [60] and that the juriconsults saw them as odious, and in their decisions abandoned rigor.

Moreover, the emperors eviscerated these laws with the privileges they granted for the rights of husbands, of children, and of three children. [61] Furthermore, they dispensed individuals from the penalties of these laws. [62] But laws instituted for public utility seemed not to allow for any dispensation.

It had been reasonable to grant the right of children to the vestals, [63] who were kept by religion in a necessary virginity ; likewise they granted the privilege of husbands [64] to soldiers because they could not marry. It was the custom to exempt emperors from the constraint of certain civil laws. Thus, Augustus was exempted from the constraint of the law limiting his ability to emancipate, [65] and the one that restricted his ability to bequeath. [66] All these were merely particular instances ; but subsequently dispensations were given without discretion, and the rule

became no more than an exception.

Philosophical schools had already introduced into the empire a spirit of detachment from business, which would not have caught on so well in the time of the republic, [67] when everyone was busy with the arts of war and peace. Whence a notion of perfection attached to everything that leads to a speculative life ; whence detachment from the cares and bothers of a family. The Christian religion, coming after philosophy, fixed, so to speak, notions which philosophy had simply prepared.

Christianity gave its character to jurisprudence, for the empire always has a connection to the priesthood. One can look at the Theodesian code, which is but a compilation of the ordinances of the Christian emperors.

A panegyrist of Constantine said to the emperor, "Your laws have been made only to correct vices and regulate morality ; you have removed the artifice from the old laws, which seemed to have no other purposes than to set traps for simplicity." [68]

It is certain that Constantine's changes were based either on ideas relating to the establishment of Christianity, or on ideas formed of its perfection. From the first objective came those laws that gave such authority to the bishops that they have been the foundation of ecclesiastical jurisdiction, whence those laws that weakened paternal authority by depriving the father of the property of his children's assets. [69] To extend a new religion, one has to suppress the extreme dependence of children, who always cling less to what is established.

The laws made with a view to Christian perfection were above all those with which he suppressed the penalties from the Papian laws, [70] and exempted from them both the unmarried and those who, though married, had no children.

"Those laws had been instituted," says an ecclesiastical historian, "as if the multiplication of the human species could be an effect of our efforts, instead of seeing that this number increases and decreases according to the order of Providence." [71]

The principles of religion have enormously influenced the propagation of the human species ; at times they have encouraged it, as among the Jews, the Mohammedans, the Gaurs, and the Chinese ; at times they have hampered it, as they did among the Romans who had become Christians.

They were always preaching continence everywhere, in other words, that virtue which is more perfect because by its nature it must be practiced by very few people.

Constantine had not suppressed the decimal laws that gave a greater extension to the gifts the husband and wife could make to each other in proportion to the number of their children. Theodosius the Younger again abrogated those laws. [72]

Justinian declared valid all the marriages which the Papian laws had forbidden. [73] These laws required people to remarry ; Justinian offered advantages to those who would not remarry. [74]

By the old laws, the natural right anyone has to marry and have children could not be taken away ; thus, when someone received a legacy conditional on not marrying, [75] when a patron forced his freed slave to swear he would not marry and would have no children, [76] the Papian law annulled both that condition and that oath. The clauses *while continuing in widowhood* which we have instituted thus contradict the ancient right, and come down from the constitutions of the emperors based on notions of perfection.

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There is no law that contains an explicit abrogation of the privileges and honors which the pagan Romans had conferred on marriages and the number of children, but where celibacy had preeminence there could no longer be an honor for marriage ; and since they were able to oblige the tax collectors to give up such profits by the abolition of penalties, it is easy to see that it was even simpler to suppress the recompenses.

The same reason of spirituality that had made them allow celibacy soon imposed even the necessity of celibacy. God forbid I should be speaking here against the celibacy which religion has adopted ; but who could hold his tongue against a celibacy occasioned by libertinism, one where the two sexes, corrupting each other through natural sentiments themselves, flee a union meant to make them better, in order to live in the union that always makes them worse ?

It is a rule drawn from nature that the more you decrease the number of marriages that could be, the more you corrupt the ones there are ; the fewer married persons there are, the less fidelity there is in marriages, as when there are more thieves, there are more thefts.

[1] Book LVI.

[2] Book II.

[3] Roman year 277.

[4] On what they did in this regard, see Livy, book XLV ; the *Epitome* of Livy, book LIX ; Aulus Gellius, book I, ch. vi ; Valerius Maximus, book II, ch. xix.

[5] It is in Aulus Gellius, book I, ch. vi.

[6] See what I have said in book V, ch. xix.

[7] See Dio, book XLIII, and Xiphil. in *Aug.*

[8] Dio, book XLIII ; Suetonius, *Life of Cæsar*, ch. xx ; Appian, book II of the *Civil Wars*.

[9] Eusebius, in his *Chronicle*.

[10] Dio, book LIV.

[11] Roman year 736.

[12] *Julias Rogationes*, *Annals*, book III.

[13] Year 762 of Rome, Dio, book LVI.

[14] I have shortened this oration, which is overwhelmingly long ; it is recorded in Dio, book LVI.

[15] [Montesquieu appears to be referring to the *Lex Julia maritandis ordinibus* and the *Lex Julia de adulteriis et de pudicitia*, 18 BCE, after the name Gaius Julius Caesar Octavianus.]

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[16] [The latter (*Lex Papia Poppæa*) appears to be separate, subsequent legislation dating from 9 CE.]

[17] *Ibid.*

[18] Title 14 of Ulpian's *Fragmenta* clearly distinguish the Julian law from the Papian law.

[19] Jacques Godefroy has made a compilation of these.

[20] The 35th is cited in law Loi 19 and following, *De ritu Nuptiarum*.

[21] Book II, ch. xv.

[22] Dionysius of Halicarnassus.

[23] The Deputies of Rome who were sent to find Greek laws went to Athens and into the cities of Italy.

[24] Aulus Gellius, book II. ch. xv.

[25] Suetonius, in *Augusto*, ch. xliv.

[26] Tacitus, [*Annals*,] book II. *Ut numerus liberorum in candidatis præpolleret, quod lex jubebat.*

[27] Aulus Gellius, book II. ch. xv.

[28] Tacitus, *Annals*, book XV.

[29] See Law VI, §5, of Decurion.

[30] See Law II following *De minoribus*.

[31] Laws I and II following *De vacatione et excusatione munerum*.

[32] *Fragmenta* of Ulpian, tit. 29, §3.

[33] Plutarch, *Life of Numa*.

[34] See Ulpian's *Fragmenta*, tit. 14, 15, 16, 17 and 18, which are one of the finest parts of ancient Roman jurisprudence.

[35] Sozomen, book I, ch. ix ; they could receive from relatives (Ulpian's *Fragmenta*, tit. 16, §1).

[36] Sozomen, book I, ch. ix, and the single law in *Codex Theodeodosianus*, *De infirmandis pœnis cœlibatus et orbitatis*.

[37] *Moralia*, "On the love of fathers for their children."

[38] See a longer detail of this in Ulpian, *Fragmenta*, tit. 15 and 16.

[39] Ulpian, *Fragmenta*, tit. 16, §1.

[40] Ulpian, *Fragmenta*, title 14. It appears that the first Julian laws allowed three years. Oration of Augustus in Dio, book LVI. Suetonius, *Life of Augustus*, ch. xxxiv. Other Julian laws granted only one year ; finally, the Papian law granted two (Ulpian, *Fragmenta*, tit. 14). These laws were not

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well received by the people, and Augustus tempered or reinforced them, depending on how willing they were to put up with them.

[41] It was the 35th heading of the Papian law, Law 19 following *De ritu Nuptiarum*.

[42] See Dio, book LIV, year 736. Suetonius, in *Octavian*, ch. xxxiv.

[43] See Dio, book LIV, and in the same Dio, the speech of Augustus, book LVI.

[44] Ulpian, *Fragmenta*, tit. 16 and Law 27, Codex, *De nuptiis*.

[45] Ulpian, *Fragmenta*, tit. 16, §3.

[46] See Suetonius, in *Claudius*, ch. xxiii.

[47] See Suetonius, *Life of Claudius*, ch. xxiii, and Ulpian, *Fragmenta*, tit. 16, §3.

[48] Dion, book LIV, Ulpian, *Fragmenta*, tit. 13.

[49] Speech of Augustus, in Dio, book LVI.

[50] Ulpian, *Fragmenta*, ch. xiii, and Law XLIV following *De ritu Nuptiarum*, at the end.]; and in the time of Ulpian[[See Ulpian, *Fragmenta*, tit. 13 and 16.

[51] See Law I in *Cod. de Nat. lib.*

[52] Novella 117.

[53] Law XXXVII. following *De operib. libertorum*, §7. *Fragm.* of Ulpian, tit. 16, §2.

[54] Ulpian, *Fragmenta*, tit. 16, §2.

[55] See above, ch. xiii in book XXVI.

[56] Except in certain cases. See Ulpian, *Fragmenta*, tit. 18, and the single law in Codex *De caducis tollendis*.

[57] *Relatum de moderanda Pappia Poppæa*, Tacitus, *Annals*, [book III, p. 117](#) [*Opera quae existant*, Paris, 1599].

[58] He reduced them to the fourth part, Suetonius, in *Nerone*, ch. x.

[59] See Panegyric of Pliny.

[60] Severus brought down to 25 years for the males, and 20 for the girls, the time of dispensations from the Papian law, as we see in confronting Ulpian (*Fragmenta*, tit. 16) with what Tertullian says about it (*Apologeticus*, ch. iv).

[61] Publius Scipio, censor, in his oration to the people on morality, complains of the abuse that had already been introduced, that the adoptive son afforded the same privilege as the natural son (Aulus Gellius, book V, ch. xix).

[62] See Law XXXI following, *De ritu Nuptiarum*.

[63] Augustus, with the Papian law, gave them the same privilege as to mothers ; see Dio, book LVI. Numa had given them the old privilege of

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women who had three children, which is to have no curator (Plutarch, *Life of Numa*).

[64] Claudius granted it to them (Dio, book LX).

[65] *Apud eum* law, following *De manumissionib*, §1.

[66] Dio, book LV.

[67] See, in Cicero's *De Officiis*, his thoughts on this spirit of speculation.

[68] Nazarius, in *Panegyricus Constantini*, in the year 321.

[69] See Laws 1, 2, 3, in the Theodosian Code, *De bonis maternis, maternique generis*, etc., and single law in the same Codex, *De bonis quæ filiis familias ex matrimonio acquiruntur*.

[70] Single law in Codex Theodosianus, *De infirmandis pœnis cælibatdus et orbitatis*.

[71] Sozomen, p. 27.

[72] Laws 2 and 3, Codex Theodosianus, *De jure liberorum*.

[73] Law "Sancimus," Codex, *De nuptiis*.

[74] Novella 127, ch. iii ; Novella 118, ch. v.

[75] Law 54 following *De conditionibus et demonstrationibus*.

[76] Law 5, §4, *De jure patronatus*.