For the Female Intercessor's Sake?

Protection vs Protectionism in Roman and Austrian Civil Law

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Contents

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I. Introduction

When designing protective rules, legislators need to undertake a balancing act, seeking to provide optimal protection while simultaneously refraining from restricting party autonomy in an overbearing and discriminatory manner. Due to the complexity of this process, protective rules can be lopsided and even unintentionally discriminate against the very group of people that they are supposed to protect. The mere labelling of a rule as "protective" thus does not necessarily accurately reflect its effect on the affected persons.

In this spirit, this paper seeks to shed light on the distinction between (adequate) "protection" and (discriminatory) "protectionism".[1] Moreover, it aims at analysing the construction of protective rules. In doing so, this article makes some key results of the author's doctoral thesis accessible to a broader public.[2] The following elaborations start out by assessing the concepts of "protection" and "protectionism" (chapter II). Rules are then presented that protected, or were intended to protect, intercessors in ancient Roman law (*Senatus Consultum Velleianum*, its predecessors and its interpretation by classical jurists; chapter III) and current Austrian law [§ 98 EheG (Federal Marriage Act), § 41 EPG (Federal Registered Partnership Act), §§ 25a-d KSchG (Federal Consumer Protection Act)] as well as case law of the Austrian Supreme Court (OGH) based on § 879 (1) ABGB (Federal Civil Code) (chapter IV).[3] Subsequently, this (case) law will be subjected to a comparative analysis (chapter V). Lastly, a conclusion will sum up the main ideas put forward in this paper (chapter VI).

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[1] The "protection"/"protectionism" terminology that this article employs originates in Benke, 'Why Should the Law Protect Roman Women? Some Remarks on the *Senatus Consultum Velleianum* (ca. 50 A.D.)' in Børresen, Cabibbo and Specht (eds.), *Gender and Religion* (Rome, 2001) 41 (50).

[2] *Karik*, Die Konstruktion von Schutznormen und deren Verortung im Spannungsverhältnis von "Protection" und "Protectionism". Überlegungen zum *SC Velleianum*, der Sittenwidrigkeit von Angehörigenbürgschaften, §§ 25a-d KSchG und § 98 EheG (Doctoral thesis 2023).

[3] Roman and Austrian legislation on the protection of intercessors are connected through the wording of § 1349 ABGB, which states that everyone, regardless of gender, may provide sureties on someone else's behalf, thus renouncing the rule of the *SC Velleianum* that had prevailed until the introduction of the ABGB due to the reception of Roman law. See Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie IV* (Vienna/Triest, 1813) 10 f; Breer, *Die Interzessionsbeschränkungen für Frauen im internationalen Privatrecht* (Würzburg, 1936) 4 ff; Wagner, *Interzession naher Angehöriger. Eine Untersuchung in historischer und vergleichender Perspektive* (Tübingen, 2018) 43 ff.

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II. Protection vs Protectionism

While the term "protection" refers to rules that adequately support those concerned, "protectionism" encompasses rules that (partly) exclude those affected from participating in (legal) life by providing an overbearing – and thus discriminatory – amount of support.

The author's doctoral thesis proposes three criteria for distinguishing between these two categories. Each of these criteria are defined to have two parameter values, allowing for a clear-cut classification of rules that are located in this grey area. This set-up of defining criteria that lead to an either-or classification necessarily entails a simplified depiction of reality's manifold shades of grey, which is an inevitable consequence of rendering the grey area accessible.

The three criteria the author proposes for distinguishing protective from protectionist rules are: (1) jurists' reasoning concerning the enactment of the rule in question, (2) the purpose of the given rule and (3) the perspective(s) of the persons concerned. The suitability of these criteria, as well their respective parameter values, shall now be sketched in brief.

(1) The term "jurists' reasoning" refers to the reasoning of the relevant legislative authority. This (vague) terminology results from the fact that the proposed criteria for distinguishing between protection and protectionism shall be applicable to any given period of time, rather than excluding e.g. ancient rules, whose "rule-makers" cannot be subsumed under the modern understanding of the legislative authority, as is the case in classical Roman law.

Jurists' reasoning may help to classify rules as either protective or protectionist, because it shows jurists' level of awareness regarding the restrictions imposed upon those concerned; further, it bears witness to the amount of thought that jurists put in when conceptualizing such rules.[4] If jurists' reasoning concerning a specific rule exhausts itself in stating that the persons concerned are to be restricted due to their (supposed) inability to act in their own best interest, this one-dimensional, patronizing approach may indicate the rule in question to be protectionist. If jurists' reasoning, however, takes into consideration both the positive and negative effects that the rule in question will have on the lives of those concerned, that is, if jurists try to find a balance between providing enough protection on the one hand and avoiding

[4] Cf. Kinalzik, *Bewertung der Rechtswohltaten an Frauen. Inhaltskontrolle von Ehegattenbürgschaften und von Eheverträgen* (Baden-Baden, 2014) 221.

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discriminatory protectionism on the other, this may indicate the rule in question to be protective.

(2) By referring to the purpose of the rule in question, one may check whether a legislator, proclaiming to protect a specific group of people, actually aims at providing protection or instead pursues a hidden agenda actively discriminating against those concerned. If the proclaimed protective aim does not correspond to the purpose of the rule in question, protectionism is indicated; if not, protection is.

(3) The perspective of the persons concerned constitutes the most significant aspect for differentiating between protection and protectionism. In almost no cases does the diverse plurality of experiences and opinions allow for the emergence of one homogenous perspective of those affected. This criterion thus necessarily generalizes the given plurality in one way or another; further, it may only capture the perspective of the persons concerned as far as such a perspective (or plurality of perspectives) is being voiced. Despite these facts, which negatively affect its representability, this criterion is an indispensable anchor for distinguishing between protection and protectionism, for those affected by the respective rule may assess its (positive and negative) effects in the most accurate way. From the perspective of the persons concerned, a (proclaimed) protective rule may, overall, diminish or enhance their room for manoeuvre; the prior indicating protectionism, the latter pointing towards protection. A (proclaimed) protective rule may only enhance the affected persons' room for manoeuvre despite diminishing their autonomy if the advantages of the rule in question outweigh the suffered loss of autonomy (i.e., if the restrictive rule prevents those concerned from harm greater than the harm inflicted by the loss of autonomy).

In terms of identifying these criteria with regard to a specific rule, it can briefly be stated that, concerning jurists' reasoning and the rule's purpose, the arguments of the respective legislative authority are to be analysed; legal literature may subsidiarily be considered. Regarding the perspective(s) of the persons concerned, one may resort to sources that directly focus on establishing their point of view (interviews, reports); further, legislative documents may occasionally provide a glimpse into the perspective(s) of the persons concerned. At times, however, some of the three criteria's parameter values may not be ascertainable; further, the criteria may produce non-uniform results [e.g., due to a divergence of jurists' reasoning and the perspective(s) of the persons that are concerned]. Both of these factors may affect the distinguishability of protection and protectionism negatively.

Even if all three criteria can be ascertained and unanimously indicate either protection or protectionism, a corresponding classification of the legal measure in question is not guaranteed. This is due to the subjective perspective of every

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researcher that inevitably shapes her/his approach to the respective research topic and that is contingent on time, space, and social context. Prime examples for the unavoidable contingency of each protection/protectionism-classification are the contradictory evaluations of legal measures, which state(d) to protect women or children: While legal measures of centuries past that were (allegedly) supposed to further women's interests are now considered protectionist, they were considered protective at the time. Current laws proclaimed to protect children are considered to be protective, despite sharing the underlying working principles of outdated protectionist gender-specific "protection". To put it differently: The assessment that all individuals of a group of people, solely defined by gender, are unable to shape their legal affairs without simultaneously leading to their own detriment is no longer considered valid; the same logic, however, is still applied with regard to age.[5]

Against this backdrop, the author's doctoral thesis stresses that the proposed (and subsequently applied, see chapter V.B) criteria are suitable indicators for classifying provisions to be protective or protectionist. At the same time, one needs to keep in mind that they do not guarantee an objective categorization of provisions, as the latter is inherently impossible to achieve.

III. Roman Law: the *Senatus Consultum Velleianum*

Not only the date of origin and the evolution of the *SC Velleianum,* but also its precise content are murky, as the provision itself has not been preserved.[6] It is well-established that the *SC Velleianum* goes back to approximately 50 CE; its exact date of origin, though, is unknown, as there exists no detailed record of this legal provision's enactment.[7] The *SC Velleianum* was preceded by edicts of at least two Roman emperors that aimed at preventing women from providing sureties for their spouses;[8] the interrelation of these three protective rules, however, remains obscure.

The most comprehensive reference to the *SC Velleianum's* original wording is contained in Ulp. (29 ed.) D. 16.1.2.1, where the classical Roman jurist Ulpian provides a transcription.[9] This alone, however, does not allow for an analysis of the

[5] See, e.g., §§ 9, 11 and 11a WrJSchG (Viennese Youth Protection Act).

[6] Medicus, *Zur Geschichte des Senatus Consultum Velleianum* (Cologne/Graz, 1957) 18.

[7] Mönnich, *Frauenschutz vor riskanten Geschäften. Interzessionsverbote nach dem Velleianischen Senatsbeschluß* (Cologne, 1999) 36; Wagner, *Interzession naher Angehöriger* 13.

[8] See Ulp. (29 ed.) D. 16.1.2.1 (footnote 10); Ulp. (29 ed.) D. 16.1.2 pr.

[9] On the (positive) assessment of the transcription's authenticity Kreller, 'Das Verbot der Fraueninterzession von Augustus bis Justinian' (1956) *Anz. ph.* 1 (3); Scheibelreiter, '*Senatus consulta.*

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provision's intricacies, as the *SC Velleianum* only vaguely states that creditors should not be able to successfully sue women who intervened on behalf of others.[10] Despite the *SC Velleianum's* vagueness having been subjected to scholarly critique,[11] its lack of precision does not attest to shortcomings of legislative authority. Rather, it results from the fact that *senatus consulta* primarily aimed at conveying political intentions that subsequently had to be implemented by jurists.[12] In order to analyse the provision's scope of application, its legal consequences and effects in detail, it is thus necessary to refer to the extensive case law, which revolves around the *SC Velleianum* and that has been created by classical Roman jurists.[13]

In terms of the *SC Velleianum's* legal consequences, the case law is straightforward and unambiguous. Given that a creditor had contracted with a female guarantor and then sued her for payment, the praetor could refute the creditor's *actio* via

Die Normen und ihre Auslegung beim Juristen Ulpian', in Buongiorno and Lohsse (eds.), *Darstellung und Gebrauch der* senatus consulta *in der römischen Jurisprudenz der Kaiserzeit* (Stuttgart, 2022) 265 (314).

[10] Ulp. (29 ed.) D. 16.1.2.1: *Postea factum est senatus consultum, quo plenissime feminis omnibus subventum est. cuius senatus consulti verba haec sunt: "Quod Marcus Silanus et Velleus Tutor consules verba fecerunt de obligationibus feminarum, quae pro aliis reae fierent, quid de ea re fieri oportet, de ea re ita censuere: quod ad fideiussiones et mutui dationes pro aliis, quibus intercesserint feminae, pertinet, tametsi ante videtur ita ius dictum esse, ne eo nomine ab his petitio neve in eas actio detur, cum eas virilibus officiis fungi et eius generis obligationibus obstringi non sit aequum, arbitrari senatum recte atque ordine facturos ad quos de ea re in iure aditum erit, si dederint operam, ut in ea re senatus voluntas servetur."* Translation by Evans-Jones in Watson (ed.), *The Digest of Justinian II*, 2nd edn. (Philadelphia, 1998) 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 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'."

[11] Gradenwitz, *Die Ungültigkeit obligatorischer Rechtsgeschäfte* (Berlin, 1887) 81; Wieacker, *Römische Rechtsgeschichte. Zweiter Abschnitt. Die Jurisprudenz vom frühen Prinzipat bis zum Ausgang der Antike im Weströmischen Reich und die oströmische Rechtswissenschaft bis zur justinianischen Gesetzgebung* (Munich, 2006) 23 and 362 (Endnote 30).

[12] Selb, 'Das prätorische Edikt: Vom rechtspolitischen Programm zur Norm', in Benöhr, Hackl, Knütel and Wacke (eds.), *Iuris Professio. Festgabe für Max Kaser zum 80. Geburtstag* (Vienna/Cologne/Graz, 1986) 259 (272).

[13] This case law is contained in D. 16.1; additional information on the *SC Velleianum* may be found in Roman emperors' rescripts collected in CJ. 4.29.

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denegatio.[14] Alternatively, and as a number of sources on the instrument imply, more commonly, the praetor could grant an *exceptio SC Velleiani* to the female intercessor,[15] provided that she had previously raised this defence.[16] It was thus up to the female intercessor to decide whether she wished to make use of the *exceptio SC Velleiani* in court; she could, however, not dispose ex ante of the *exceptio*.[17] If the female guarantor had already paid her debt, but only later on learned of the *SC Velleianum's* applicability to her *intercessio*, she could even reclaim what she had paid by means of a *condictio indebiti*.[18] While the *denegatio* and the *exceptio SC Velleiani* thus resulted in the creditor being barred from collecting the debt that was owed, a *condictio indebiti* raised by the female intercessor even resulted in the creditor having to refund the debt previously successfully collected. In the latter case, the creditor could, in turn, be granted an *actio restitutoria* against the previous debtor, whose debt the female intercessor had paid; this restored the creditor's claim.[19] Similarly, the creditor could raise an *actio institutoria* against the woman's beneficiary if she had intervened by taking up a primary debt in her beneficiary's stead and

[14] Ulp. (29 ed.) D. 16.1.2.1 (see footnote 10).

[15] The *exceptio's* prevalence in case law is seen to be caused by two factors: The *denegatio* demanded for the unambiguous applicability of the *SC Velleianum*. The very enactment of the *SC Velleianum*, however, apparently led to a decrease of such unambiguous cases, for creditors were caused to abstain from willingly contracting with female intercessors. On top of this, cases, in which a *denegatio* could be granted (i.e. cases, in which the *SC Velleianum* clearly was applicable), were of no particular interest to jurists and thus not prominently featured in their elaborations. See on this reasoning Medicus, *Geschichte* 30; Wagner, *Interzession naher Angehöriger* 17 (footnote 37).

[16] See, e.g., Mod. (heur. sing.) D. 16.1.25.1: *Quod si pro eo fideiusserit, exceptione senatus consulti Velleiani iudicio conventa adversus creditorem tueri se poterit, nisi pro suo negotio hoc fecerit.* Translation by Evans-Jones in Watson (ed.), *The Digest of Justinian II*, 2nd edn. (Philadelphia, 1998) 7: "But if she acts as a verbal guarantor on his behalf, having been sued, she will be able to protect herself against the creditor with the defense of the senatus consultum Velleianum, unless she acted for the benefit of her own affairs."

[17] This corresponds to the prevailing opinion, cf. Finkenauer, 'Der Verzicht auf die *exceptio SC Velleiani* im klassischen Recht' (2013) *TR* 17 (19). Finkenauer himself, however, argues differently, ibid. 17 ff.

[18] See, e.g., CJ. 4.29.9 (Gordian 239): *Quamvis pro alio solvere possit mulier, tamen si praecedente obligatione, quam senatus consultum de intercessionibus efficacem esse non sinit, solutionem fecerit eius senatus consulti beneficio munitam se ignorans, locum habet repetitio.* Translation by Kehoe in Frier (ed.), *The Codex of Justinian II*, 2nd edn. (Cambridge, 2016) 917: "Although a woman can pay on behalf of another, her right to reclaim still has a place if, because of a preceding obligation that the decree of the Senate on assumptions of liability does not allow to be valid, she has made the payment (while) unaware of her protection by the benefit of this decree of the Senate." More on this in Medicus, *Geschichte* 30 f; Wagner, *Interzession naher Angehöriger* 17.

[19] See in detail Gradenwitz, *Ungültigkeit* 173 ff.

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subsequently raised the *exceptio SC Velleiani* in court;[20] this substituted a *vinculum iuris* between the creditor and the woman's beneficiary.[21] Both of these *actiones* aimed at protecting the creditor by preventing the woman's beneficiary from being unjustly enriched at her/his expense, while the praetor's *denegatio* as well as the *exceptio SC Velleiani* and the *condictio indebiti* aimed at furthering the female intercessor's interests.

Contrary to the ease with which these legal consequences could be ascertained, the identification of the *SC Velleianum's* scope of application proved to be very intricate. This is due to the variety of aspects that classical Roman jurists pondered in this context, as well as to the multitude of highly complex cases that the sources contain, necessitating lengthy and detailed analyses.[22] The lack of a (somewhat homogenous) body of literature adds to these difficulties.[23]

According to classical Roman jurists, the *SC Velleianum* encompassed all kinds of contracts, through which a woman could intervene on someone else's behalf[24] –

[20] Ibid. 186 ff. More on this subsequently.

[21] On both *actiones* see Ulp. (29 ed.) D. 16.1.8.14.

[22] Especially so Afr. (4 quaest.) D. 16.1.19.5. Here, African elaborates on a lengthy case, in which a female guarantor intervened via *intercessio* by taking up a loan and instructing her lender to disburse the loan to the creditor of Titius. Since the woman's creditor did not have sufficient ready cash when she instructed him to pay out the loan to Titius' creditor, he stipulated the sum to Titius' creditor. This case encompasses (legal) ties between four persons (the female intercessor, her creditor, Titus and his debtor) and assesses, whether the *SC Velleianum* was applicable to this construction, allowing the woman thus to raise an *exceptio SC Velleiani*. Moreover, it is inquired a) whether the woman's creditor is able to defend himself with this *exceptio* against the *actio* of Titius's (and his own) creditor, if he has not already paid the sum he had promised, and b) whether, if the woman's creditor has already paid, he is able to successfully reclaim this sum. Further complicating its analysis, Afr. (4 quaest.) D. 16.1.19.5 makes reference to three different cases, which are all evaluated on their comparability with the (main) statement of facts. This paper's scope allows neither for detailed reflection on Afr. (4 quaest.) D. 16.1.19.5, nor for the thorough exegetic analysis of other sources; both, however, is contained in chapter 4.II and 4.V of the doctoral thesis on which this article is based.

[23] Controversies exist, e.g. on the question of whether a woman's intention to make a gift of the sum that she promised via *intercessio* led to the *SC Velleianum's* inapplicability, see footnote 35. While in such cases, merely a *homogenous* body of literature is missing, other primary sources are, although referenced, left unconsidered, resulting in a lack of secondary sources thereon: In the context of Afr. (4 quaest.) D. 16.1.19.5 see, e.g., Höbenreich, 'Das Gewicht der Tradition', in Höbenreich and Rizzelli (eds.), *Scylla. Fragmente einer juristischen Geschichte der Frauen im antiken Rom* (Vienna/Cologne/Weimar, 2003) 61 (79); Mönnich, *Frauenschutz* 40 and 132.

[24] Ulp. (29 ed.) D. 16.1.2.4: *Omnis omnino obligatio senatus consulto Velleiano comprehenditur, sive verbis sive re sive quocumque alio contractu intercesserint.* Translation by Evans-Jones in Watson (ed.), *The Digest of Justinian II*, 2nd edn. (Philadelphia, 1998) 1: "Every single kind of obligation is embraced by the senatus consultum Velleianum, whether the women interceded by verbal, by real, or by any other sort of contract whatsoever."

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including two specific set congregations in which a woman intervened by taking up a primary debt in the beneficiary's stead.[25] A primary debt that had been incurred by a woman could constitute an *intercessio* to which the *SC Velleianum* was applicable if the woman in question used a loan in order to pay someone else's debt;[26] further, if she used a loan in order to grant a loan in turn to someone else.[27] It is consistent that the *SC Velleianum* is applicable to such, and exclusively such, main obligations, as (only) in these cases is the female primary debtor in the end obliged for another person's benefit. In other words: If a woman takes up a loan and subsequently uses it for one of the two purposes mentioned, this obligation is encompassed by the *SC Velleianum's* scope of application, as this provision aimed at preventing women from being liable for someone else's debt.

The *SC Velleianum's* applicability necessitated that the respective *intercessio* was taken *pro alio*, i.e., that the woman did not, in fact, merely conduct her own business by incurring the obligation in question.[28] An *intercessio pro suo*, which may have consisted in a woman intervening on behalf of someone who had vouched for her debt,[29] thus barred application of the *SC Velleianum*. This is clearly laid down in Ulp.

[25] CJ. 4.29.4 pr. (Alexander Severus 223): *Senatus consultum locum habet, sive eam obligationem, quae in alterius persona constitit, mulier in se transtulerit vel participaverit sive, cum alius pecuniam acciperet, ipsa se constituit ab initio ream, quod et in rerum earum pro aliis obligationibus admissum est.* Translation by Kehoe in Frier (ed.), *The Codex of Justinian II*, 2nd edn. (Cambridge, 2016) 915: "The decree of the Senate has a place if a woman has transferred to herself or participated in an obligation that exists in the person of another, or, when another person was receiving money, she established herself as a debtor from the beginning, (a rule) which has been allowed also in obligations of this property for other people."

[26] See, e.g., Scaev. (1 resp.) D.16.1.28.1; Afr. (4 quaest.) D. 16.1.19.5.

[27] See, e.g., Paul. (6 brev.) D. 16.1.12; Ulp. (29 ed.) D. 16.1.8.14; Afr. (4 quaest.) D. 16.1.17 pr.

[28] Contrary to the interpretation of some scholars [e.g., Medicus, *Geschichte* 35; Kreller, (1956) *Anz. ph.* 1 (2)], the question whether a woman intervened out of an altruistic or egoistic motive did not have an impact on the *SC Velleianum's* applicability; so did solely the question whether a woman *actually* intervened (*intercessio pro alio*) or merely conducted her own business (*intercessio pro suo*). On the fuzziness of "altruism" and this term's consequential lack of suitability for the legal context, see Meissel, 'Altruismus und Rationalität. Zur 'Ökonomie' der negotiorum gestio', in Babusiaux, Nobel, Platschek (eds.), *Der Bürge einst und jetzt: Festschrift für Alfons Bürge* (Zurich, 2017) 255 (283).

[29] Gai. (9 ed. prov.) D. 16.1.13 pr.

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(29 ed.) D. 16.1.2.1,[30] further attested to in multiple other sources[31] – and, again, consistent with the *SC Velleianum's* telos.[32]

The given provision was inapplicable to *intercessiones* which a woman had conducted in malicious intent,[33] for example if she had tried to trick the creditor by promising to not raise an *exceptio SC Velleiani* but later on did so anyway, stripping him of the security that she had promised.[34] The inapplicability of the *SC Velleianum* due to so-called *calliditas feminarum* does not contradict this provision's principles and is consistent with the general rule of (Roman) law that fraudulence should under no circumstances be legally protected.

Lastly, the *SC Velleianum* was indubitably inapplicable[35] if the creditor lacked knowledge of the fact that the woman in question intervened on someone else's behalf. Since the *SC Velleianum* was neither supposed to tarnish women's creditworthiness nor to tamper with the financial market as such, this provision's applicability to primary debts was limited by the creditor's state of knowledge: Only if the creditor knew that her/his female primary debtor intervened on someone else's behalf was the *SC Velleianum* applicable.[36]

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[30] See footnote 10.

[31] Pap. (3 resp.) D. 16.1.27.2, Mod. (heur. sing.) D. 16.1.25.1 and CJ. 4.29.6 pr. (Alexander Severus 228) bear reference to the *SC Velleianum's* inapplicability to *negotia sua*; *obligationes in rem suam* are referred to in Gai. (9 ed. prov.) D. 16.1.13 pr., Paul (6 reg.) D. 16.1.22 and Jul. (51 dig.) D. 16.1.15.

[32] Windscheid, *Lehrbuch des Pandektenrechts. Zweiter Band*, 5th edn. (Stuttgart, 1879) 835 ff; Mönnich, *Frauenschutz* 57.

[33] The (sole two) sources on this topic refer to *calliditas feminarum*, see Ulp. (29 ed.) D. 16.1.2.3 and CJ 4.29.5 (Alexander Severus 224). On *calliditas* see, inter alia, Halbwachs, 'Calliditas feminarum versus infirmitas sexus. Bemerkungen zum Schutz des Gläubigers vor der mulier intercedens', in Babusiaux, Nobel and Platschek (eds.), *Der Bürge einst und jetzt: Festschrift für Alfons Bürge* (Zurich, 2017) 137 (137 ff).

[34] Dernburg, *Pandekten. Zweiter Band. Obligationenrecht*, 2nd edn. (Berlin, 1889) 219.

[35] Whether the female intercessor's intention to gift the sum that she had pledged to pay for someone else's debt led to the *SC Velleianum's* inapplicability is debated in literature based on Ulp. (29 ed.) D. 16.1.4 pr., Ulp. (29 ed.) D. 16.1.4.1 and Call. (3 inst.) D. 16.1.21.1, see Mönnich, *Frauenschutz* 98 (footnote 376). The author's doctoral thesis argues that, based on these sources, it cannot be ascertained whether this aspect had any impact on the applicability of the *SC Velleianum*: In Ulp. (29 ed.) D. 16.1.4 pr. and Ulp. (29 ed.) D. 16.1.4.1, no *intercessiones* are being referred to; whether Call. (3 inst.) D. 16.1.21.1 revolves around an *intercessio* is unclear and thus up to one's interpretation.

[36] See Paul. (30 ed.) D. 16.1.11: *Si mulier tamquam in usus suos pecuniam acceperit alii creditura, non est locus senatus consulto: alioquin nemo cum feminis contrahet, quia ignorari potest, quid acturae sint.* Translation by Evans-Jones in Watson (ed.), *The Digest of Justinian II*, 2nd edn. (Philadelphia, 1998) 4: "If a woman receives money for her own use, but with the intention of lending

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IV. Austrian Law: § 98 EheG, § 41 EPG, §§ 25a-d KSchG and OGH Case Law

The introduction of § 1349 ABGB put an end to the *SC Velleianum's* reign on Austrian territory and thus equalized men and women in this regard. It simultaneously eliminated the only instrument that provided for any protection of guarantors, leaving female and male intercessors equally bare of any kind of legal protection.[37] In contrast, Austrian civil law today provides a multitude of instruments for the protection of intercessors. They result out of a recent development starting in 1985, when § 31a KSchG and § 98 EheG were enacted; the latter provision is now mirrored in § 41 EPG. A decade after the enactment of § 31a KSchG and § 98 EheG, the Austrian Supreme Court (OGH) created another mechanism for the protection of intercessors, which it modelled after German case law and which it based on § 879 (1) ABGB.[38] The (as of now) final content-wise development of protective rules for intercessors was taken in 1997, when the provisions of §§ 25a-b KSchG, which replaced § 31a KSchG and thus are rooted in 1985's legislation,[39] as well as §§ 25c-d KSchG, which contained entirely new legal provisions, were enacted. Due to the notable divergence in both date of origin (see above) and substance (see below), the Austrian protective rules may be divided into two generations, with the first generation encompassing rules that essentially go back to 1985 (§ 98 EheG,

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it to another, there is no place for the *senatus consultum*; for otherwise no person will contract with women because he cannot know what they might do."

[37] See Ernst, 'Interzession. Vom Verbot der Fraueninterzession über die Sittenwidrigkeit von Angehörigenbürgschaften zum Schutz des Verbrauchers als Interzedenten', in Zimmermann, Knütel and Meincke (eds.), *Rechtsgeschichte und Privatrechtsdogmatik* (Heidelberg, 1999) 395 (399). Aptly Honsell: "Durch Bürgschaft darf sich jedermann ruinieren, vorausgesetzt nur, er ist volljährig" – "Anyone is free to bring upon their own financial ruin by pledging for someone else's debt – the sole prerequisite for this being the attainment of the age of majority" (own translation), Honsell, 'Bürgerliches Recht: Kein Sittenverstoß einer Bank, die vor Abgabe einer Bürgschaftserklärung nicht die Bonität des Bürgen prüft: BGH, 19. 1. 1989 – IX ZR 124/88' (1989) *JZ* 494 (495). While this quote refers to Germany, it is equally applicable to Austria, since both of these countries lacked any kind of protective rules for guarantors.

[38] All decisions of the OGH can be accessed via https://www.ris.bka.gv.at/Bund/ with their case number. Please refer to chapter 5.II.C of the author's doctoral thesis, if you are interested in a quantitative analysis (text and diagrams) of the statements of affairs, which could be drawn from the roughly 70 relevant OGH cases that have been decided between 1995 and 2017. These cases have been assessed in regard to seven aspects, granting insights into the social contexts, in which people are likely to provide sureties for someone else's debt – e.g., gender of the guarantor, her/his relation to the primary debtor, her/his financial stability and the reason why the primary debt was incurred in the first place.

[39] For detailed information on the interrelation of § 31a KSchG (1985) and §§ 25a-d KSchG, please refer to chapter 5.III.A of the author's doctoral thesis.

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§ 41 EPG, §§ 25a-b KSchG) and the second generation originating in the 1990s (the OGH's protective mechanism, §§ 25c-d KSchG).

The following paragraphs sketch out the current legal framework on the protection of intercessors and proceed in chronological order.[40]

A. First Generation: § 98 EheG, § 41 EPG and §§ 25a-b KSchG

§ 98 EheG (1985) specifically refers to cases in which spouses jointly took up a loan but divorced prior to paying their debt in full. This provision mandates the following: Given that a spouse has either agreed to or been selected by court to fully assume the previously joint obligation, the other may file for being (merely) considered guarantor of default, rather than co-debtor. § 98 EheG thus provides the option of a spouse, often in a comparatively worse financial condition than the other and/or who did not profit (as much) from the joint obligation,[41] to reduce the extent of her/his liability; § 41 EPG by now provides the exact same option for registered partners. By creating § 98 EheG in 1985, the legislature aimed to protect divorcées from being exposed to the creditor's lawsuit, as creditors had often preferred to sue ex-wives rather than ex-husbands.[42] § 98 EheG and § 41 EPG, however, usually only provide for temporary protection of the guarantor by default: If the primary debtor is not able to settle the debt, the guarantor by default will also be exposed to the creditor's claim, just at a later point in time.[43]

Choosing a different approach, the provisions of §§ 25a-b KSchG (rooted in § 31a KSchG 1985, minimally adapted in 1997) impose disclosure obligations on corporate creditors whose business (partially) involves granting loans to consumers.[44] § 25a KSchG is applicable only to spouses who take up a joint loan as consumers. It

[40] The details of the current legal framework on the protection of intercessors, as well as the highly interesting political process through which § 31a KSchG was "upgraded" to §§ 25a-d KSchG, cannot be covered within the scope of this paper. Both topics are analysed in chapter 5.III and 5.IV of the author's doctoral thesis.

[41] Cf. Gamerith, 'Die Kreditmithaftung geschiedener Ehegatten nach § 98 EheG' (1987) *RdW* 183 (183).

[42] Cf. Unger, 'Rechtliche Unterschiede bei der Aufnahme von Krediten durch Ehegatten und Lebensgefährten' (2004) *ÖBA* 680 (681).

[43] Th. Rabl, 'Risiko Angehörigenbürgschaft: Schlaglichter aus Judikatur und KSchG-Novelle' (1996) *ecolex* 443 (443).

[44] § 1 (1) KSchG defines a "consumer" as a contracting party for whom the respective contract is not part of her/his conduct of business.

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mandates that spouses must be informed beforehand[45] and in writing on marriage-specific technicalities that arise in the context of borrowing transactions, e.g. that a jointly incurred debt is unaffected by divorce; § 43 (1) 9. EPG renders this rule applicable to registered partners. § 25b KSchG has a broader scope of application than § 25a KSchG, as it encompasses all consumers contracting with corporate creditors. § 25b KSchG further differs from § 25a KSchG in that it does not aim at informing (primary and secondary) debtors in a pre-contractual stage, but at keeping intercessors informed about the likelihood of actually having to pay the amount pledged. In case of the corporate creditor's non-compliance with §§ 25a-b KSchG, (s)he is to be punished with an administrative penalty not to exceed 1,450 € according to § 32 (1) 1. d KSchG. § 25b (1) KSchG further provides for a civil law penalty which relieves the secondary debtor from having to pay interest and costs that arise in this context, but leaves the secondary debtor's main obligation untouched.

B. Second Generation: OGH Case Law and §§ 25c-d KSchG

The first case in which the OGH ruled on intercessors' protection in the context of sureties given by relatives of the main debtor (1995) took another, and far more radical, approach. In 1 Ob 544/95, the Austrian supreme court decided that a guarantee given by a family member of the primary debtor is void if three specific criteria are met at the time of contracting. In so doing, the OGH basically copied what the German Constitutional Court (BVerfG) had ruled, adapted to the Austrian legal system by stating that intercessions may be void if they fall under the scope of § 879 (1) ABGB.[46] This provision contains a blanket clause that broadly invalidates all contracts that are *contra bonos mores*[47] (and not encompassed by a more specific legal provision), which allows judges to further legal development, as they did in this case.[48] The three criteria that together may lead to an intercession being void are: (1) a flagrant imbalance between the debt that the intercessor had promised to pay and

[45] See especially Apathy/Frössel, '§ 25a KSchG', in Schwimann and Kodek (eds.), *ABGB: Praxiskommentar*, 5th edn. (Vienna, 2021) para. 3 and 8. Differently e.g. Koziol, 'Das Kreditgeschäft', in Avancini, Iro and Koziol (eds.), *Österreichisches Bankvertragsrecht. Band II: Konto und Depot* (Vienna, 1993) 1 (para. 1/180).

[46] OGH 27.3.1995, 1 Ob 544/95.

[47] § 879 (1) ABGB: "Ein Vertrag, der gegen ein gesetzliches Verbot oder gegen die guten Sitten verstößt, ist nichtig" – "A contract that violates a legal prohibition or goes against *bonos mores* is void" (own translation).

[48] See, inter alia, Graf, '§ 879 ABGB', in Kletečka and Schauer (eds.), *ABGB-ON* 1.05 (Vienna, 2019) para. 60. For an assessment of § 879 (1) ABGB and the method by which the OGH created the given rules for intercessors, please refer to chapter 5.II.A and 5.II.B of the author's doctoral thesis.

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her/his ability to pay,[49] (2) impairment of the secondary debtor's freedom of decision[50] and (3) the creditor's knowledge or negligent ignorance[51] of the prior two aspects.[52]

§§ 25c-d KSchG (1997) were enacted subsequent to the aforementioned OGH decision. Both of these provisions are applicable to all intercessions taken up by a consumer and accepted by a corporate creditor. § 25c KSchG obliges creditors to inform prospective secondary debtors about primary debtors' weak financial situation. This obligation is to be fulfilled in the precontractual stage and in cases, in which the respective creditor realized or should have realized that the primary debtor is unable or unlikely to be able to fully pay what (s)he owes. If the creditor does not comply with § 25c KSchG, (s)he can be required to pay the administrative penalty, which also applies to §§ 25a-b KSchG and is described above [see § 32 (1) 1. d KSchG]. Further, § 25c KSchG provides for the possibility that the secondary debtor may be freed from the obligation incurred if (s)he would not have intervened on the primary debtor's behalf had (s)he known about the primary debtor's weak financial situation.

§ 25d KSchG endows judges with the power to mitigate or even waive a debt if criteria are met. These criteria strongly resemble (but do not match) those that the OGH has applied since 1995 to intercessions that were made by a primary debtor's close relatives. § 25d KSchG is only applicable if the incurred debt grossly exceeds the intercessor's ability to pay and if this fact could have been perceived by the creditor. This rule refers, inter alia, to the emotional disposal and financial (in)dependence of the debtor as further aspects to be considered by the judge. In contrast to OGH case law, however, the applicability of § 25d KSchG does not depend on the creditor having some connection to the intercessor's will to intervene.[53]

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[49] A precise ratio (debt : ability to pay), above which the "flagrant misbalance"-criterion is fulfilled, has not been specified by the OGH. Chapter 5.II.C.3 of the author's doctoral thesis, however, shows that cases, in which the debt amounts to at least ten times of the intercessor's monthly net income, were considered by the OGH to potentially be void.

[50] This criterion is comprised of multiple facets, such as the intercessor's emotional disposal towards the primary debtor, which is indicated by close familiar ties, see, e.g, OGH 26.11.2002, 10 Ob 315/02z.

[51] The creditor's knowledge/negligent ignorance of the other two criteria is necessitated, for the applicability of § 879 (1) ABGB requires that (s)he had acted *contra bonos mores*, see P. Bydlinski, 'Die Sittenwidrigkeit von Haftungsverpflichtungen. Zugleich Bemerkungen zur E des OGH 27.3.1995, 1 Ob 544/96, ZIK 1995, 124 und zum BMJ-Entwurf des § 31a Abs 3-6 KSchG' (1995) *ZIK* 135 (137).

[52] See on all three criteria Graf, '§ 879 ABGB', para. 158.

[53] Faber, (2004) *ÖBA* 527 (542).

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C. Inter- and Intra-Generational Interrelation?

On the interrelation of these two generations of protective rules, it can briefly be stated that they may apply in parallel, for they pursue very different approaches on how to aid intercessors.

Intra-generationally, the following holds true for the first generation of relevant provisions: § 25a KSchG and § 25b KSchG do not rival, for they burden creditors with information duties that differ in regard to the relevant information as well as concerning the point in time, when it is to be provided. As § 98 EheG provides for an entirely different protective rule, it does not compete with §§ 25a-b KSchG. Thus, all provisions of the first generation may be applicable cumulatively.

In the second generation, the protective rules and case law compete in that they all may lead to the respective intercessor being (partially) released from her/his debt. When faced with a fact pattern to which the OGH case law and §§ 25c-d KSchG may be applicable,[54] the court must assess § 25c KSchG first. This is due to the fact that this provision refers already to the precontractual stage.[55] § 25d KSchG is to be assessed last,[56] since § 25d KSchG provides for less strict criteria than does the OGH case law and because § 25d KSchG was expressly meant to complement, not replace the pre-existing OGH case law based on § 879 (1) ABGB.[57]

[54] Cf. Faber, 'Das Mäßigungsrecht gemäß § 25d KSchG. Zur Teilnichtigkeit von Sicherungsgeschäften' (2004) *ÖBA* 527 (542).

[55] Cf. Mayrhofer, '§ 25c KSchG', in Fenyves, Kerschner and Vonkilch (eds.), *Klang*, 3rd edn. (Vienna, 2006) para. 43 f.

[56] Faber, (2004) *ÖBA* 527 (541).

[57] Explanatory remarks on the government bill proposing § 25d KSchG, RV 311 BlgNR 20. GP 28 f.

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V. Comparative Analysis

The ancient Roman and the current Austrian system on the protection of intercessors shall now be subjected to a comparative analysis building on the individual analyses above. First, these two legal systems will be contrasted in regard to the way in which they were constructed (chapter V.A). Second, they will be compared in the context of protection/protectionism (chapter V.B).

A. Construction of Protective Rules

The protective rules that ancient Roman and current Austrian law provide for intercessors both developed in multiple stages, each starting with a comparatively weak level of protection that was strengthened at a later point in time. While the *SC Velleianum's* precursors solely applied to intercessions that women had made on behalf of their husbands, the *SC Velleianum's* scope of application encompasses all intercessions that were effectuated by women. The Austrian legislator started out by introducing temporary protection (§ 98 EheG; now mirrored in § 41 EPG) and (minimally sanctioned) duties to inform [§ 31a KSchG (1985)], but now also allows for secondary debtors to be freed from their obligations in specific situations (§§ 25c-d KSchG). This development was driven by the OGH, which in 1995 drew upon § 879 (1) ABGB and laid down that intercessions may be invalid if *contra bonos mores*.

Both ancient Roman and current Austrian law address intercessions in an all-encompassing manner, albeit in regard of differing aspects. The *SC Velleianum* extends to women's intercessions in general. In contrast, the current Austrian law accompanies the entire process of intervening on someone else's behalf: It contains provisions that refer to the pre-contractual stage as well as the stage during which intercessions are valid and may even lead to such an obligation being void.

Ancient Roman and current Austrian civil law on the protection of intercessors share a common impetus: Both were originally enacted in order to prevent a woman from being excessively indebted due to intervening on behalf of her (ex-)husband. Concerning ancient Roman law, this can be drawn from the edicts of Roman emperors, which preceded the *SC Velleianum* and which exclusively contained the rule that women should not intervene on behalf of their husbands. In regard to current Austrian law, this is attested by arguments brought forward in the legislative process, which led to the enactment of § 98 EheG and § 31a KSchG (1985).[58]

[58] Parliamentary Committee Report on Motion IA 88/A and Motion IA 109/A, AB 729 BlgNR 16. GP 2.

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B. Protection vs Protectionism

As it would exceed the scope of this article to analyse in detail whether ancient Roman and current Austrian civil law on the (proclaimed) protection of intercessors may be considered protection or protectionism, the following paragraphs shall highlight only the results of such analyses.[59] In so doing, reference will be made to the three criteria for distinguishing between protection and protectionism: jurists' reasoning, purpose of the rule in question, and perspective(s) of the persons concerned (see chapter II).

Concerning jurists' reasoning, it can be stated that the classical Roman jurists produced no homogenous approach in arguing why the *SC Velleianum* applied to women's *intercessiones* and provided for the possible invalidation of such obligations. Multiple sources contain the assessment that female intercessors are considered to be in need of protection.[60] Ulpian even bluntly refers to the supposed gender-specific incapability of women (*infirmitas feminarum*, *calliditas sexus*).[61] Differing from this approach, which is based on the assumption that women are by nature in need of protection when acting as *intercessores*, Paul. (30 ed.) D. 16.1.1.1 refers to the socially constructed inferiority of women. Here, the scholar argues that the *SC Velleianum* is a mere logical consequence of the restrictions that have been imposed on women all along (*Nam sicut moribus...*). While these arguments are dissimilar, they share one common trait: their protectionist, one-dimensional fixation on the assessment that female *intercessores* are, in general, in need of protection. Afr. (4 quaest.) D. 16.1.19.5, Paul. (30 ed.) D. 16.1.11 and Paul. (6 brev.) D. 16.1.12, however, contain differentiated assessments, none of which refer to the theme of "female inferiority", but rather aim at weighing the interests of the creditors and female intercessors concerned in a purely dogmatic manner. Thus, these three sources' reasoning indicates a protective rather than a protectionist approach. In brief: While some fragments contain protective reasoning, others suggest jurists' approach to be protectionist. Contrary to this, the reasoning of the pertinent Austrian legislation and case law does not tie the protection of intercessors to gender(-specific weakness), despite stating to aim primarily at the protection of (ex-)wives who intervened on behalf of their (ex-)husbands. Rather, intercessors are deemed to be in need of protection if they should be in a situation rendering them particularly vulnerable, e.g., if they are consumers and/or have a close relation to the primary debtor. In recognizing that vulnerability is not a gender-specific constant, but may

[59] The underlying analyses may be found in the author's doctoral thesis.

[60] Call. (3 inst.) D. 16.1.21.1; Mod. (heur. sing.) D. 16.1.25.1.

[61] Ulp. (29 ed.) D. 16.1.2.2; Ulp. (29 ed.) D. 16.1.2.3; similarly, CJ. 4.29.5.

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occur situationally, the Austrian (case) law on the (proclaimed) protection of intercessors avoids over-protecting – and thus discriminating against – women, while at the same time ensuring that vulnerable men may equally benefit from the pertinent protective mechanisms.

In respect of the second criterion, the purpose of the rule in question, it is impossible to ascertain which telos the Roman rule actually pursued due to the fact that classical Roman law refers both to protective[62] and discriminatory tendencies[63] of the *SC Velleianum*. This is also reflected in the heterogenous literature.[64] Since the purpose of this rule cannot be determined, the second criterion for differentiating between protection and protectionism does not provide reliable information on whether to label the *SC Velleianum* "protection" or "protectionism". Concerning the pertinent Austrian (case) law, it can be stated that its sole purpose is to provide protection.

The third criterion, that of the perspective(s) of the persons concerned, is almost impossible to determine with regard to classical Roman law. It may only be accessed through the glimpses which classical Roman jurists provide on women's reactions vis-à-vis the *SC Velleianum*.[65] Studying Scaev. (1 resp.) D. 16.1.28.1 and Afr. (4 quaest.) D. 16.1.19.5, it becomes apparent that women (at times) perceived the *SC Velleianum* as restrictive, as the rule posed an obstacle to them acting as intercessors. Both of these fragments bear reference to women interceding in a covert and cumbersome manner, as they, wishing to openly pledge for someone else's debt, were not considered reliable secondary debtors due to the *SC Velleianum*. This points towards (patronizing) protectionism. In contrast, the Austrian law on the (proclaimed) protection of intercessors is, as far as the legislative materials show, regarded as protective by those concerned. This conclusion can be drawn in particular from the multiple references made to intercessors' demands for protective rules in the two legislative processes.[66] There exists no record of intercessors complaining of the loss

[62] See, e.g., Paul. (30 ed.) D. 16.1.1.1.

[63] See, e.g., Ulp. (29 ed.) D. 16.1.2.1; Ulp. (29 ed.) D. 16.1.2.3; Paul. (30 ed.) D. 16.1.1.1.

[64] Cf. Halbwachs, 'Calliditas feminarum' 137 (138).

[65] On the low amount of information, which the classical Roman jurists provide on the lives behind the case law Faber and Meissel, 'Partners in Business – Einst und jetzt. Historisch-vergleichende Anmerkungen zum Familien- und Gesellschaftsrecht', in Fischer-Czermak and Tschugguel (eds.), *Beiträge zum Familien- und Erbrecht. Liber Amicorum für Edwin Gitschthaler* (Vienna, 2020) 33 (38).

[66] Stenographic Protocol of the 108th Session of the Austrian National Assembly during the 16th Legislation Period, StenProtNR 16. GP 108. Sitzung 9462; Stenographic Protocol of the 53rd Session of the Austrian National Assembly during the 20th Legislation Period, StenProtNR 20. GP 53. Sitzung 35, 42 f, 50.

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of autonomy suffered due to the introduction of these protective rules; rather, the opposite holds true. As described above, the amount of protection provided by § 98 EheG and §§ 25a-b KSchG is regarded as quite low.[67] Moreover, the two generations of rules and case law on the protection of intercessors do not seamlessly ensure the protection of all intercessors: If the creditor does not provide the proper amount of information as mandated in §§ 25a-b KSchG, intercessors may intervene (as they oftentimes have) overhastily and carelessly, endangering their financial security. Despite this, intercessors will be bound by their respective obligation in most cases: § 25c KSchG only applies if the intercessor would not have intervened had the creditor provided the appropriate amount of information. Likewise, both § 25d KSchG and the pertinent OGH case law only apply if a number of additional criteria are fulfilled.[68]

Summing up these elaborations, the *SC Velleianum*, referring to the two criteria "jurists' reasoning" and "perspective(s) of the persons concerned", may be labelled as "protectionism". Differing from this, the current Austrian rules may be considered "protection" according to all three criteria, although it is open to question whether the amount of protection that they provide is sufficient to adequately protect intercessors from financial hardship.[69]

VI. Conclusion

Drawing on the author's doctoral thesis, this paper has provided a concise overview of the construction of protective rules for the sake of intercessors in ancient Roman and current Austrian civil law. In so doing, it showed that different periods of time may produce similar issues, stimulating jurists' interest and leading to the introduction of (proclaimed) protective rules. More specifically, the elaborations above brought to light that ancient Roman and current Austrian civil law both sought to provide rules on secondary debts that (ex-)wives incurred on behalf of their (ex-)husbands, as such obligations have been taken up multiple times, leading to financial problems or even bankruptcy of the female intercessor. Moreover, it has been demonstrated that, across centuries, jurists may share problem-solving strategies

[67] See above chapter IV.A; cf. on the "first generation" Apathy/Frössel, '§ 25b KSchG', in Schwimann and Kodek (eds.), *ABGB: Praxiskommentar*, 5th edn. (Vienna, 2021) para. 6.

[68] See in detail chapter 5.IV.B of the author's doctoral thesis.

[69] This question is dealt with in Karik, 'Interzedent:innenschutz in Österreich: Der Weisheit letzter Schluss?' (2023) *JRP* (forthcoming).

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in constructing protective rules, while at the same time approaching similar issues in fundamentally different ways.

Both ancient Roman and current Austrian civil law started out by creating comparatively weak tools for the (proclaimed) protection of intercessors (edicts of Augustus and Claudius; § 98 EheG and § 31a KSchG), expanding the level of (proclaimed) protection at a later point in time (*SC Velleianum*, §§ 25c-d KSchG, pertinent OGH case law). Another similarity between the ancient Roman and current Austrian approach is that they both address intercessions in an all-encompassing manner. The former generally refers to women's intercessions, while the latter applies to all stages of an intercession, including the pre-contractual stage.

This article also addressed the grey area where protection and protectionism blur, introducing three criteria for distinguishing between these two categories: (1) jurists' reasoning concerning the enactment of the (proclaimed) protective rule in question, (2) the purpose of the given rule, (3) the perspective(s) of the persons concerned. When applying these criteria to a specific rule, one needs to keep in mind that they provide guidance for distinguishing between protection and protectionism and thus "institutionalize" objectivity to a certain extent. They do not, however, guarantee an objective categorization. This is because such an objective categorization is impossible to achieve due to the subjective perspective that inevitably shapes each researcher's perception.

Applying the three criteria for distinguishing protection and protectionism to the ancient Roman *SC Velleianum* brought to light that this rule may be classified as "protectionism". This is due to jurists' reasoning and the perspectives of the women concerned pointing in this direction. The purpose of the *SC Velleianum* cannot be determined, however, for the sources refer to both discriminatory and protective tendencies. Regarding current Austrian legislation and pertinent case law on the protection of intercessors, all three criteria suggest a designation of "protection". It is debatable, however, whether the amount of protection provided is sufficient.

The most important aspects of the elaborations above may be distilled into five best-practice recommendations for constructing protective rules, which are both stakeholder-oriented and effective. Firstly, it is key to listen to the voices of those persons who are supposed to be protected in the legislative process, so as to avoid subjecting them to a protectionist regime. Secondly, one must recognize that vulnerability may arise situationally and is not a constant. Such an understanding greatly enhances the possibility of adequately detecting and meeting protection needs instead of imposing (protectionist) rules to one specific group of people, while at the same time excluding others from (necessary) legal protection. Thirdly, when

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constructing protective rules, the focus should be on providing a legal regime that increases the agency of vulnerable persons, for example by mandating duties to inform in order to make sure that they are fully aware of the legal consequences of their actions. Fourthly, it makes sense to provide for a complementary "safety net", allowing for the correction of grave injustice, e.g. through the invalidation of individual intercessions. Lastly, the existence of adequate sanctions, ensuring that other persons comply with the rules set up for protecting vulnerable people, is an indispensable precondition for protective rules to be effective.

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