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Éditorial

Jean-François Gerkens

Dans l'éditorial de la *RIDA* 64, nous déplorions la disparition de Joseph Mélèze-Modrzejewski, membre de notre comité de rédaction. Avec le décès de Hans Ankum, c'est un nouveau membre de notre comité de rédaction qui est venu à manquer. Il y était entré pour le numéro 36 (1989), il y a donc environ 30 ans, en même temps que Giovanni Pugliese.

Hans Ankum a fait l'objet d'une commémoration lors de l'assemblée générale de la SIHDA d'Édimbourg, ainsi que lors d'une rencontre du « Forum romanum », société savante qu'il avait fondée au sein de son Université d'Amsterdam. Lors de cette réunion du 18 octobre 2019, Eric Pool a évoqué « le maître et ami Hans Ankum », Laurens Winkel « le romaniste », Edgar du Perron le « professeur de l'Université d'Amsterdam » et l'auteur de ces mots, « Hans Ankum et la SIHDA ». La *RIDA* commémorera Hans Ankum dans son prochain numéro.

Au demeurant, le présent numéro commémore, comme annoncé, Joseph Mélèze-Modrzejewski sous la plume de Jakub Urbanik. Il rend également hommage à Berthold Kupisch à l'initiative de Jeroen Chorus.

Enfin, le premier article du présent numéro constitue l'élaboration du texte de la conférence introductive à la session internationale de la SIHDA de Bologne. Pascal Pichonnaz l'avait prononcée le 12 septembre 2017,en ouverture de la session internationale dont la chronique est parue dans le numéro précédent de la *RIDA*. Le présent numéro contient quant à lui, la chronique de la SIHDA de Cracovie de 2018.

Au titre des nouveautés éditoriales, la rédaction de la *RIDA* a décidé de publier — dans le futur et en plus de la revue — des monographies sous forme de « Hors-série la *RIDA* ». Nous espérons que l'initiative trouvera également son lectorat.

Excellente lecture à toutes et tous !

Chaudfontaine, le 11 novembre 2019.
Jean-François Gerkens

Religion in Law's Domain: recourse to supernatural agents in litigation, dispute resolution, and pursuits of justice under the Early Roman Empire

À Rome, l'évolution juridique part de débuts très humbles, qui se rapprochent de ceux que nous observons dans les sociétés les plus inférieures qui sont connues, et se rapproche, dans les derniers moments, de notre droit moderne. On y trouve donc un raccourci, presque un tableau de l'évolution juridique de l'humanité (E. Durkheim, in V. Karady [ed.], *Textes*, I, Paris, 1975, p. 244).

Janne Pölönen

Helsinki

Autonomy of law is among the most important achievements of Roman civilization. This resulted from the efforts of Roman jurists, who differentiated civil law from religious, social, or ethical rules. It is quite naturally assumed today that formally rational Roman law, backed up by imperial power, was highly effective in regulating conduct and conflict. This leaves historians with strong expectation that religion, strictly separated from legal rules and processes, scarcely played a role in this privileged functional domain of law. Purpose of my paper is to explore gaps between the expected and observed role played by religion in litigation, resolution of disputes and other pursuits of justice, both inside and outside the Roman courts, during the classical period of Roman law (roughly, from the first century BC to the third century AD).

This paper provides a sort of cross-section of the Roman legal culture. It begins with introduction to the assumed role played by religion, or recourse to the supernatural, in the functional domain of law. This is followed by discussion of the Roman jurists' treatment of religion in case of burial and oath-taking. After the jurists' writings, a look is taken at giving of evidence under oath before the judges from the advocates' perspective. The rest of the paper is devoted to examination of litigation, resolution of disputes and other pursuits of justice inside and outside of public tribunals, as revealed by narratives and documents.

Introduction

Hundreds of years, scholars have linked legal development to societal progress,[1] and law's relation especially to religion has been of great interest to both lawyers and sociologists.[2] Emile Durkheim set out to explain how law replaces religion as the moral focus of societies advancing from "mechanic" to "organic" form of social solidarity.[3] According to Durkheim, both function to maintain the social order but in course of societal development law supersedes religion. Positivist legal science begins with an assumption that in advanced legal systems law has replaced religion, and stresses the separation of law from religion and popular morality. Autonomous legal system "looks to itself rather than to the standards of some external social, political or ethical system for guidance in making and applying law".[4] Autonomy is the product of formal rationality, which in Max Weber's legal sociology distinguished western (especially Continental) law from primitive and oriental legal traditions,[5] in which the making, finding and application of law is guided by religion.[6]

Formally rational qualities of the modern western law are credited to its Roman pedigree. Autonomy of Roman law vis-à-vis religion is one of the basic truths of legal history.[7] For example, Jolowitz and Nicholas state in *Historical Introduction to the Study of Roman Law* that "it is an indication of the legal genius of the Romans that they were able, at so early a stage in their development, to

1. This article is developed from a paper presented on the 6th of February 2007 at the *séminaire commun des ATER de l'École Pratique des Hautes Études* in Paris organised by Frédéric Gabriel. I would also like to thank prof. Jean Andreau, dr. Kalle Korhonen and dr. Kaius Tuori for their comments on earlier versions of the manuscript.

2. P. Stein, *Legal Evolution: The Story of an Idea*, Cambridge, 1980. See also B.Z. Tamanaha, *A General Jurisprudence of Law and Society*, Oxford, 2001, p. 118 for a useful summary of the social and legal characteristics of "traditional" and "modern" societies.

3. E. Durkheim, *De la division du travail social*, Paris, 1893. Durkheim's idea is closely paralleled by Henry Summer Maine's movement from "status" to "contract", which involves a theory about the religious character of the law in early societies: *Ancient Law*, London, 1961; R. Cotterrell, *Emile Durkheim: Law in a Moral Domain*, Stanford, 1999, p. 94–95.

4. R. Lembert, "The Autonomy of Law: Two Visions Compared", in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society*, Berlin/New York, 1988, p. 159.

5. M. Weber, *Economy and Society*, vol. 2, Berkeley and Los Angeles, 1978, p. 809–838, 978. See already Rudolf von Jhering, *L'esprit du droit romain*, vol. 1, Paris, 1887, p. 268.

6. Weber, *o.c.* (n. 5), p. 657–658.

7. F. Schulz, *Principles of Roman Law,* Oxford, 1936, p. 24–25, 38–39; G. Pugliese, "L'autonomia del diritto rispetto agli altri phenomeni e valori sociali nella giurisprudenza romana", in *La storia del diritto nel quadro delle scienze storiche*, Firenze, 1966, p. 161–192; A. Watson, *The Spirit of Roman Law*, Athens 1995; A. Lewis, "Autonomy of Roman Law", in P. Coss (ed.), *The Moral World of Law*, Cambridge, 2000.

separate law so completely from religion".[8] It is understood that magic and religion were closely intertwined with law in the most archaic Roman society, and may have played a role in formation of legal rights and claims.[9] It is recognized, moreover, that the Romans considered themselves deeply religious people: they legally protected religious rites, things and places, and their whole civic life, including the proper time for legislative and legal processes, was governed by strict observance of religious rules and calendar.[10]

But the Roman civil law, as it developed from the XII tables since the middle of the fifth century BC, left remarkably little room for the influence of religion despite the important role the pontiffs played in its early interpretation and administration.[11] In historical times, the Romans understood their law to be a man-made result of continuous legislation and interpretation. Within the Roman legal system, law-making, law-finding and fact-finding were "rational" processes controlled by the human intellect instead of the supernatural.[12] Most importantly, legal specialists — *iuris periti* — emerged who developed the *ius civile* towards an independent and internally coherent set of rules and principles that was conceptually differentiated from religious or divine rules and their knowledge (*ius pontificum*, *ius sacrum, ius divinum*, and *ius naturale*).[13]

From the perspective of legal history, it is right to underline the Roman law's separation from religion, and to recognize its role as the precursor to the modern Western legal systems. The problem is that once the autonomous civil law is introduced with the XII Tables, the legal sphere of Roman history is almost only about legally rational ideas, rules and processes, and phases of their development

8. H.F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*[3], Cambridge, 1972, p. 109. According to Durkheim, the Roman law presents from the times of the Twelve Tables "*une œuvre tout humaine*"; Cotterrell *o.c.* (n. 3), p. 84.

9. P. Huvelin, "Magie et droit individuel", in *Année sociologique* 10 (1907), p. 1–47; P. Huvelin, *Études d'histoire du droit commercial romain*, Paris, 1929; P. Noailles, *Du droit sacré au droit civil*, Paris, 1949; Jolowicz – Nicholas, *o.c.* (n. 8), p. 89: "It is true that Roman law took on a secular character at a comparatively early stage in its history, but with Romans, as with all peoples, law and religion were not originally differentiated, and there were many spheres, even after the XII Tables, and in later times, where the *ius sacrum*, the religious law strictly so called, touched the ordinary civil law."

10. Jhering has aptly described the Roman state a "divine edifice", in which everything was consecrated to some divinity, and in which it was forbidden to change anything without the god's approval: Jhering, *o.c.* (n. 5), p. 272.

11. Jhering, *o.c.* (n. 5), p. 266–306; M. Humbert, "Droit et religion dans la Rome antique", in *Archives de philosophie du droit* 38 (1993), p. 35–63; J. Scheid, "Oral Tradition and Written Tradition in the Formation of Sacred Law in Rome", in C. Ando and J. Rüpke (eds.), *Religion and Law in Classical and Christian Rome*, Oxford, 2006, p. 14–33.

12. Cic. *rep.* 2, 2; R. Orestano, *Introduzione allo studio storico del diritto romano*, Bologna, 1987, p. 594–598. On "*la laïcisation du procès*": G. Broggini, "La preuve dans l'ancien droit romain", in *La preuve I : Antiquité*, Bruxelles, 1989, p. 252–256.

13. A. Schiavone, Ius. *L'invention du droit en Occident*, Paris 2008.

in historical context of Roman society. Exclusion of religion from the Roman civil law (a historical fact) and from the Roman legal history (a historiographical fact) has important consequences to our understanding of the effect the Roman law had in people' lives. Until the Late Antiquity takes over, there is little in the Roman legal sources and history to suggest that religion played a role in the privileged functional domain of the law and authority: the maintenance of social order and regulation of conduct and conflict among the populace. This does not mean that the role of religion is explicitly denied by historians, rather it is forgotten or not given systematic attention.

Thoughts and techniques of the Roman jurists, and the autonomous rules and procedures elaborated in their writings, represent the definitive legal achievement of the Roman civilization. Nevertheless, legal culture of the Roman Empire was shaped also by the most diverse attitudes and behaviour of inhabitants of the Roman world with little or no specialist legal learning.[14] As magistrates, officials, judges and advocates, they were involved in the law's finding and application to facts of concrete cases in Roman courts, and as subjects of the Roman Empire they controlled conduct and had disputes to resolve. Institutional and popular legal culture has been largely overlooked by students of Roman law and history. One reason is that the study of reality of law and the role played by religion (what the officials and people thought and did) calls for empirical rather than legal analysis.[15] Much conduct aimed at resolution of disputes and pursuit of justice is deemed extra-legal or even illegal, and so fall outside the interest of traditional legal history. Empirical analysis cannot replace legal analysis in study of what is Roman law, but it can produce a more accurate description of law's operation in Roman society.[16] An important practical challenge is that the surviving Roman evidence documenting legal ideas and behavior is mostly meager, fragmentary and anecdotic.

In analyzing the various sources that testify to the uses of religion in the law's functional domain, one has to cross not only the boundary between law

14. On legal culture in general: L.M. Friedman, *The Legal System: A Social Science Perspective*, New York 1975; D. Nelken (ed.), *Comparing Legal Cultures*, Aldershot 1997; L.M. Friedman, "The Place of Legal Culture in the Sociology of Law", in M. Freeman (ed.), *Law and Sociology: Current Legal Issues*, Oxford 2006.

15. B. Frier, *The Rise of the Roman Jurists*, Princeton, 1985, p. 77 n. 103; E. Meyer, *Law and Legitimacy in the Roman World*, Oxford, 2004.

16. It is important, however, to clearly differentiate between the legal and sociological analysis: J. Pölönen, "The Case for Sociology of Roman Law", in M. Freeman (ed.), *Law and Sociology*, Oxford, 2006, p. 398–408; J. Pölönen, "Framing 'Law and Society' in the Roman World", in P.J. du Plessis, C. Ando, and K. Tuori (eds.), *The Oxford Handbook of Roman Law and Society*, Oxford University Press, Oxford, 2016, p. 8–20. In general, see R. Cotterrell, *The Sociology of Law: An Introduction*, London, 1984; R. Treves, *Sociologia del diritto: origini, ricerche, problemi*, Torino, 1987; N. Luhmann, *Rechtssoziologie*, Opladen, 1987; A.-J. Arnaud – M.J. Fariñas Dulce, *Introduction à l'analyse sociologique des systémes juridiques*, Bruxelles, 1998.

and religion,[17] but also one traditionally separating religion from superstition or magic.[18] Distinction between practices that conform or do not conform with the official law or religion of Rome is interesting but should not be limiting our understanding of the recourse to the spiritual beings in resolution of disputes and pursuits of justice among the populace.[19] Such recourse involved widely shared beliefs in supernatural agents, which do not have ordinary biological bodies but to whom humans attribute animacy and mentality.[20] Thus I follow in this article something like Ittai Gradel's approach to "religion" as consisting of "action of dialogue between humans and what they perceive as "another world' ".[21]

Jurists, burial, and oath-taking

The Roman jurists "isolated" the civil law rules and principles from their environment, to the extent of mostly ignoring the existence of other normative orders in the society. Religious norms are not an exception. In addition to the extra-commercial status of sacred places and things, holidays exempted from legal business, and the transmission of family rites through marriage, adoption and succession, the burial of corpses was among the few areas of civil law touched by religion.[22] This may seem a marginal area of the civil law but given the large number of deaths taking place in the Roman world the disputes over burials and burial-places may have been common.[23] Without any doubt, most ancients regarded the burials of greatest religious importance. Even an enlightened Roman, although he ridiculed the Olympian mythology, would not disregard the religion

17. C. Ando – J. Rüpke (eds.), *Religion and Law in Classical and Christian Rome*, Oxford, 2006; C. Ando, *Matter of the Gods: religion and the Roman Empire*, Berkeley, 2008.

18. J.G. Gager, *Curse Tablets and Binding Spells from the Ancient World*, New York, 1992; M. Sachot, "'Religio/superstitio'. Historique d'une subversion et d'un retournement", in *Revue de l'histoire des religions* 208 (1991), p. 355–394; B.-Ch. Otto, "Towards Historisizing 'Magic' in Antiquity", in *Numen* 60 (2013), p. 308–347.

19. The writings of the Roman jurists may tell us no more about the popular legal attitudes and practices than the learned and critical writings of the small elite tell about the religious attitudes and practices of the majority of population: J.-P. Clerc, Homines magici. *Une étude sur la sorcellerie et la magie dans la société romaine impériale*, Bern/Berlin/New York, 1995, p. 16–17 (with reference to MacMullen).

20. I. Pyysiäinen, *Supernatural Agents: Why we believe in souls, gods, and buddhas*, Oxford, 2009. E. Tylor defined religion as belief in spiritual beings: *Primitive Culture: Researches into the development of mythology, philosophy, religion, art, and custom*, vols. I–II, London, 1871.

21. I. Gradel, *Emperor Worship and Roman Religion*, Oxford, 2002,p. 4–5.

22. E.g. Schulz, *o.c.* (n. 7), p. 26.

23. In an estimated population of 60,000,000 there may have been over 2,000,000 deaths per year if we presume a mortality rate of 35 deaths per 1,000 per year. But given the life expectancy at birth of only 25 years, around 30 per cent of the deaths occurred under one year of age: R.P. Saller, *Patriarchy, Property and Death in the Roman Family*, Cambridge, 1994, p. 12–25. Naturally, only part of the total population of the Empire had Roman citizenship.

of the dead. The burial allowed the deceased to pass from the human society to the underworld of the *di manes*. If unburied, in Roman belief the dead would remain in a liminal state restlessly haunting as ghosts the society they are unable to leave. The families of the deceased remained in a state of pollution until the burial and ritual purification were properly accomplished.[24]

Legal trouble ensued especially from the fact that burial makes the very spot in which the corps is interred religious (*locus religiosus*) and so unfit for human commerce and use.[25] Thus, no one had right to make a burial on a land owned by someone else (*alieno loco*); anyone who did this was liable to an action on the facts (*actio in factum*) and a fine. But even the owner of land was forbidden — in strict legal principle — to make the spot religious by burial if doing so hurt someone else's civil law right in respect to that land. There was a conflict between the legal right in the use of land and the religious interest in burial, which was debated also by the jurists. The Severan jurist Ulpian preferred the opinion that the owner could make a place enjoyed by someone under the right of usufruct religious if the usufructuary agreed to the burial, and even against the latter's wish if, as already Julian (who "codified" the praetor's edict under Hadrian) thought, the deceased to be buried in it was the owner of the land who had granted the right of usufruct and there was no other convenient place of burial:

> If one man has the title, another the usufruct, not even the former can make place religious, unless he happens to have buried the person who has bequeathed the usufruct, it not being possible to bury him so conveniently anywhere else; that is what Julian writes. Otherwise, the place cannot become religious against the wishes of the usufructuary; but if the usufructuary agrees, the better view is that the place does become religious.[26]

Thus it seems, as F. de Visscher points out, the owner's "right" to be buried in a place that he owned during his lifetime was protected even after his death.

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24. E. Jobbé-Duval, *Les morts malfaisants*, Paris, 2000 [1924], p. 51, 40, argued that "*la croyance aux 'revenants' doit être considérée comme ayant été génerale chez les Romains*", "*pas seulement une superstition populaire*"; F. De Visscher, *Le droit des tombeaux romains*, Milano, 1963, p. 32–39; H. Cancik-Lindemaier, "*Corpus*: some philological and anthropological remarks upon Roman funerary customs", in A.I. Baumgarten – J. Assman – G. A.G. Stroumsa (eds.), *Self, Soul & Body in Religious Experience*, Leiden, 1998, p. 417–428; E. Cantarella, *Les peines de mort en Grèce et à Rome*, Paris, 2000, p. 172–176; J. Bodel, in S.I. Johnston (ed.), *Religions of the Ancient World: a Guide*, Cambridge, Mass., 2004, p. 489–492.

25. See in general, Y. Thomas, "*Res Religiosae*: On the categories of religion and commerce in Roman law", in A. Pottage – M. Mundy (eds.), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, Cambridge, 2004, p. 40–72.

26. D. 11.7.2.7: "*Ulpianus libro vicensimo quinto ad edictum. Si usum fructum quis habeat, religiosum locum non facit. Sed et si alius proprietatem. alius usum fructum habuit, non faciet locum religiosum nec proprietarius, nisi forte ipsum qui usum fructum legaverit intulerit, cum in alium locum inferri tam oportune non posset: et ita iulianus scribit. alias autem invito fructuario locus religiosus non fiet: sed si consentiat fructuarius, magis est ut locus religiosus fiat*"; DeVisscher, *o.c.* (n. 24), p. 61 n. 60.

The same would hold true if the deceased owner needed to be buried on land he had given to someone else as a legacy,[27] or, as Callistratus points out, on land he had owned in common with one or more partners.[28] A spot could also be turned religious by burying the owner on land he had transferred to the possession of creditor as a pledge (*pignus*); indeed the debtor was allowed already during his lifetime to make burial of a deceased family-member on such land.[29] Likewise, the owner could make religious a place under a praedial servitude (for example, a right of way) if the person to whom it is owed can enjoy the same benefit in some other place.[30]

Someone wanting to bury a deceased person to a certain place could seek from the magistrates an interdict on burying a dead body (*de mortuo inferendo*) against anyone who wished to prevent the burial, or, as the case may be, an interdict on building a sepulchral monument (*de sepulchro aedificando*) against anyone who tried to prevent the construction of the tomb. According to Papinian, the protection of the interdict was available also to those who had no right — according to the strict principle of civil law, that is — to make the place religious (*personae, quae, quamquam religiosum locum facere non possunt*): the owner of land who wanted to bury a dead man on farm against the wishes of the usufructuary, or a co-owner who wanted to bury a dead man on common land against the wishes of the other partner(s).[31] We have already seen that Ulpian and Callistratus allowed a place to be made religious against the will of *usufructuarius* or *socius*, but only if the person buried was the deceased owner. It is not clear if the owner of land Papinian has in mind wanted to bury the deceased owner, or someone else. In any case, the jurists allowed exceptions to the rule.

The primary reason why the jurists allowed burials against the strict principles of the civil law is religious, even if they seem to have protected — as de Visscher suggested — the rights of the deceased owner. In discussion of the *actio in factum* against someone who has buried a corps on land enjoyed by someone else, Ulpian explains that the owner is permitted to make place religious with the consent of the usufructuary "out of respect for religion" (*hoc uerum est fauore religionis*), and that indeed he can do it even without the consent if he buries the deceased owner.[32] Ulpian is no less explicit in regard to the interdict *de sepulchro aedificando*: it "has been introduced because it is in the interest of the religion that burial monuments are built and ornamented".[33] According to Papinian, this is also the reason why

27. D. 11.7.4; De Visscher, *o.c.* (n. 24), p. 60–61.

28. D. 11.7.41.

29. D. 11.7.2.9; De Visscher, *o.c.* (n. 24), p. 61 n. 61.

30. D. 11.7.2.8; De Visscher, *o.c.* (n. 24), p. 61.

31. D. 11.7.43.

32. D. 7.1.17*pr*.

33. D. 11.8.1.6: "*Ulpianus libro sexagensimo octavo ad edictum. Interdictum hoc propterea propositum est, quia religionis interest monumenta exstrui et exornari.*" Thus one may ask if it was because

interdict *de mortuo inferendo* can be sought against the dissenting usufructuary or co-owner of the land:

> For it is in the public interest, so that corpses should not lie unburied, that we ignore the strict principle, which is quite often left out of account in doubtful religious disputes; for the highest principle of all is that which serves the interest of religion.[34]

Here Papinian might seem at first to offer a more enlightened common good (health?) reason why the jurists ("we") ignore the strict principle of the civil law: *propter publicam utilitatem, ne insepulta cadauera iacerent*. But he makes it clear that this is one of the dubious disputes involving religion, in which the strict principle of civil law is habitually overlooked. *Quae nonnumquam in ambiguis religionum quaestionibus omitti solet* is not a formulation of an abstract legal doctrine but an empirical observation of the legal practice, the law in action. The passage ends in a slogan, authentic or not, that seeks to justify the practice Papinian observed: *nam summam esse rationem, quae pro religione facit*.[35] Papinian seems to suggest that the jurists giving advice in regard to the application of law, or perhaps the magistrates and judges actually applying the law, do not usually allow the law to jeopardize the interest of religion. This is indeed consonant with the Roman view that legal learning was not only about the formal legal rules and principles, but also about their wise application in concrete settings. As Ulpian puts it, "practical

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of a religious reason that heirs, who in keeping with the strict rules of the civil law refused to build a monument the deceased had planned for his burial, were "compelled by the imperial or pontifical authority to respect the last will": D. 5.3.50.1: "*Papinianus libro sexto principali vel pontificali auctoritate compelluntur ad obsequium supremae voluntatis.*" The imperial authority means in this context the emperor in his role of *pontifex maximus*. On the pontifical authority in matters of transfer of cadavers and restoration of burial monuments: D. 11.7.8*pr*; D. 11.8.5.1; N. Laubry, "Le transfert des corps dans l'Empire romain : problèmes d'épigraphie, de religion et de droit romain", in *Mélanges de l'École française de Rome. Antiquité* 119 (2007), p. 149–188. For example, in case the corps was placed in monument that was incomplete, the pontiff were to establish what can be done to build it without offending against religion: D. 11.8.5.

34. D. 11.7.43*fin*: "*Papinianus libro octauo quaestionum. Nam propter publicam utilitatem, ne insepulta cadauera iacerent, strictam rationem insuper habemus, quae nonnumquam in ambiguis religionum quaestionibus omitti solet: nam summam esse rationem, quae pro religione facit*."

35. On the high respect for religion shown in the legal sources: R. Haensch, "'Religion' und Kulte im juristischen Schrifttum und in rechtsverbindlichen Verlautbarungen der Hohen Kaiserzeit", in D. Elm von der Osten – J. Rüpke – K. Waldner (eds.), *Texte als Medium und Reflexion von Religion im römischen Reich*, Stuttgart, 2006, p. 235. When considering whether an arbiter subsequently appointed to priesthood is to be compelled by the praetor to make an award, Paul argues that he is not, because "concession should be made not only to the honor attained by the individuals but also to the majesty of the god for whose rites the priests ought to be free": D. 4.8.32.4: "*Paulus libro tertio decimo ad edictum. non tantum honori personarum, sed et maiestati dei indulgetur, cuius sacris vacare sacerdotes oportet*."

wisdom in legal questions lies in attention to things divine and things human, in knowing what is just and what unjust".[36]

In addition to the religious interest in burials, it did not escape the Roman jurists that the functioning legal system often relied on conscientious oath-taking. Two titles in the Digest (12.2 and 3) are devoted to it. It has been quite often thought, however, that the Romans of the classical times were no more religiously devoted to their oaths, that they were less afraid of committing perjury than having a good conscience and reputation. Yet there are reasons to doubt how widespread, after all, the lack of fear of the gods was in the ancient society, and there are reasons to think that for most inhabitants of the Roman Empire oath was essentially a religious affirmation of the truth witnessed and avenged in case of perjury by the gods.[37] Even a learned Roman like Cicero, although he regarded the oath perhaps more as a matter of personal sense of justice (*iustitia*) and faith (*fides*), points out the great "usefulness" of religion to the society at large by acknowledging "how many things are affirmed by oaths".[38] In legal practice, as Gaius observed, oaths were "relied on as an important means of shortening litigation",[39] some of which were voluntary and some involuntary.

The voluntary oath (*iusiurandum voluntarium*) was one that both the potential plaintiffs and defendants might anytime propose to each other in order to settle their dispute. They might do so entirely out of court, or after formal proceedings had started, even during the trial. The voluntary oaths were important means of alternative dispute resolution filtering cases away from tribunals.[40] Ulpian explains in his commentary on the Praetor's edict that this kind of oath was valid in all kind of actions.[41] In the law's eyes, it is generally agreed, the validity of the oath depended not on the fact that the parties had called the gods as witnesses in order to end their dispute but on the fact of their mutual agreement (*transactio*) to do

36. D. 1.1.10: "*Ulpianus libro primo regularum. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.*" On the meaning and translation of this passage: N. MacCromack, "De Iurisprudentia", in J. Cairns – O.F. Robinson (eds.), *Critical Studies in Ancient Law, Comparative Law and Legal History: Essays in Honour of Alan Watson*, Oxford, 2001, p. 81.

37. John Scheid has stressed that in Rome perjury was always considered an inexpiable impiety to be revenged by the gods themselves: e.g. J. Scheid, "Les *tabulae Pompeianae Sulpiciorum* témoins de la vie religieuse quotidienne", in *Cahiers du Centre Gustave Glotz* 11 (2000), p. 121–129, 113–119.

38. Cic. *leg.* 2, 16: "*Utilis esse autem has opiniones quis neget, cum intellegat quam multa firmentur iure iurando.*" On *fides* and *iustitia*: Cic. *off.* 3, 104; Schulz, *o.c.* (n. 7), p. 228.

39. D. 12.2.1: "*Gaius libro quinto ad edictum prouinciale. Maximum remedium expediendarum litium in usum uenit iurisiurandi religio, qua uel ex pactione ipsorum litigatorum uel ex auctoritate iudicis deciduntur controuersiae.*"

40. On the relative importance of formal litigation and alternative dispute resolution in the Roman empire: J. Pölönen, "Quadragesima Litium: Caligula's Tax on Lawsuits", in *Cahiers du Centre Gustave-Glotz* 19 (2008), p. 77–109.

41. D. 12.2.3.1; D. 12.2.9.1.

so.[42] The other party was of course free to refuse the proposal without harm done to his legal claims, but if he accepted to take the oath the case was closed. The party who tendered the oath had agreed to accept the truth as sworn by his adversary, and accordingly the law protected the validity of such oaths sworn on no matter what, even superstition, save illegal religion.[43] If sued, the party swearing was protected by the magistrate with the defense of oath taken (*exceptio iurisiurandi*), or with an action on oath (*actio iurisiurandi*) if he wanted to pursue his rights in regard to the case settled by an oath. Instead of the truth in the matter, the only thing he had to prove was that the oath had been correctly taken.

The oath was involuntary (*iusiurandum necessarium*) if the magistrate compelled the parties to swear. This could be a remedy against malicious litigation (*iusiurandum calumniae*), when the plaintiff or the defendant was not allowed to proceed but under oath that he or she was not undertaking litigation in order to be vexatious. Besides this, particularly the defendant could be compelled to take an oath tendered by the plaintiff in order to determine the factual existence of his claim of certain sum of money or certain thing. The dominant opinion indeed holds that at least in classical times this kind of oath was available only in case of *condictio* and other actions related to it.[44] Eventually, Greenidge suggests, this kind of "oath became a substitute for evidence *in iure* throughout the whole domain of civil jurisdiction".[45] Whatever the truth in this matter, the defendant had an alternative of offering the oath tendered back to the plaintiff, who was in turn obliged to swear himself in order not to lose the case. The party who refused to take the oath administered by the magistrate automatically lost the case: according to Paul, the magistrate was to regard it "an indication of manifest wickedness and an admission to refuse to swear or to counter-swear".[46] And there is no reason not to believe Gaius (who wrote during the late second century AD) when he observes about the law in action that "it is very frequent practice of judges [that is, magistrates] in doubtful cases to pronounce after an oath has been exacted, in favor of the party swearing".[47]

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42. M. Humbert, "À propos du *iusiurandum* de *T Sulp*. 28 et 29 : Aveu d'*iniuria* ou défense, par un serment décisoire, à une action entachée de *calumnia*?", in *Cahiers du centre Glotz* 11 (2000), p. 122: "*Les dieux n'ont rien à voir dans l'efficacité de cet acte purement laïc. L'aspect religieux est ramené à la sincérité escomptée de celui qui jure et qui, s'il ment, est menacé de parjure et de subir l'ire des dieux.*"

43. D. 12.2.5.1–3.

44. P.F. Girard, *Manuel élémentaire de droit romain*, Paris, 1929, p. 1065.

45. A.H.J. Greenidge, *The Legal Procedure of Cicero's Time*, Oxford, 1901, p. 261.

46. D. 12.2.38: "*Paulus libro trigensimo septimo ad edictum. Manifestae turpitudinis et confessionis est nolle nec iurare nec iusiurandum referre.*"

47. D. 12.2.31: "*Gaius libro 30 ad edictum provinciale. solent enim saepe iudices in dubiis causis exacto iureiurando secundum eum iudicare qui iuraverit.*" The passage is, in my view wrongly, suspect of interpolation: G. Pugliese, "La preuve dans le procès romain de l'époque classique", in *La preuve I : Antiquité*, Bruxelles, 1989, p. 328 n. 1.

The necessary oaths did not automatically decide cases, but the magistrates treated them — in principle, at least — merely as evidence which informed their own decisions; the case was decided by the magistrate, not by the god(s). It is interesting to note, however, that unlike in case of voluntary oaths the magistrates were to accept oaths sworn only on some divinity. As Ulpian explains, "an oath sworn on one's own salvation, even if it seems to be an oath by god (for such an oath is taken in reliance on the divine presence), is nevertheless void unless expressly tendered in those terms".[48] The fact that the validity of necessary oaths depended on being sworn on god suggests that the legal apparatus relied on them as the medium of the truth on grounds of religion. This, of course, does not mean a blind reliance on oaths. While Ulpian treated oath-taking as a matter of religion, he also was a realist as to the wide range of beliefs while explaining why the praetor must not uphold the condition of swearing oaths the testators may impose on heirs: "There are some among men who in their contempt of religion are ready to swear, and others who in their fear of the divine power, are extremely timid, to the extent of superstition."[49]

Because the magistrates exacted necessary oaths without the voluntary agreement of the parties, and used them as (potentially fallacious) evidence especially in doubtful cases in which other means of proof were lacking, "the imperial constitutions had permitted a case to be revived if someone says he has found new documents on which alone he is going to rely".[50] The law's high respect for religion, however, is shown by the fact that the case decided on basis of oath, whether necessary or voluntary, could not be reopened on the pretext of perjury:

> Emperor Antoninus (Caracalla) to Herculianus. A cause decided by an oath, taken pursuant to agreement of the parties, or when the opponent has tendered the oath and it is taken or offered back, cannot be reopened even under the pretext of perjury, unless specifically excepted from this law (AD 212).[51]

Even more interesting are the jurists' arguments referred to by Ulpian that because of "religious scruples" a case could not be reopened even if the voluntary oath was actually later proven false:

48. D. 12.2.33: "*Ulpianus libro uicesimo octavo ad Sabinum. Qui per salutem suam iurat, licet per deum iurare videtur (respectu enim divini numinis ita iurat), attamen, si non ita specialiter iusiurandum ei delatum est, iurasse non videtur: et ideo ex integro sollemniter iurandum est.*"

49. D. 28.7.8*pr*: "*Ulpianus libro quinquagesimo ad edictum. enim faciles sint nonnulli hominum ad iurandum contemptu religionis, alii perquam timidi metu divini numinis usque ad superstitionem.*"

50. D. 12.2.31: "*Gaius libro 30 ad edictum provinciale. Admonendi sumus interdum etiam post iusiurandum exactum permitti constitutionibus principum ex integro causam agere, si quis nova instrumenta se invenisse dicat, quibus nunc solis usurus sit.*" In my view *si alias inter ipsos iureiurando transactum sit negotium* later in this passage refers to voluntary oaths, however Pugliese, *o.c.* (n. 47), p. 328 n. 1 and 330 n. 1.

51. C. 4.1.1: "*Imp. Antoninus A. Herculiano. Causa iureiurando ex consensu utriusque partis vel adversario inferente delato et praestito vel remisso decisa nec periurii praetextu retractari potest, nisi specialiter hoc lege excipiatur.*"

> If on my application you swear an oath and are acquitted and afterward it is shown you have committed a perjury, Labeo says that the action for fraud is to be given against you. However, Pomponius says that by means of the oath the action is held to have been compromised. An opinion which Marcellus also affirms in the eight book of his Digest, for religious scruples determine that one ought to abide by the position (created by the oath).[52]

In this case the parties had agreed to settle their dispute by oath after the beginning of the trial stage (*post litem contestatam*). The crucial point is that if the jurists actually regarded voluntary oaths as mere acts of mutual agreement to end disputes, as Labeo and many modern commentators seems to think, there should have been no problem in admitting the case to be reopened on basis of the evident fraud. But Pomponius, Marcellus and Ulpian clearly thought the authority of agreement concluded by oath was greater — because of the religion — than that of an ordinary private settlement. As Paul observed, its force was even greater than of a legal decision (*res iudicata*).[53]

Orators, oaths, and divine vengeance

Although the voluntary and necessary taking of oaths is part of the popular and institutional legal culture, the jurists look at it almost exclusively from the perspective of the rules and principles on which legal decisions ought to be based on. The jurists usually expound the law on basis of facts proposed to them, without a moment's thought on problems of actually finding out and proving those facts. Thus the Roman law on books deals with the elements of technically valid oaths and their consequences in regard to actions and exceptions to be granted by the magistrates. It has next to nothing to say about weighing of oath as evidence by the magistrates during the preliminary hearings, let alone by the private judges during the actual trials. There is indeed little to suggest in the legal treatises that the parties might actually take oaths before the judges who actually adjudicate formally contested disputes, except that the plaintiffs might be formally required to swear as to the value of the case (*iusiurandum in litem*).[54] In order to gain more insight into

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52. D. 4.3.21: "*Ulpianus libro undecimo ad edictum. Quod si deferente me iuraueris et absolutus sis, postea periurium fuerit adprobatum, Labeo ait de dolo actionem in eum dandam: Pomponius autem per iusiurandum transactum uideri, quam sententiam et Marcellus libro octauo digestorum probat: stari enim religioni debet*." See also Paul in D. 12.2.28.10.

53. D. 12.2.2: "*Paulus 18 ad edictum. Iusiurandum speciem transactionis continet maioremque habet auctoritatem quam res iudicata*." It is interesting to note that the jurists sometimes justified the validity of voluntary oaths also by religious arguments. In discussing an oath taken by a slave, Ulpian states that the master is to be protected by "an action or defense of pact by reason of the sacred bond and agreement": D. 12.2.25: "*Ulpianus libro uicensimo sexto ad edictum. Puto dandam mihi actionem vel pacti exceptionem propter religionem et conventionem.*" The reason why *religio* is evoked in this case is that under the sacred law even slaves had both legal personality and capacity, for a brief discussion see Schulz, *o.c.* (n. 7), p. 217.

54. L. Chiazzese, *Iusiurandum in litem*, Milano 1958.

the law and religion in action in courts it is necessary to turn to the writings of the specialists of proof who in practice advocated the truth of their clients' cases to the magistrates and judges.[55]

According to Quintilian, either party might offer to take an oath, even without being asked to do so, or challenge the opponent to oath-taking during trial. This is at once in stark contrast to the oaths discussed by the jurists. First, an oath sworn by one party without anyone having tendered it to him was of no legal effect.[56] And secondly, Quintilian makes it is clear that the opponent did not automatically lose his case if he refused the challenge to swear.[57] This perhaps leaves room for doubt if an oath taken during trial due to a challenge might qualify as a voluntary oath. But rather than to terminate the dispute in agreement by voluntary oath after the joinder of issue (*litis contestatio*), the purpose of oaths taken in the heat of the legal battle on forensic stage was to give evidence, the validity of which the judges (or magistrates) were in principle free to evaluate. A controversy of the Elder Seneca suggests, however, that the judges (in this case the centumviral court) might declare beforehand that they would decide according to an oath sworn, and Quintilian points out that in actual practice the judges (including magistrates) were likely to listen to oath taken because "it frees the person who hears the case from the burden".[58]

The evidence was given by the parties and witnesses in person, and in absence of modern science and techniques of investigation the truth in any matter depended largely on creation of belief over their authority and respectability. Forensic debate over the value of oaths taken was inevitable (it might involve philosophical debates over the gods' intervention in mens' lives); and the more so if someone offered to swear on his own initiative.[59] According to Quintilian, in this case it might be

55. It has been rightly stressed that to anyone actually involved in a lawsuit the facts of the case were the most pressing concern. Quintilian thought that "what causes advocates most stress is the evidence", and also jurist Neratius observes that "the law can and ought to be definite, but the interpretation of facts often baffles even very careful people": D..22.6.2: "*Neratius libro quinto membranarum. Ius finitum et possit esse et debeat, facti interpretatio plerumque etiam prudentissimos fallat*."

56. D. 12.2.3*pr* "*Ulpianus libro vicensimo secundo ad edictum. si reus iuraverit nemine ei iusiurandum deferente, praetor id iusiurandum non tuebitur: sibi enim iuravit.*"

57. Greenidge, *o.c.* (n. 45), p. 262; Pugliese, *o.c.* (n. 47), p. 329–330.

58. Sen. *contr.* 1, pr; Quint. *inst. or.* 5, 6, 4: "*Eum cuius cognitio est onere liberat, qui profecto alieno iure iurando stari quam suo maluit*." Therefore, it was indeed advisable for an advocate never to offer to the opponent the option of taking oath. The burden was essentially a moral and religious one, as the judge would prefer the decision to rest on the party's oath than on the oath he himself had sworn when taking up the duty of the judge.

59. Also, Ulpian remarks that if such an oath was not denied protection by the praetor "everyone of easy consciousness would rush to untendered oath-taking as a means of shuffling off the troubles of litigation": D. 12.2.3*pr*: "*Ulpianus libro vicensimo secundo ad edictum. alioquin facillimus quisque ad iusiurandum decurrens nemine sibi deferente iusiurandum oneribus actionum se liberabit*."

argued that the whole way of life of the man makes it incredible that he would commit a perjury, or that he would not risk the wrath of gods because so little is at stake in the dispute. In a more enlightened version, he might offer to add the proof of a clear conscience to the other means of winning the case. The opposition naturally retorted what was clear also to Ulpian, that some persons are not in the least afraid of committing perjury, or that the man is only proposing to pass sentence on his own case.

Thus, the intimate connection between oath-taking and fear of divine punishment recurred on the forensic stage; only here the law's formal indifference to the fact of perjury is replaced by the immediate test of beliefs over what is true and what is not. Quintilian's arguments show that much would depend on the social status, reputation, way of life, morals, gravity and authority of the person giving evidence under oath. This is unsurprising, as the magistrates were indeed required always to look for those same qualities in witnesses,[60] and — as it is well-known — the judges could be highly sensitive to character of persons appearing before them.[61] Just as the respect of the gods was an integral part of an upright and trustworthy person's character, an indifference to gods and religious traditions were likely to reduce the credibility of parties and witnesses at court. The advocates naturally tried to play this card. One example is the speech for Fonteius charged for provincial maladministration, in which Cicero undermined the testimony of witnesses from Gaul on basis of their alleged racial indifference to gods:

> Do you think that nations like that are influenced, when they give evidence, by the sanctity of an oath or by the fear of the immortal gods, differing so widely from all other nations as they do in habits and in character?[62]

Excursus to the Divine Evidence

In addition to testimony given under oath by the parties and their witnesses, also divine evidence (*divina testimonia*) — oracles, auspices, prophecies, and replies of priests, augurs and diviners — could, according to Cicero, "often be drawn for the creation of belief".[63] The divine evidence played a decisive role for

60. D. 22.5.2–3; Paul. *Sent*. 5.15.1; P. Garnsey, *Social Status and Legal Privilege in the Roman* Empire, Oxford, 1970, p. 211–212.

61. E.g. *Rhet. Her*. 1, 8; P.R. Swarney, "Social Status and Social Behaviour as Criteria in Judicial Proceedings in the Late Republic", in B. Halpern – D.W. Hobson (eds.), *Law, Politics and Society in the Ancient Mediterranean World*, Sheffield, 1993, p. 137–155.

62. Cic. *Font.* 30: "*An vero istas nationes religione iuris iurandi ac metu deorum immortalium in testimoniis dicendis commoveri arbitramini?*"; B. Kremer, *Das Bild der Kelten bis in augusteische Zeit*, Stuttgart, 1994, p. 95.

63. Cic. *part. or*. 6: "*Testimonium quae sunt genera? Divinum et humanum: divinum, ut oracula, ut auspicia, ut vaticinationes, ut responsa sacerdotum, haruspicum, coniectorum*." Cic. *top*. 77: "*Quibus ex locis sumi interdum solent ad fidem faciendam testimonia deorum.*" See also Julius Victor in K. Halm, *Rhetores latini minores*, Lipsia, 1863, p. 406. See J.P. Lévy, "Le problème des

example in some legendary cases like those of P. Claudius Pulcher and Vestal Virgin Tuccia.[64] Quintilian points out three instances in Cicero's speeches.[65] But even if parties might produce oracles as evidence of property rights before Tiberius in the *cognitio principis*, it is better to take it from the *institutio oratoria* that in general the testimony of the gods "is rarely employed, but is not without use".[66] The role actually played by the divine evidence — or by the oath — in courts was determined by the weight the magistrates and judges (in case of popular assemblies the people) deciding cases admitted to it. It is interesting in this perspective to take into consideration the curious recourse the advocates sometimes had to the belief that the gods actively interfere in men's lives, and take revenge for perjury and other serious crimes.

This recourse is based on the idea that the punishment the gods visit on the culprit manifests itself as madness and fury. Consequently, the accused's irrational or abnormal behavior could be presented as evidence for the very crimes committed. In the deliberative speech delivered in the senate against Piso, Cicero argued that his adversary's crimes were effectively proved by his frenzied lunacy: he was "so utterly unmanned by the consciousness of his crimes and his atrocities, that… he should dare to send no dispatch to the senate"; "must I not account you senseless, frantic, demented — madder than the Orestes or the Athamas of tragedy", asks Cicero, "when you dared first to be guilty of the deed (and this is my main indictment)?".[67] In *de domo sua*, Cicero argued that the immortal gods "wrought upon [Clodius'] insensate mind with panic and apprehension… What wonder, then, that with fear hounding him, with infatuation inspiring him, and with crime hurrying him upon his ruin, he was unable to carry out the prescribed

ordalies en droit romain", in *Studi in onore di Pietro de Francisci*, vol. 2, Milan, 1956, p. 419–420; J.P. Lévy, "Cicéron et la preuve judiciaire", in *Droits de l'antiquité et sociologie juridique. Mélanges Henri Lévy-Bruhl*, Paris, 1959, p. 190 n. 1.

64. Val. Max. 8, 1, 4–5 (abs.).

65. Cic. *Cat*. 3, 22, in which Cicero persuades his audience that the Jupiter's statue set up timely on top of the column on forum according to soothsayer's instructions proved that Catiline's conspiracy was the very plot they had hoped would be disclosed by the statue, and showed that the immortal gods lent their authority to his actions and his evidence. Another example is *Pro Ligario* 19, in which Cicero argues that "between the two causes [i.e. of Pompeius and Caesar] it was at the time difficult to decide, for the reason that on either side there was something to approve; to-day that cause must be adjudged the better, whereto the gods added their assistance" ("*Causa dum dubia, quod erat aliquid in utraque parte, quod probari posset; nunc melior ea iudicanda est, quam etiam di adiuverunt*"). Third is an unspecified passage in *De haruspicum responsis*.

66. Quint. *inst. or.* 5, 11, 42: "*Id rarum est, non sine usu tamen.*"

67. Cic. Pis. 44: "*Sic fuisse infrenatum conscientia scelerum et fraudum suarum ut… nullam sit ad senatum litteram mittere ausus*"; 47: "*Ego te non vaecordem, non furiosum, non mente captum, non tragico illo Oreste aut Athamante dementiorem putem, qui sis ausus primum facere — nam id est caput.*"

ritual, or to pronounce a single word of the accustomed formula?".[68] In *pro Milone,* also "the selfsame anger of the gods that inspired his minions with such a spirit of madness that… he was tossed into the street and charred in the flame" without a funeral is presented as a demonstration of Clodius' sacrilegious crimes.[69]

If "madness" could be used as incriminating evidence, the fact that the accused showed no sign of the divine anger and punishment could be used to argue that he cannot have committed the crime. This was part of Cicero's defense in court *pro Roscio Amerino* charged of parricide. In order to demonstrate the power of this kind of reasoning, Cicero first recounts a previous case of certain Titus Caelius of Tarracina, who went to sleep one evening after supper in the same room with two grown-up sons, and was found dead in the morning with his throat cut. The sons were indicted for parricide before a jury court,[70] but were acquitted because in the morning they had been found happily asleep:

> The judges having been convinced that the young men had been found asleep when the door was opened, they were acquitted and cleared of all suspicion. In fact, there was no one who thought that a man could have existed capable of going to sleep immediately after he had violated all laws divine and human by an impious crime, because those who have committed such a deed are not only unable to rest peacefully, but cannot even breathe without fear.[71]

According to Valerius Maximus, who later recounted the case, "it was thought not in nature that after killing their father they could take their rest upon his wounds and blood".[72] Cicero wants to persuade that men of good judgment believed that no one could remain untouched by the madness after having committed so serious a crime as parricide. In order to convince his audience, Cicero next invites — like in the speech against Piso — the testimony of the poets, recalling the fate of tragic figures like Orestes and Athama pursued by the Furies, the goddesses who take vengeance for guilt:

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68. Cic. *Dom.* 141.

69. In *De haruspicum responsis* (10) Cicero points out that the prodigy (a strange noise) and the soothsayers' answers had warned of Clodius' madwickedness.

70. O.F. Robinson, *The Criminal Law of Ancient Rome*, Baltimore, 1995, p. 46–47.

71. Cic. *Rosc. Amer.* 65: "*Tamen, cum planum iudicibus esset factum aperto ostio dormientis eos repertos esse, iudicio absoluti adulescentes et suspicione omni liberati sunt. Nemo enim putabat quemquam esse qui, cum omnia divina atque humana iura scelere nefario polluisset, somnum statim capere potuisset, propterea quod qui tantum facinus commiserunt non modo sine cura quiescere sed ne spirare quidem sine metu possunt*." Val. Max. 8, 1, 13; T.P. Wiseman, "T. Cloelius of Tarracina", in *Classical Review* 17 (1967), p. 263–264; O.F. Robinson, *Penal Practice and Penal Policy in Ancient Rome*, London/New York, 2007, p. 49.

72. Val. Max. 8, 13 (abs.): "*Iudicatum est enim Rerum Naturam non recipere ut occiso patre supra vulnera et cruorem quietem capere potuerint.*" This seems to be an emphatically rational explanation.

> Do you not see in the case of those whom the poets have handed down to us, as having, for the sake of avenging their father, inflicted punishment on their mother, especially when they were said to have done so at the command and in obedience to the oracles of the immortal gods, how the furies nevertheless haunt them, and never suffer them to rest, because they could not be pious without wickedness. And this is the truth, O judges. The blood of one's father and mother has great power, great obligation, is a most holy thing, and if any stain of that falls on one, it not only cannot be washed out, but it drips down into the very soul, so that extreme frenzy and madness follow it.[73]

Then follows a movement from the popular belief in the Furies and their blazing torches to the parricide's psychology:[74]

> For do not believe, as you often see it written in fables, that they who have done anything impiously and wickedly are really driven about and frightened by the furies with burning torches. It is his own dishonesty and the terrors of his own conscience that especially harassed each individual; his own wickedness drives each criminal about and affects him with madness; his own evil thoughts, his own evil conscience terrifies him. These are to the wicked their incessant and domestic furies which night and day exact from wicked sons punishment for the crimes committed against their parents.

Similar argument is advanced also *in Pisonem*. According to Cicero, there is no doubt that guilt is followed by madness, but in place of popular superstition he also offers a more enlightened explanation that this is a mental state provoked by the guilty conscience.[75] Yet, in *de legibus* Cicero seems to admit that the Furies exist and bring about the mental suffering: "Guilty men are tormented and pursued by the Furies, not with blazing torches, as in the tragedies, but with the anguish of remorse and the torture of a guilty conscience."[76]

Whether he personally believed in the divine punishment, as an advocate and statesman Cicero clearly recognized it was a very popular belief,[77] and — like oath

73. Cic. *Rosc. Amer.* 66–7.

74. G.O. Hutchinson, "Pope's Spider and Cicero's Writings", in T. Reinhardt – M. Lapidge – J.N. Adams (eds.), *Aspects of the Language of Latin Prose*, Oxford, 2005, p. 183–187, esp. 187.

75. F. Delarue, *Stace, poète épique : originalité et cohérence*, Paris, 2000, p. 257–8: "*Le but de Cicéron n'est pas de réfuter l'existence des Furies, mais d'affirmer la réalité psychologique du remords qu'elles figurent symboliquement.*" According to P. Grimal, "*cet argument est emprunté, non sans ironie, à la doctrine épicurienne, qui situe dans l'âme des coupables ce que la légende rapporte à l'outre-tombe*": *Cicéron. Discours contre L. Pison*, Paris, 1966, p. 120.

76. Cic. *leg.* 1, 40: "*Eos agitent insectenturque furiae non ardentibus taedis, sicut in fabulis, sed angore conscientiae fraudisque cruciatu.*"

77. G. Achard, *Pratique rhétorique et idéologie politique dans les discours "optimates" de Cicéron*, Leiden, 1981, p. 241–2: "*Puisque Cicéron prend si longuement la peine de dissuader ses auditoires de croire aux Furies, c'est que chez de nombreux* boni viri *— et à plus forte raison chez le peuple — subsiste la croyance en l'existence des Furies. Il est probable que devant des auditoires sans doute plus éclairés comme ceux du* Pro Roscio *et de la* Pisonienne *l'orateur a cru possible, exceptionnellement, de présenter une opinion plus rationnelle. Mais ces passages*

— another reason why the religion was so useful to the society at large: "How many persons are deterred from crime by the fear of divine punishment, and how sacred an association of citizens becomes when the immortal gods are made members of it, either as judges or as witnesses?"[78] Yet it is important to remember that religious arguments are attested only in political or criminal cases tried before large republican jury courts. It is difficult to say what role, if any, they played under the empire before the senate, the governors, the prefects or the emperors. Unlike oath-taking, they would presumably have had next no place in conduct of ordinary civil cases.

Magic, Prayer, and Popular Legal Culture

It was only natural that people involved in litigation tried to influence the course of trial, among other things, by means of magic. Some evidence suggests that litigants actually brought magical objects to trials. Pliny's Natural History records that emperor Claudius executed a Gallic Roman knight for keeping a "snake's egg" in his bosom during a lawsuit; this object was highly praised by the druids "as the giver of victory in the law-courts and of easy access to the potentates".[79] But it was believed that a part of hyena could be used for similar effect. As Pliny explains, "the extremity of the rectum of this animal is a preservative against all oppression on the part of chiefs and potentates, and an assurance of success in all petitions, judgments, and lawsuits, and this, if a person only carries it about him".[80] Some extant objects may have been produced to make the target person disbelieved as

prouvent que, pour l'ensemble des Romains, la démence est un châtiment infligé par les Immortels et que, pour nombre d'entre eux, les dieux se servent des Furies pour tourmenter les coupables." See also R. MacMullen, *Paganism in the Roman Empire*, New Haven/London, 1981, p. 58–59; J.B. Rives, *Religion in the Roman Empire*, Oxford, 2007, p. 51.

78. Cic. *leg.* 2, 16: "*Quam multos divini supplici metus a scelere revocarit, quamque sancta sit societas civium inter ipsos diis immortalibus interpositis tum iudicibus, tumtestibus?*"

79. Plin. *NH* 29, 54: "*Druidis ad victorias litium ac regum aditus mire laudatur, tantae vanitatis ut habentem id in lite in sinu equitem R. e Vocontiis a divo Claudio principe interemptum non ob aliud sciam.*" The prompt execution may be explained by the fact that the religious rites of the druids had been forbidden by Augustus to Roman citizens, and were "utterly abolished among the Gauls' by Claudius himself: Suet. *Claud.* 25, 5; Robinson, *o.c.* (n. 70), p. 95.

80. Plin. *NH* 28, 104: "*Super omnia est, quod extremam fistulam intestini contra ducum ac potestatium iniquitates commonstrant et ad successus petitionum iudiciorumque ac litium eventus, si omnino [tantum] aliquis secum habeat.*" Also the tongue of chameleon was supposed to help in lawsuits: 114: "*Linguam, si viventi exempta sit, ad iudiciorum eventus pollere.*"

plaintiffs or witnesses during trial, and been carried to the court under clothes.[81] The practice is also attested in the Greek Magical Papyri.[82]

There is also good deal of evidence on use of magical spells in litigation. An important group of curses indeed seek to literally "bind the tongs" of the adversaries, and so to prevent the opposing parties, their advocates and witnesses from speaking in court.[83] The most famous literary anecdote concerns C. Scribonius Curio, who was pleading for Servius Naevius against Cicero's client Titinia in an important private law case when he suddenly fell silent and claimed to have suffered a total memory loss because of her "potions and incantations".[84] According to Cicero, Scribonius only had bad memory. But the belief in the power of magic was so widespread that Curio was able to make the claim in the first place (this may, of course, have been an attempt to tarnish Titinia's character).[85] Galen, who worked at the imperial court in Rome during the late second century, cited it as an example of the (ridiculous) beliefs in magic (shared by other physician like Xenocrates, who wrote in the middle of the first century AD) that the opponents' tongs could be tied during the trial.[86]

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81. An amulet with Greek text inscribed perhaps in the 2nd or 3rd century AD reads "Achilles son of Alius, son of Taurus; Ioulis; if they talk, let them not, I prey, be believed" (Allian and Iulian family names suggest that they are Roman citizens): C. Bonner, "A Miscellany of Engraved Stones", in *Hesperia* 23 (1954), p. 155–156.

82. *PMG* 36, 35–68. References to this and other papyri: Clerc, *o.c.* (n. 19), p. 173–174.

83. A. Audollent, *Defixionum Tabellae*, Paris 1904. Besides litigation, people had other reasons to stop their enemies from speaking, so the purpose of such curses may not have always been "judicial". The curse-tablets addressed to the Goddess Muta Tacita by an old woman in order to seal up "hostile mouths and unfriendly tongues", in a scene Ovid depicts taking place during the traditional Roman feast of *Feralia*, may have been aimed against the *mala lingua fascinatoria*: Ovid. *Fasti* 2, 571–582: "*hostiles linguas inimicaque vinximus ora*"; Clerc, *o.c.* (n. 19), p. 110–111.

84. Cic. *Brutus* 219: "*subito totam causam oblitus est idque veneficiis et cantionibus Titiniae factum esse dicebat*"; *Orat.* 129: "*sibi venenis ereptam memoriam diceret*"; A.-M. Tupet, *La magie dans la poésie latine*, Lille, 1976, p. 204–205; W.J. Tatum, "Cicero, the Elder Curio, and the Titinia Case", in *Mnemosyne* 44 (1991), p. 364–371; F. Graf, "How to Cope with a Difficult Life. A View of Ancient Magic", in P. Schäfer – H.G. Kippenberg (eds.), *Envisioning Magic: A Princeton Seminar and Symposium*, Leiden, 1997, p. 105–106; J.B. Rives, "Magic, Religion, and Law: The Case of the *Lex Cornelia de sicariis et veneficiis*", in C. Ando – J. Rüpke (eds.), *Religion and Law in Classical and Christian Rome*, Stuttgart, 2006, p. 54–55. Another famous anecdote involved the fourth century orator Libanius: Gager, *o.c.* (n. 18), p. 121 n. 23.

85. According to Tupet, *o.c.* (n. 84), p. 205: "*L'anecdote [of Curio] prouve que l'on croyait couramment à l'efficacité de pratiques magiques capables de faire perdre la parle à un avocat.*" Pliny states in his natural history that "there is indeed nobody who does not fear to be spell-bound by imprecations": Plin. *NH* 28, 19: "*Defigi quidem diris deprecationibus nemo non metuit.*"

86. C.G. Kühn, *Claudii Galeni Opera Omnia*, vol. 12, Hildesheim, 1965, p. 251; Gager, *o.c.* (n. 18), p. 120; P.T. Keyser, "Science and Magic in Galen's Recipes (Sympathy and Efficacy)", in A. Debru (ed.), *Galen on Pharmacology: Philosophy, History and Medicine. Proceedings of the Vth International Galen Colloquium, Lille, 16–18 March 1995*, Leiden, 1997, p. 188.

Also the Greek and Latin curse tablets (*defixiones*) surviving from different times and places around the ancient world provide evidence on use of magic in litigation. In one curse tablet probably from the first century AD found in Kempten, the goddess Muta Tacita is asked to silence certain Quartus,[87] and in a very fragmentary text also from Germany one Sextus asks that his enemies could do nothing against him, and that they be out of their minds and mutes (*vani et muti*).[88] Another possible litigant in the first century AD in Raetia demands the loss of his *adversarii*: "Domitius Niger, Lollius, Iulius Severus and Severus, the slave Niger, the enemies of Brutta and those who have spoken against her, you shall lose them all."[89] Although litigation seems to be implied, the problem with these texts is that they do not explicitly mention the existence of the legal process. At least one text dated to the reign of Marcus Aurelius and found from Aquitania leaves no room for doubt:

> [1st tablet] I denounce the persons written below, Lentinus and Tasgillus, in order that they may depart from here for Pluto and Persephone. Just as this puppy harmed no one, so (may they harm no one) and may they not be able to win this suit; just as the mother of this puppy cannot defend it, so may their advocates be unable to defend them, (and) so (may) those enemies [2nd tablet] be turned back from this suit; just as this puppy is (turned) on its back and is unable to rise, so neither (may) they; they are pierced through, just as this is; just as in tomb souls have been silenced and cannot rise up, and they (can)not…[90]

Also a find of curse tablets buried in a tomb in Emporia in Spain involves a border dispute taking place in AD 78 between the *Olossitani* and the *Indicetani*, with names inscribed on lead belonging to the highest imperial officials acting as the council.[91] These cases among others are well-known to historians of religion

87. R. Egger, "Zu einem Fluchtäfelchen aus Blei", in *Römische Antike und frühes Christentum*, vol. 2, Klagenfurt, 1963, p. 247–253: "*Mutae Tacitae, ut mutus sit Quartus, agitatus erret ut mus fugiens aut avis adversus basyliscum, ut eius os mutum sit, Mutae! Mutae dirae sint, Mutae tacitae sint, Mutae! Quartus ut insaniat. Ut Erinnis rutus sit et Quartus Orco, ut Mutae Tacitae, ut Mutae sint ad portas aureas.*" But, Clerc, *o.c.* (n. 19),p. 111.

88. *AE* 1978 no. 546.

89. Audollent, *o.c.* (n. 83), p. 93a: "*Domitius Niger et [L]ollius et Iulius Sever[u]s [e]t S[e]verus Nig[ri] servus adve[rsa]r[ii] Bruttae et quisquis adversus illam loqut(us est): omnesperdes.*"

90. Audollent, *o.c.* (n. 83), p. 169: "*Denuntio personis infra scribtis Lentino et Trasgillo, uti adsint ad Plutonem [et] at Proserpinam hinc a[beant]. Quomodo hic catellus nemin[i] nocuit, sic… nec |illi hanc litem vincere possint; quomodi nec mater huius Catelli defendere potuit, sic nec advocati eorum e[os d]defendere <non> possint, sic il[o]s [in]imicos… adversos ab hac l[i]te esse; quomodi hic catellus aversus est nec surgere potesti, sic nec illi; sic traspecti sin[t] quomodi ille…*"; Gager, *o.c.* (n. 18), p. 143–145. See also Audollent, *o.c.* (n. 83), p. 192, (Capua 1st century BC): "*nec fari nec dicere possint*", and other examples in Tupet, *o.c.* (n. 84),p. 205.

91. It is not clear, however, what effect the curse was intended to have on those officials. M. Almagro, *Las Inscripciones Ampuritanas Griegas, Ibéricas y Latinas*, Barcelona, 1952, p. 163–169; N. Lamboglia, "Una nuova popolazione pirenaica: gli Olossitani", in *Rivista di Studi Liguri* 25 (1959), p. 147–161; Gager, *o.c.* (n. 18), p. 142–143.

and magic. Naturally, individual *defixiones*, or even their entire dossier, cannot prove the frequency of recourse to magic in litigation. John Gager, who has recently reviewed the evidence, suggests that "we must now begin to consider the likelihood that commissioning a curse tablet against prospective judicial opponents was a regular feature of the legal process in the Greco-Roman world".[92] Nevertheless, it is important to remember that however regular the habit of commissioning curse-tablets against opponents in public litigation may have been, it never was a formal feature of the "legal process" itself.

Besides the actual trial, communication with the supernatural may also have been involved in the preparation of the case that might lead to litigation. In addition to rather backward techniques of fact-finding, the passive legal system of Rome left collection of evidence and presentation of proof entirely to the initiative and resources of the parties. In general, people experiencing grievances had very little hope for legal redress whenever the suspect could not be identified. Theft, probably among the more common grievances especially in towns, is a case in point.[93] In his Apology, Apuleius cites an interesting story related by Varro concerning certain Fabius (cos. Q. Fabius Maximus?) who had consulted the learned P. Nigidius Figulus, a reputed astrologer and magician, concerning stolen money:

> He [Varro] records also that Fabius, having lost five hundred denarii, came to consult Nigidius; the latter by means of incantations inspired certain boys so that they were able to indicate to him where a pot containing a certain portion of the money had been hidden in the ground, and how the remainder had been dispersed, one denarius having found its way into the possession of Marcus Cato the philosopher. This coin Cato acknowledged he had received from a certain lackey as a contribution to the treasury of Apollo.[94]

According to Varro, it was believed Nigidius was able not only to find out the place where large part of the money was found but also to identify people in possession of even only one denarius of it. Cato confessed that he had the coin (what indicates that there was at least an informal inquiry) but indicated a foot-follower slave as the one who had given it to him. We do not know what happened next, but maybe the slave was put to question. This is an isolated anecdote, but

92. Gager, *o.c.* (n. 18), p. 116–150, citation 117.

93. See Baldwin's remarks on the situation in the Roman Egypt: B. Baldwin, "Crime and Criminals in Graeco-Roman Egypt", in *Aegyptus* 43 (1963), p. 256. The recourse to supernatural seems to have been common usage already in the archaic times, as shown by the house-search *lance et licio*, an ill-understood practice that is commonly thought to have its origin in religion or magic: Jolowicz – Nicholas, *o.c.* (n. 8), p. 167–169. Some remarks on similar practices in other traditional societies: D. Black, *Social Structure of Right and Wrong*, New York, 1998, p. 99.

94. Apul. *apol.* 42, 7–8: "*Itemque Fabium, cum quingentos denarium perdidisset, ad Nigidium consultum uenisse; ab eo pueros carmine instinctos indicauisse, ubi locorum defossa esset crumina cum parti eorum, ceteri ut forent distributi; unum etiam denarium ex eo numero habere M. Catonem philosophum; quem se a pedisequo in stipe Apollinis accepisse Cato confessus est*." Tupet, *o.c.* (n. 84), p. 205–206.

similar practice of consulting astrologers and magicians concerning the stolen property is attested also in Ulpian's commentary of the *actio iniuriae*:

> If some astrologer or one offering some other unlawful foretelling, on being consulted, should say that someone is a thief, but he is not, there shall be no action for insult against him, but he is liable under imperial enactments.[95]

In the eyes of the law, astrology could be condemned as a form of unlawful, malicious, divination (magic) but there is no indication, however, that identification of thieves as such by means of astrology or magic was a public offense. This much can be inferred already from the case of Nigidius, which Apuleius cites in court to support his own case. Ulpian stresses that the astrologer had indicated a man that in fact was not a thief (*qui non erat*), implying that the victim of theft had accused him on basis of what the astrologer found out, or perhaps even that he had been formally absolved before the magistrate. Yet the astrologer's victim was not interested in having him criminally charged for practicing illegal divination but in raising against him a private action for defamation.[96] Presumably, then, his claim was that the astrologer had intended to harm his reputation by naming him a thief.

Instead of seeking help concerning actual or potential litigation, victims of theft are also attested in many discovered *defixiones* to have entrusted the identification and pursuit of the culprits entirely to the gods.[97] One text dated to the first century AD and found engraved on marble near Emerita in Spain is addressed to "Goddess Ataecina Turibrigensis Proserpina. By your majesty I ask, pray, and beg that you avenge the theft that has been done to me. Whoever has changed (replaced?), stolen, pilfered from me the things that are noted below: 6 tunics, 2 linen cloaks, an undergarment…"[98] Also from Spain comes a lead tablet dated to the second century AD: "O Mistress Spring Fuyi… I ask that you track down your possessions. Whoever has stolen my shoes and sandals I ask that you… Whether she is a girl, a woman, or a man who stole them… pursue them."[99] A similar text found near Innsbruck in Austria and dated to around AD 100 reads:

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95. D. 47.10.15.13: "*Ulpianus libro septuagensimo septimo ad edictum. Si quis astrologus uel qui aliquam illicitam diuinationem pollicetur consultus aliquem furem dixisset, qui non erat, iniuriarum cum eo agi non potest, sed constitutiones eos tenent*." For some later examples of identification of thieves: E. Peterson, *Frühkirche, Judentum und Gnosis*, Freiburg, 1959, p. 334 n. 2.

96. According to Robinson, *o.c.* (n. 70), p. 50, "Imperial enactments extended defamation to the untruthful pronouncements of an astrologer".

97. The material has been discussed in R.S.O. Tomlin, "The Curse tablets", in B. Cunliffe (ed.), *The Temple of Sulis Minerva at Bath*, Oxford, 1988, p. 59–105.

98. *Dea Ataecina Turi-|brig. Proserpina | per tuam maiestatem | te rogo obsecro | uti vindices quot mihi | furti factum est; quisquis | mihi imudavit involavit | minusve fecit [e]a[s res] q(uae) i(nfra) s(criptae) s(sunt) | tunicas VI, [p]aenula | lintea II, in[dus]ium cu- |ius I. C… m ignoro | i…ius*; *CIL* 2, 462.

99. *Domna Fons Foyi* […]| *ut tu persequaris tuas | res demando quiscun-|que caligas meas tel-|luit et solias tibi | illa demando {ut} ut | illas aboitor si quis | puela si mulier sive | [ho]mo involavit* | […] *illos persequaris*; J. Gill – J.M. Luzon, "*Tabella defixionis* de Itálica", in *Habis* 6 (1975),

> Secundina charges Mercurius and Moltinus that whoever has stolen 14 *denarii* or two necklesses, that the perfidious Cacus take him away or his possessions, just as they have been taken away from her, the very things that she commits to you to track down. And she also assigns you to persecute him and to separate him from his possessions and from his fellow men and from those who are dearest to him. With that she charges you; you have to catch him.[100]

Tomlin, who has studied a large find of similar (but somewhat later) tablets from Britain, notes that the victims often specify the stolen objects and the number of coins like the law would have required them to do before the magistrates.[101] And as Versnel points out, it is a peculiar feature of many texts that the victims cede the stolen properties to the gods, making them judges in their own cases.[102] Sometimes the gods are also asked to exert pressure on the culprits so that they restore the property, part of the value of which may have been donated to them as in this text found in Nottinghamshire dated to around AD 200:

> Donated to the Jupiter best and greatest, so that he may haunt (personal name missing) in his mind, in his memory, in his innards, in his intestines, in his heart, in his marrow, in his veins, in his…, whoever, whether man or woman, who stole the 112 *denarii* of Dignus (?) and that he (the thief) will personally make a full settlement. To the god named above has been donated one-tenth of the sum when he repays.[103]

A text from Bath in Britain, perhaps from the second or third century, also identifies the thieves: "I have given to the goddess Sulis the six silver coins which I have lost. It is for the goddess to exact (them) from the names written below: Senicianus and Saturninus and Anniola."[104]

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p. 117–133 ; *AE* 1975 no. 497; H.S. Versnel, "Beyond Cursing: The Appeal to Justice in Judicial Prayers", in C.A. Faraone – D. Obbink (eds.), *Magica Hiera: Ancient Greek Magic and Religion*, New York, 1991, p. 60.

100. *Secunda Mercurio et | Moltino mandat, ut siquis * XIIII | sive draucus duos sustulit, ut | eum sive fortunas eius infi-|dus Cacus sic auferat quo-|modi ill<a>e ablatum est id quod | vobis delegat, ut persecuatis | vobisque deligat, ut | persicuatis et eum | aversum a fortunis <s>u-|is avertatis et a suis prox-|simis et ab eis quos caris-|simos abeat, oc vobis | mandat, vos [e]um cor[ipi]a-|tis* ; L. Franz, in *JOAI* 44 (1959), p. 69; Versnel, *o.c.* (n. 99), p. 83.

101. D. 47, 2, 19; Tomlin, *o.c.* (n. 97), p. 70–71.

102. Versnel, *o.c.* (n. 99), p. 82–83.

103. E.G. Turner, "A Curse Tablet from Nottinhamsshire", in *Journal of Roman Studies* 53 (1963), p. 122–124; Gager, *o.c.* (n. 18), p. 196.

104. Tomlin, *o.c.* (n. 97), p. 118–119: "*[D]eae Suli donavi [arge]ntiolos sex quos perd[idi.] a nomin[i] bus infrascrip[tis] deae exactura est: Senecia(n)us et Saturninus <sed> et Ann[i]ola carta picta persc[ripta]*"; Gager, *o.c.* (n. 18), p. 193–194. The victim could, however, also be a disappointed creditor. Tomlin, *o.c.* (n. 97), p. 119 n. 3, points out that "the use of *exactura* means that *nomen* also has the transferred sense of 'account' from the practice of writing the name of the person concerned at the head of the page that contained his account". The idea could be either that the three persons are denounced as his debtors because of the six silver coins stolen, or that they are denounced as thieves because they have not paid the six silver coins they owe him.

The curse tablets such as these suggest that there is much more to the recourse to the gods than malevolent black magic, or problems of identifying culprits and of obtaining justice in the public tribunals. In an important paper, Versnel has suggested that a careful distinction should be made between the traditional curse tablets (*defixiones*) and what he calls "judicial prayers" or "prayer for justice".[105] Unlike curses that seek to manipulate the gods in order to harm enemies without justification, the prayers persuade the God(s) to do justice and avenge wrongs suffered. Although the form and content of prayers sometimes show important similarities with curses, they tend to differ in one or more key respects: the suppliants may use their own names, they may address the "Olympian" gods, they may explain and justify their claims, and even have their prayers publicly displayed in a temple.

Perhaps the best example of a judicial prayer, dated to the late first or the early second century AD, has been found inscribed in Greek on a piece of pottery in the Roman Egypt. It concerns a dispute between Roman citizens, the brothers *Silvani* and certain Longinus:

> Claudius Silvanus and his brothers to mistress Athena against Longinus, son of Marcus. Since Longinus — against whom we have often appealed to you because he was after our lives while we did nothing wrong, poor as we are — while he wins nothing with this, he still continues to be malicious against us, we beg you to do justice. We have already asked Ammon for help as well.[106]

Obviously, the form and language of prayers for justice like this resemble that used in courts of law. It is also possible to note that the quite rhetorical tenor of the pleading, for the poor innocent victims against the rich, powerful and arrogant adversary,[107] is commonly found in petitions addressed to magistrates and could have been borrowed from a draft manual.[108] It ought indeed to have been possible to plead the same case before the prefect of Egypt, though it is impossible to say if the brothers had recourse also to the magistrates or not. There is little reason to doubt, however, that the *Silvani* believed they had a good case and that the gods could do them justice.

The so-called "confession inscriptions" from Lydia and Phrygia offer a well-known but still a striking demonstration of what the divine authority and justice were able to achieve in a society where "illness and disease, misfortune, premature death, more widespread and inexplicable in the Roman world than our own, could

105. Versnel, *o.c.* (n. 99), p. 60–106.

106. Versnel, *o.c.* (n. 99), p. 72; Cl. Gallazzi, "Supplica ad Atena su un ostrakon da Esna", in *Zeitschrift für Papyrologie und Epigrafik* 61 (1985), p. 107.

107. See *Rhet. Her.* 1, 8; Cic. *inv.* 1, 22; Quint. *inst. or.* 4, 14.

108. On draft manuals: R. Bagnall, "Official and Private Violence in Roman Egypt", in *Bulletin of the American Society of Papyrologists* 26 (1989), p. 212; D. Feissel – J. Gascou, "Documents d'archives romains inédits du Moyen Euphrate", in *Journal des Savants* (1995), p. 85 n. 88.

be attributed to divine anger".[109] According to Plutarch, superstitious people regarded all misfortune as divine punishment, and sought expiation by confessing various sins and errors they have committed.[110] The mechanism is shown in action in a stele erected in AD 156/157. A woman named Tatias was rumored to have poisoned her son-in-law, and so she "drew up a scepter (a staff which represented the god's power and presence) and placed curses in the temple, as if to show that she was not guilty of the transgressions attributed to her, although she was aware of her guilt. The gods subjected her to a punishment that she did not escape."[111] Apparently Tatias died, and her relatives interpreted this as a divine punishment for the crime and/or her false statements in regard to it before the god, and so took off the curses and set up the confession inscription to appease the gods.

From an inscription dated to AD 164/165 we learn that the god had been prayed to take vengeance against anyone who stole from a bath house, so that any prospective thieves knew they were targets. Consequently, a thief who stole from a bath-house did exactly what we usually only see many victims seek in their curses and prayers; that he or she returns the stolen property to the temple.[112] A stele inscribed in AD 118/119 records that certain Skollos had sworn to return a deposit he accepted from certain Apollonius, and his daughter, believing that her father died because he had not fulfilled his oath, set up the "confession" stele as an act of expiation.[113] In another case of uncertain date a plaintiff presented a successful petition to the god Men Axiottenos in what looks like an ordinary case of injury. Hermogenes, son of Glukon, and Nitonis, son of Philoxenos slandered Artemidoros with respect to maybe drinking or stealing wine, and Artemidorus presented his petition to the god in a tablet (*pittakion*). Hermogenes erected the stele to appease the god after having suffered some form of punishment.[114]

A stele erected in AD 114/5 shows another form of recourse to the divine justice; a sort of adversary process before the staff of god that involves the

109. Tomlin, *o.c.* (n. 97), p. 103; Versnel, *o.c.* (n. 99), p. 77; Gager, *o.c.* (n. 18), p. 172. On fortune, nature, gods and magic as alternative explanations for maladies: Clerc, *o.c.* (n. 19), p. 22–47.

110. Plutarch, *moralia*, 168 A-C; Clerc 1995, p. 137–145. On superstition in general: Rives, *o.c.* (n. 77), p. 183–187.

111. P. Herrmann, *Tituli Asiae Minoris V*, vol. 1, Vindobona, 1981, p. 318 = E.N. Lane, *Corpus Monumentum Religionis Dei Menis*, Leiden, 1971, no. 44; Tomlin, *o.c.* (n. 97), p. 103; Versnel, *o.c.* (n. 99), p. 76; Gager, *o.c.* (n. 18).

112. Herrmann, *o.c.* (n. 111), p. 159 = Lane, *o.c.* (n. 111), no. 69; Tomlin, *o.c.* (n. 97), p. 104; Versnel, *o.c.* (n. 99), p. 77 (with other examples). It has been correctly observed that there is no reason to suppose with J. Zingerle an elaborate system of priestly tribunals: "Heiliges Recht", in *Jahrshefte des österreichischen archäologischen Instituts* 23 (1926), p. 5–72; E.N. Lane, *Corpus Monumentum Religionis Dei Menis*, vol. 3, Leiden, 1976, p. 31; Versnel, *o.c.* (n. 99), p. 80–81.

113. Herrmann, *o.c.* (n. 111), p. 440 = Lane, *o.c.* (n. 111), no. 51; Tomlin, *o.c.* (n. 97), p. 104; Gager, *o.c.* (n. 18).

114. Herrmann, *o.c.* (n. 111), p. 251 = Lane, *o.c.* (n. 111), no. 58; Tomlin, *o.c.* (n. 97), p. 104; Versnel, *o.c.* (n. 99), p. 76; Gager, *o.c.* (n. 18).

"plaintiffs" and the "defendants".[115] The object of dispute were three pigs belonging to Demainetus and Papias that wandered off and got mixed with the sheep of Hermogenes and Apollonius.[116] The pig-owners first asked Hermogenes and Apollonius concerning their property on the spot, and after denial the latter were invited to take oath in a more formal procedure taking place before the gods. The gods duly punished Hermogenes for his false oath with death — or so his wife, his child, and Apollonius believed. In order to avoid the same punishment, they set up the confession inscription to expiate the god. As Stephen Mitchell points out, the "divine authority and justice was accepted across the whole spectrum of human activity".[117] Yet it is important to note that these were ordinary disputes it should have been possible to take before the Roman, or some local, legal authorities. But whereas the "judicial oaths" taken into consideration by the Roman jurists were taken with an eye to potential or actual litigation before the Roman authorities, the oaths attested in the confession inscriptions do not anticipate "legal" consequences but rely entirely on the divine justice.

Among the traditional Gallic tribes, the druids were not only priests who conducted sacrifices and were able to communicate the gods' will but, according to Julius Caesar, also the judges in all matters both civil and criminal. Those who did not submit to the druids' judgment were excluded from the society:

> For they determine respecting almost all controversies, public and private; and if any crime has been perpetrated, if murder has been committed, if there be any dispute about an inheritance, if any about boundaries, these same persons decide it; they decree rewards and punishments. If anyone, either in a private or public capacity, has not submitted to their decision, they interdict him from the sacrifices. This among them is the heaviest punishment.[118]

The Celtic god Grannus — no less than Ammon, Men, Sulis, or Apollon (with whom he was assimilated in the Roman times) — played the role also of giver of justice and avenger of injustice. Especially his great sanctuary in Grand was well-known for the ordeal of boiling waters (*iudicium aquae ferventis*) that punished perjurers.[119] The god's and the emperor's justice coexisted in this part of Gaul, and ot has been argued that the hot cauldron was eventual incorporated into the Roman

115. See also Lane, *o.c.* (n. 112), p. 28–29.

116. Herrmann, *o.c.* (n. 111), p. 317 = Lane, *o.c.* (n. 111), no. 43; Tomlin, *o.c.* (n. 97), p. 103; Gager, *o.c.* (n. 18); S. Mitchell, *Anatolia: Land, Men, and Gods in Asia Minor*, vol. 1, Oxford, 1993, p. 192.

117. Mitchell, *o.c.* (n. 116), p. 193 (with bibliography, 191 n. 225). See also Tomlin, *o.c.* (n. 97), p. 103–104; Versnel, *o.c.* (n. 99), p. 75–79.

118. Caes, *BG* 6, 13, 5: "*Nam fere de omnibus controversiis publicis privatisque constituunt, et, si quod est admissum facinus, si caedes facta, si de hereditate, de finibus controversia est, idem decernunt, praemia poenasque constituunt; si qui aut privatus aut populus eorum decreto non stetit, sacrificiis interdicunt. Haec poena apud eos est gravissima.*"

119. *Pan. Lat.* 6, 21, 7.

magistrate's administration of justice in case of non-citizen soldier population of the Celtic origin settled on the area (*deditici*).[120]

In many communities and associations, a common religion entailed a vision of justice, harmony and peace that may have obliged members to subordinate their individual claims of legal right to the shared values and goals of the group, and so to avoid any recourse to the courts of law.[121] It is well-attested in case of the Jewish and early Christian communities that the legal order represented by the public courts was seen as alien to the faith and the moral community of the believers. Litigation before the foreign Roman judges, and the harsh consequences of the law they applied, were to be avoided. Recourse was to be had to the friendly reconciliation and internal arbitration, under the ultimate penalty of excommunication.[122] This ideology continued well into the late antiquity and beyond,[123] and can be found behind the development and recognition of the "jurisdiction" of the Jewish courts and those of the bishops.[124]

Of course, the recourse to gods for justice in rural communities of Anatolia or Britain, and the avoidance of Roman litigation inside the Jewish and early Christian communities, may seem marginal in comparison to the centers of imperial Roman law and authority.[125] Yet the oaths, prayers and curses are attested everywhere in

120. S. Kerneis, "La vérité du droit. Justice oraculaire et gouvernement imperial dans la Gaule romaine", in *Revue Internationale des droits de l'Antiquité* 54 (2007), p. 333. However, B. Rossignol, "Le droit et la vérité. À propos d'une décision inexistante de Trajan et d'une procédure oraculaire inventée en Gaule (réponse à S. Kerneis)", in *Revue Internationale des droits de l'Antiquité* 56 (2009), p. 115–129.

121. In general, J.S. Auerbach, *Justice Without Law?*, New York/Oxford, 1983, p. 19–46.

122. The Jews of Sardis argued, as Flavius Jusephus reports, that "from earliest times they have had, in accordance with their native laws, a private association and a place of their own, in which they manage their affairs and settle the disputes they have with each other", and this also the Roman authority permitted them to do: Jos. *Ant. Iud.* 14. 235. According to Juvenal they were "habituated to despising the laws of Rome": *Sat.* 14. 96–106; M.H. Williams, *The Jews among the Greeks and Romans: A Diasporan Sourcebook*, London, 1998, p. 37, 169. On attitudes and practices of conflict resolution among Christians, esp. Paul. I Cor. 6:1–8; Luke 12:25–6; cited in T. Gagos – P. Van Minnen, *Settling a Dispute: towards a legal anthropology of late antique Egypt*, Ann Arbor, 1994, p. 44; Matt. 18:15–7.

123. Writers especially within the monastic movement were highly critical of the Roman Empire: see P. Sivonen, *Being a Roman Magistrate*, Helsinki, 2006, p. 143–50, esp. 146 on Sulpicius Severus' condemnation of recourse to the Roman tribunals. See also Anna M. Silvas, *The Asketikon of St Basil the Great,* Oxford, 2005, p. 192. Not all shared this scepticism: C. Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire*, Berkeley, 2000, p. 49–70.

124. J. Harries, *Law and Empire in Late Antiquity*, Cambridge, 1999, p. 191–211; R. Frakes, Contra Potentium Iniurias: *The* defensor civitatis *and Late Roman Justice*, München, 2001, p. 197–198; P. Garnsey – E. Humfress, *Evolution of the Late Antique World*, Cambridge, 2001, p. 74–80; J. Harries, "Creating Legal Space: Settling Disputes in the Roman Empire", in C. Hezser (ed.), *Rabbinic law in its Roman and Near Eastern context*, Tübingen, 2003, p. 63–82.

125. Tomlin, *o.c.* (n. 97), p. 96 discovered a stark social contrast between the groups of people whose names are found inscribed on stone and lead tablets at the temple of Dea Sulis: "almost everyone

the Roman empire, and they are based on the same widely shared fundamental, if popular, religious beliefs concerning the divine interference in mens' lives that even the elite legal culture did not ignore (as we have seen in the discussion of burials and oaths).[126] In considering to what extent the divine justice may have prevailed in Asia Minor outside those rural communities in which it is most cogently attested by the practice of setting up confession inscriptions, Mitchel concludes that "it is implausible to imagine that the gods of northern Lydia or Apollo Lairbenos played a radically different part in men's lives than gods elsewhere".[127] To take the idea a bit further, the exceptional confession inscriptions of the rural Anatolian villages may only be the most blatant manifestation of the divine justice experienced also in many other parts and pockets of the ancient world.

The city of Rome, the stronghold of the Roman law and legal authority, was not an exception, even if the elite ridiculed superstition. A good example is the Elder Seneca, whom Saint Augustine cites as the one who daringly attacked the folly of rituals taking place throughout the year in the temple of *Tria Capitolina*:

> He goes next to relate the deeds which are customary performances in the very Capitol and completely demolishes them with absolute fearlessness… One servant informs Jupiter of the names of his worshipers, another announces the hours; one is his bather, another his anointer, that is, he gestures with empty hands to imitate the act of anointing. There are women who are hairdressers for Juno and Minerva: while standing far away from the temple as well as from the image they move the fingers as if they were dressing hair, and there are others who hold a mirror. There are men who summon the gods to give bond for them, and some who offer them petitions and explain their case… Still these men, he says, though they offer useless service to the god, offer no base or indecent service.[128]

In regard to the legal business, Seneca refers to two distinct groups of people. The first, *qui ad uadimonia sua deos aduocent*, have been understood to have either

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recorded on stone is a Roman citizen", "by contrast there is not a single Roman citizen named in the tablets". On worshipers of Men: Lane, *o.c.* (n. 112), p. 109–114, 110: "the bulk of the dedicants" were "free peasantry", but the cult was also respectable "in high Roman circles": 113.

126. See Rives, *o.c.* (n. 77), p. 50–52, who makes the important point that the fact that there was no religious moral code or scripture like in Judaism, Christianity and Islam, "does not mean that moral concerns played no part whatsoever in the Greco-Roman religious tradition".

127. Mitchell, *o.c.* (n. 116), p. 194.

128. Sen. ap. Aug. *civ. dei* 6, 10: "*Iam illa, quae in ipso Capitolio fieri solere commemorat et intrepide omnino coarguit… Alius nomina deo subicit, alius horas Ioui nuntiat: alius lutor est, alius unctor, qui uano motu bracchiorum imitatur unguentem. Sunt quae Iunoni ac Mineruae capillos disponant (longe a templo, non tantum a simulacro stantes digitos mouent omantium modo), sunt quae speculum teneant; sunt qui ad uadimonia sua deos aduocent, sunt qui libellos offerant et illos causam suam doceant… Hi tamen, inquit, etiamsi superuacuum usum, non turpem nec infamem deo promittunt*." H.S. Versnel, "Religious Mentality in Ancient Prayer", in H.S. Versnel (ed.), *Faith, Hope and Worship: Aspects of Religious Mentality in the Ancient World*, Leiden, 1981, p. 30 n. 118; Versnel, *o.c.* (n. 99), p. 81–82.

requested the gods to be guarantors for their obligation to appear in court,[129] or to be their advocates when they appear in court.[130] The second group, *qui libellos offerant et illos causam suam doceant*, are invariously interpreted to be presenting petitions to the gods and explaining their cases to them.[131] It may be useful to note that in judicial context, to which *libellos offerre* apparently refers to, *causam docere* effectively means "to show" or "to prove" a case. Even if Seneca's account does not have to be taken too technically, it seems to have been the customary practice even at the heart of the Roman Empire to have recourse to the gods for legal assistance and for the divine justice.[132] Such practices apparently took place side by side with recourse to formal litigation, as well as voluntary oath-taking.

A settlement recorded in a document dated to AD 49 from the *Sulpicii* archive concerns a case of slander between Julius Fortunatus and C. Sulpicius Cinnamus and was reached "on a way to *vadimonium*" ("*cum ad vadimonium ventum esset*"), that is to a preliminary hearing before the local magistrates at Puteoli, when Cinnamus proposed to swear an oath that he was not guilty as charged.[133] This case demonstrates that Roman citizens of Italian municipalities under the Early Empire had recourse to oath-taking in resolution of their disputes even if they

129. The translation above by W.M. Green (Loeb Classical Library), and A. Bendlin, "Nicht der Eine, nicht die Vielen. Zu Pragmatik religiösen Verhaltens in einer polytheistischen Gesellschaft am Beispiel Roms", in R.G. Kratz – H. Spieckermann (eds.), *Götterbilder, Göttesbilder, Weltbilder*, vol. 2, Tübingen, 2006, p. 309: "Eine weitere Gruppe von Leuten ruft die Götter als Bürgen für ihre Verpflichtungen als Angeklagte vor Gericht an."

130. In this sense, J. Scheid, "Le fondamentalisme dans la religion romaine (v^e^ s. av. – iii^e^ s. apr. J.-C.). Quelques reflexions sur un concept inapproprié", in P. Barceló – J.J. Ferrer – I. Rodríguez (eds.), *Fundamentalismo político y religioso: de la antigüedad a la edad moderna*, 2003, p. 17 and S. Estienne, "Images et culte : pratiques 'romaines'/influences 'orientales' ", in C. Bonnet – J. Rüpke – P. Scarpi (eds.), *Religions orientales* — Culti misterici, Stuttgart, 2006, p. 149 n. 13: "*Certains prient les dieux de leur servir d'avocats*". Similarly, a passage in Seneca, *ep.* 8, 6 — "*cum ad vadimonium advocatus descenderem*" — is translated "when I appear as counsel in court" by R.M. Gummere (Loeb Classical Library), whereas the *Oxford Latin Dictionary* understands it is about "a surety". In any case, *ad vadimonium advocare*, *venire*, etc. means to be present at the time and place appointed for a judicial hearing. The *vadimonium* could be either for appearance, or reappearance, in the magistrate's tribunal, or before the private judges. See in general: E. Metzger, *Litigation in Roman Law*, Oxford 2004; Lintott, *Cicero as Evidence: A Historian's Companion*, Oxford, 2008, p. 49 n. 23.

131. In addition to the Loeb translation, Versnel, *o.c.* (n. 99), p. 81–82; Scheid, *o.c.* (n. 130), p. 17 and Estienne, *o.c.* (n. 130), p. 149 n. 13: "*d'autres leur remettent des placets et leur expliquent leur cas*"; Bendlin, *o.c.* (n. 129), p. 309: "*wieder andere präsentieren Anklageschriften und legen ihnen ihren Fall ausführlich dar*".

132. According to A. Corbeill, "it is not improbable that the religious practices described by Seneca date back to soon after the formal introduction of the cult' in that temple already in the late sixth century BC": *Nature Embodied: Gesture in Ancient Rome*, Princeton, 2004, p. 28. But Versnel points out the exact religious context is not quite clear: *o.c.* (n. 99), p. 82 n. 117, with further remarks in H.S. Versnel, *l.c.* (n. 128), p. 30 n. 118.

133. *TSulp*. 28 and 29 in G. Camodeca, Tabulae Pompeianae Sulpiciorum. *Edizione critica dell'archivio puteolano dei Sulpicii,* I, Roma 1999; Humbert, *l.c.* (n. 42), p. 126–129.

had the alternative to litigate either in the local court, or in the Praetor's court at Rome. To return to Rome, Suetonius tells us that after the death of Julius Caesar, "who ranked amongst the Gods, not only by a formal decree, but in the belief of the vulgar", a column of Numidian marble was erected in the Forum by the populace of Rome, and at this column "they continued for a long time to offer sacrifices, make vows, and decide controversies, in which they swore by Caesar".[134] Whether these oaths were taken with or without view to formal litigation, Caesar was undoubtedly but one of the many divinities to whom the people involved in disputes and their resolution had recourse in the city of Rome.

Conclusions

The scholars are used to measuring and understanding the Roman legal culture on basis of its "highest" achievements, one of which is the separation of law from religion. The jurists carefully maintained the internal coherence of the law by keeping the legal rules and principles conceptually distinct from religious reasons, whether or not the latter had bearing on the law to be actually applied by the tribunals. Yet the laws and procedures promoted by the legal *honoratiores* — in which Weber, Durkheim and many others have seen the beginnings of formally rational qualities of the modern law — are very partial guides to the great variety of beliefs, attitudes, practices involved in litigation and resolution of ordinary conflicts in the ancient society. In fact, even during the classical period of Roman law, religion played a far more important role in the daily legal life than the jurists' writings would make us believe. Historian's task is to not lose sight of what might be taken as the "primitive" and "irrational" aspects of the legal culture of the Roman Empire.[135]

But even the official legal culture was, of course, not indifferent to religion. The civil law had to give way sometimes to the demands of religion, as the case of burial demonstrates. Satisfied that perjury is met with the divine punishment, the law also allowed the magistrates to regularly accept "irrational" evidence given under oath sworn by gods. As laymen, they may also have given much more weight to religious considerations in their everyday administration of justice than the law elaborated

134. Suet. *Iul.* 88: "*in deorum numerum relatus est, non ore modo decernentium, sed et persuasione uolgi*"; 85: "*apud eam longo tempore sacrificare, vota suscipere, controversias quasdam interposito per Caesarem iure iurando distrahere perseuerauit*."

135. One form of Judicial prayer is attested in practice still in the 19th century Brittany. This "primitive" ritual involved addressing the following formula to the St. Yves de Vérité: "You are the little saint of truth, I vow you So and So, if he is right, condemn me, but if I am right, make him die within the prescribed year." See P.-Y. Lambert, "Defining Magical Spells and Particularly Defixiones of Roman Antiquity: A Personal Opinion" in K. Brodersen – A. Kropp (eds.), *Fluchtafeln: Neue Funde und neue Deutungen zum antiken Schadenzauber*, Frankfurt Am Main, 2004, p. 79–80. Judicial prayers are not uncommon even in the contemporary Western societies: C.J. Greenhouse, *Praying for Justice: Faith, Order, and Community in an American Town*, Ithaca 1986.

in a relative isolation from the practice may imply. The giving of evidence in trial before the private judges was influenced by their religious beliefs, not to forget those of the parties, the witnesses and the audiences, relative to the oaths and perhaps even the divine testimonies. Like magistrates, the judges were eager to rely on the religion of oaths taken, and many, if not all, were indeed expected to believe in divine punishment (or at least a somewhat enlightened version of it), or that parties and their advocates might suffer magical attacks. The respect of the gods was part of the person's respectability in courts.

Naturally, people did not come to litigation without their religious beliefs. Many litigants actually sought to secure their success by means of magic or prayer, and others had recourse to astrology and divination in order to identify opponents to sue. People frequently offered to take oath, or were challenged or compelled to oath-taking, in courts. But many potential litigants also agreed to avoid the troubles of legal process by accepting the truth their opponents swore under oath. There were also people who sought divine justice. Some of them perhaps appealed to the gods as their last hope because the legal apparatus, Roman or local, for one reason or another failed to do them justice. But others were satisfied entirely with the gods' intervention. Like people having recourse to public courts, they could take a unilateral action by imploring the gods to do justice against an absent adversary (identified or unknown), or challenge the opponent as a defendant in a bilateral action for a statement as to the truth before the gods.

It is of course not possible to determine, statistically speaking, how important role the religion played in resolution of disputes. It seems possible, however, to argue that law and formal litigation were far from dominating the field. Instead of only one type of "legally rational" Roman litigant, we must envision a whole range of people involved in regulation of conduct and conflict in the imperial Roman society, and a wide variety of religious beliefs and attitudes of those involved in both formal and alternative dispute resolution processes. Undoubtedly religion played an important role in litigation, dispute resolution and pursuit of justice, which we are accustomed to think as the privileged domain of Roman law. This by no means diminishes the Roman jurists' achievement; on the contrary it makes it seem all the more astonishing.

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