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Sacred Law and Civil Law

Olga Tellegen-Couperus

1. The connection between sacred and civil law

In the summer of 47 BC, two prominent Roman senators met on the island of Samos, off the coast of Asia Minor: Marcus Iunius Brutus and Servius Sulpicius Rufus. Brutus is best known as a politician and as one of the murderers of C. Iulius Caesar, Rufus as the top jurist of his time. In the previous year, both had been supporters of Pompey and both had fled to the East after the battle of Pharsalos when Pompey had been beaten by Caesar. Rufus had withdrawn to the island of Samos, where he awaited the pardon of and reconciliation with Caesar. Brutus had already been pardoned and was on his way back from Asia to Rome. He made a stop on the island of Samos, and there the two met. According to Cicero who described this meeting, they talked about law: Brutus asked Rufus many questions about the extent to which pontifical law is connected to civil law.¹ Unfortunately, Cicero does not provide any details about the specific questions Brutus asked, let alone Rufus' answers, but it is clear that the issue was regarded as relevant by both Brutus and Rufus.

This story is remarkable in that it seems to contradict the commonly held view that, already in the course of the Republic, civil law had become separated from pontifical law, i.e., from religion. Early secularisation is even regarded as one of the characteristics of Roman law.² The story cannot be discarded as the odd one out, because in other places Cicero also quotes leading Roman jurists who stress the importance of being well acquainted with pontifical law.³ However, verifying the story is difficult because our knowledge of early civil law is limited and that of pontifical law problematical.

In the middle of the nineteenth century, Niebuhr suggested that, of old, the pontiffs as keepers of law and time used to record major events and decisions.⁴ Although Niebuhr does not mention any source, he may have been inspired by Livy's story about King Numa who was said to have entrusted written directions for performing the rites of worship to the newly appointed pontiff Numa Marcius.⁵ Niebuhr's suggestion triggered numerous attempts to reconstruct the so-called *Priesterbücher*, and as many critical comments on these attempts.⁶

Recently, John Scheid has qualified this phenomenon as 'the modern myth of the *Priesterbücher*' and has suggested that Roman religious tradition was mainly oral. In his view, it 'consisted in the combination of two elements: on the one hand, a ritual savoir-faire, orally transmitted from father to son, from public officer to public officer, relying on written formulas of prayer and an orally enacted calendar; on the other, isolated decisions adapting these ritual rules to new situations.'⁷ Focussing on the pontiffs, Scheid suggests that they recorded these decisions or *regulae* in their *commentarii*. The *regulae* were never collected or systematized into a corpus. According to Scheid, they must have been comparable to the opinions given by the jurists on problems of civil law.

Referring to Magdelain's research on the early development of civil law, Scheid suggests that the procedures used by Roman priests can be reconstructed with the help of civil law procedures.⁸ One of the procedures in which the pontiffs were involved was the punishment of religious offences. How did they set to work? According to Scheid, the main rule was that someone who had intentionally offended a god must be surrendered to that god for the sake of vengeance. The procedure that could lead to surrender consisted of two elements: the designation of the guilty person and the establishment of guilt. Scheid reconstructs the first element by comparing it with *noxae deditio* (noxal surrender) in civil law and international law. For the second element, Scheid refers to a *regula* of Q. Mucius Scaevola the Pontifex in which a distinction is made between an impiety committed

intentionally and one committed unintentionally. Here, Scheid does not compare guilt in sacred law with guilt in civil law although that would have been possible.

Scheid seems to combine two aspects of pontifical law and civil law: the way in which opinions were recorded and the content of both sets of law. The first aspect is not problematical. In the first three centuries of the Republic, the pontiffs were the experts in sacred law as well as in civil law. Subsequently, also senators who were not pontiffs started to become involved in civil law; they are now known as jurists.⁹ As from the third century BC, the jurists wrote down and collected their opinions; however, the oldest texts we know date from the end of the second century BC.¹⁰ They have been preserved because, in the first two centuries AD, jurists referred to them in their commentaries and opinions, and because, in the sixth century, Emperor Justinian ordered a selection and collection to be made of the works of the classical jurists, a compendium which is called the Digest. It is not surprising that, in the Digest, most texts stem from the late classical jurists Ulpian and Paul (AD 180-220); only a limited number of texts have their origin in the Roman Republic. It is more than likely that the early jurists recorded their opinions in the same way as the pontiffs had theirs; in fact, the jurists of the late Republic often were also pontiffs.

The second aspect of Scheid's reconstruction, however, is very problematical. Did pontifical law and civil law share content? If they did, it may be possible to reconstruct pontifical law with the help of civil and international law. However, if they did not, it does not mean that there was no connection between pontifical law and civil law. The interaction between both sets of law may have taken place on a different level. Therefore, the question is whether the method applied by Scheid is adequate for the problem he tackled

In the following, I shall study Scheid's reconstruction from the point-of-view of Roman law. First, I shall deal with the comparison of *noxae deditio* in sacred, civil, and

international law. Then, I shall compare Scaevola's *regula* on impiety with a *responsum* that the same Scaevola gave in a (civil law) case of unlawful damage.

2. *Noxae deditio* in sacred, civil, and international law

Scheid reconstructs the designation of the guilty person in sacred law with the help of *noxae deditio* in civil and international law. He assumes that, in the later Republic, *noxae deditio* was applied in all three areas of law. First, Scheid summarily describes the *noxae deditio* in civil and international law, and then he compares it with that in sacred law.

In civil law, *noxae deditio* is a well known concept. Unfortunately, its early history is shrouded in mist. Scheid refers to the reconstruction by the Belgian Romanist Fernand de Visscher. In his book entitled 'Le régime de la noxalité en droit romain' which was published in 1947, De Visscher distinguished two phases (I shall quote Scheid's translation of this passage): 'the first phase begins as soon as the crime is committed. During this phase, the *deditio noxae* is only the right or the means of the group for escaping the impending vengeance. During this period the group can be freed by the exile or *dimissio*, the repudiation or the denial of the guilty person as well as by any other act implying the ending of social contact with him. The second phase starts with the summons by the victim or his parents. The group of the guilty person now is forced to hand him over. From now on, the group can only be freed by a *noxae deditio* to the victim or the victim's group.'¹¹ According to De Visscher, the obligation of *noxae deditio* was never sanctioned by a civil action, but only by the coercive means of the magistrate: public authority simply substituted collective vengeance.¹² Scheid concludes that *deditio noxae* always remained part of public law; it was political rather than juridical.¹³

For *noxae deditio* in international law, Scheid also refers to De Visscher. According to the latter, international *deditio* is closely related to that of civil law.¹⁴ It shows (again, I quote Scheid's translation) that 'if, in circumstances in which the international customs consider it efficacious, the offered *deditio* is refused by the offended state, it will be sufficient to free the state of the guilty person from every guilt, even if its response is limited only to the expulsion of the guilty person from the city.' Scheid illustrates this statement with the famous case of the consul Hostilius Mancinus who, in 137 BC, had been surrendered by the Romans to the Iberian city of Numantia but had not been accepted.¹⁵ In the Senate, P. Mucius Scaevola argued that the *deditio* was a deed of sovereignty of the Roman people that was independent from the *receptio*. Scheid concludes that the Roman authorities, by publicly recognizing the offence and its author, carried out the *derelictio* and ended the social contact with the guilty party.

Now let us turn to sacred law. According to Scheid, in archaic Rome, the *deditio noxae* as described by De Visscher, also applied in the case of a divine offence. The guilty person became *impius* and was excluded from public and religious life. The community would hand him over to the offended god who could take vengeance if he so chose.¹⁶ In this way, the community could free itself from every responsibility.¹⁷ The *impius*, however, could not expiate himself.

According to Mommsen and Wissowa, the second century BC saw a softening of the traditional sternness of Roman religion.¹⁸ On the basis of three inscriptions of the time - two containing regulations for sacred groves near Spoleto and Luceria and one containing a law for the Jupiter temple in Furfo, all located in Central or South Italy - they assumed that the penalties for all religious offences were relaxed.¹⁹ According to Scheid, however, the regulations only show that a guilty person could expiate an unintentional offence by offering a sacrifice; he could also pay a fine for having violated a public regulation and then a priest

should expiate the offence by offering a *piaculum*. The intentional offences remained inextinguishable.²⁰ Around 100 BC, the jurist and pontifex maximus Q. Mucius Scaevola confirmed these rules; the only innovation he introduced was to make it possible for the unintentional offender to repair the damage done and to expiate his deed himself. The sanction for an intentional offence remained surrender to the injured party, i.e., to the offended god, in order that the god be permitted to take vengeance on the offender. According to Scheid, this *noxae deditio* of sacred law survived until the end of the first century AD, when the emperor's intrusion into civil life limited the scope of vengeance.²¹ He concludes that the divine right to take vengeance, as acknowledged by the *deditio* of the intentional *impius*, should not be regarded as only an archaic institution.

Whereas De Visscher considered *noxae deditio* as a remnant of a period when the settlement of conflicts between more or less independent groups was realized by agreements on specific details rather than by legal solutions founded on a common norm, Scheid extends this interpretation to historical times.²² He suggests that *noxae deditio* can be considered simply as a form of political settlement that allowed private or international vengeance to be taken. The question is, however, whether *noxae deditio* in civil law is comparable to *deditio* in international and sacred law. I will first consider *noxae deditio* in civil law and then deal in more detail with the *deditio* of Mancinus and international law.

2.1 *Noxae deditio* in civil law

When a modern law student consults a textbook on Roman private law, he is bound to find a description of *noxae deditio* that is very different from that of Scheid. In the latter case, it is always connected with vengeance, in the former it is treated in the context of the liability of a *pater familias* or a *dominus* for a delict committed by his son or slave. In his *Institutes*, Gaius describes it in the following way:

Gai. *Inst.* 4.75

Ex maleficiis filiorum familias servorumque, veluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominove aut litis aestimationem suffere aut noxae dedere. Erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisve damnosam esse.

“Wrongdoing by sons or slaves, as where they have been guilty of theft or outrage, has given rise to noxal actions, the nature of which is that the father or master is allowed either to bear the damages awarded or to surrender the offender. For it would be inequitable that their misconduct should involve their parents or masters in loss beyond that of their persons.”²³

In classical Roman law, the *pater familias* or *dominus* would be held liable for delicts committed by his son or slave, but he could limit his responsibility by surrendering the son or slave to the injured party. What is crucial is that the choice between paying the fine or surrendering the son or slave was up to the defendant. The praetor would include this choice in the *formula*. If the defendant opted for *noxae deditio*, because paying the damage would cost him much more than the value of the slave, the slave (or son) had to be handed over by means of a formal act, the *mancipatio* or the *in iure cessio*.

Next to nothing is known about the rules of *noxae deditio* in earlier law.²⁴ The reconstruction by De Visscher discussed above is well-known, but not generally accepted.²⁵ Moreover, his reconstruction comprises more than Scheid wants us to believe. In fact, De Visscher distinguishes four different procedures in Roman law. The earliest procedure was (1) the pre-legal one; it was soon followed by (2) the legal system of noxality; in early classical Roman law, the system of noxal actions (3) was developed, whereas in postclassical law, the regime of noxality underwent (4) deformations. De Visscher assumed that the older,

pre-legal procedure was not displaced by the younger, legal ones but continued to exist.²⁶ In the second stage (i.e., that of the legal system of noxality), the victim's side had a right to demand the surrender of the wrongdoer, but the group sheltering the latter was allowed to buy them off by offering compensation. At some quite early date, when the *legis actio* procedure was still dominant, the system of *actiones noxales* was introduced: now the wrongdoer or his group was obliged to pay compensation but they were allowed to surrender the wrongdoer to the victim.

It is particularly the first procedure as proposed by De Visscher that has been rejected by other Romanists. Several other attempts at reconstruction have been made.²⁷ Max Kaser, for instance, developed another theory based on *Noxalhaftung*: the idea that noxal liability was created by the delict itself.²⁸ The problem is – as usual – that there are hardly any sources for archaic Roman law so that it is impossible to know anything about the origin of this special form of liability with any amount of certainty.²⁹

Scheid only refers to the first procedure described by De Visscher, i.e., to the pre-legal phase about which nothing is known. If, one day, De Visscher's reconstruction will turn out to be correct, Scheid's comparison will hold for the early Roman Republic. However, the *noxae deditio* of classical Roman law belongs to the third procedure described by De Visscher. It was used for different offences (e.g., theft, damage to property), for different persons (not for those who were free and *sui iuris*), and for a different purpose (limitation of liability of a *pater familias* or *dominus* for delicts committed by a son or slave). Moreover, Roman criminal law did not know *noxae deditio* as a way of punishment either.³⁰ Therefore, the *noxae deditio* in civil law does not seem to have any connection with *deditio* in sacred law.

2.2 *Noxae deditio* in international law

For noxal surrender in an international context, Scheid mentions the famous case of Mancinus. The story behind it has come down to us in several sources: it has been told by historians like Appian and Plutarch,³¹ but the *deditio* aspect has been described most extensively by Cicero. In the first book of his *De oratore*, he makes Crassus tell the story of Mancinus as an example of important cases where actions involving civil rights turn upon points of law.

Cicero, *De oratore* I 181

Etenim sic C. Mancinum, nobilissimum atque optimum virum, ac consularem, cum eum propter invidiam Numantini foederis pater patratus ex S.C. Numantinis dedidisset, eumque illi non recepissent, posteaque Mancinus domum revenisset, neque in senatum introire dubitasset; P. Rutilius, M. filius tribunus plebis, de senatu iussit educi, quod eum civem negaret esse; quia memoria sic esset proditum, quem pater suus, aut populus vendidisset, aut pater patratus dedidisset, ei nullum esse postliminium.

“For in truth such was the experience of Gaius Mancinus, a man of the highest rank and character and a past consul, who under a decree of the Senate had been delivered up to the Numantines by the *pater patratus*, for concluding an unpopular treaty with their nation, and whose surrender they had refused to accept, whereupon he returned home and unhesitating commons, ordered him to be removed, affirming that he was no citizen in view of the traditional rule that a man sold by his father or by the people, or delivered up by the *pater patratus*, had no right of restoration.”³²

From the other sources we know that, in 137 BC, the consul C. Hostilius Mancinus had been defeated in several battles by the Numantines, in Hispania Citerior, and that finally his army

had been encircled by them. A peace treaty was made, but our sources differ as to the person who represented Rome. According to Appian, it was Mancinus who bound himself by an oath to this agreement.³³ Plutarch, however, states that Mancinus' quaestor Tiberius Gracchus made the treaty thereby saving the lives of some 20,000 Roman citizens.³⁴ At Rome, the treaty was considered humiliating, and it was denounced as a disaster and as a disgrace to the name of Rome. The people decided that the consul Mancinus should be delivered up to the Numantines, but for Tiberius' sake all the other officers were spared.³⁵

Mancinus was taken back to Spain by the *pater patratus*, the head of the fetial priests.³⁶ He was left before the gate of Numantia, stripped and in chains. However the Numantines refused to accept him and, at night fall, he was taken back to the Roman camp.

Mancinus returned to Rome. He wanted to enter the Senate-house again but was ordered out by the tribune of the people P. Rutilius. Comparing the surrender of Mancinus up by the *pater patratus* with the case of the man who was sold by his father or by the people, Rutilius stated that he had no right of restoration. From other sources, we know that his case was hotly debated in the Senate: P. Mucius Scaevola took the side of Rutilius and maintained that Mancinus was no longer citizen. He was like an exile; he could only be restored in his rights as a citizen when the Roman people would 'receive' him again.³⁷ M. Iunius Brutus, on the other hand, argued that Mancinus had never lost his citizenship because like a gift, a *deditio* was not complete until it had been accepted.³⁸ Rutilius and Scaevola won the day, but a year later, the Roman people restored Mancinus as citizen and senator, and even elected him as praetor.

Following De Visscher (and, indirectly, Rutilius and Scaevola), Scheid considers the *deditio* of Mancinus as a deed of sovereignty on the Roman side that was independent from the reception, the formal acceptance, by the injured city. Both De Visscher and Scheid assume that Mancinus had committed perjury and that his *deditio noxae* was considered an expiation

that would free the Roman people of the responsibility for this perjury. Scheid suggests that, when one transposes this case into a religious situation, one could say that, by recognizing the status of an inexpiable *impius* as that of the author of a crime against the gods, the Roman people freed itself from every responsibility.³⁹

I do not agree with this analysis. First, I do not think that Mancinus had committed perjury: it seems it was Tiberius Gracchus and not Mancinus who had made the treaty with the Numantines and, moreover, it was not Mancinus but the Roman people that broke the treaty. Consequently, the Romans were unfair both against Mancinus and against the Numantines. It seems they used the *deditio* in order to expiate a perjury they themselves committed. Therefore, in terms of the *noxae deditio* of civil law, there was no damage committed by a subordinate person.

Second, I doubt whether *deditio* can be considered as a deed of sovereignty of the Roman people. Sometimes it will have worked like that, for instance in 188 BC, when Lucius Minucius Myrtilus and Lucius Manlius were said to have beaten Carthaginian ambassadors and were delivered by the fetials to the ambassadors and taken to Carthage.⁴⁰ If they would have been refused by the Carthaginians, Livy – who mentions this event – would have told us so. In other cases, however, the *dediti* were refused, for instance by the Samnites (in 321 BC, after the battle at the Caudine Forks) and by the Numantines.⁴¹

In my view, *deditio* was a religious concept that could be used for political ends.⁴² Its effect was determined by political power. It is striking indeed that no case of *deditio* is known to have taken place after 137 BC. Only once, in 55 BC, the subject came up for discussion again, when Cato wanted Caesar to be handed over to two Gallic tribes for having violated a truce.⁴³ The decline of *deditio* can very well be explained by the rise of Rome's political power. The fact that it is political power that determines who decides whether the *deditus* will

be accepted shows that international *deditio* is basically different from the *noxae deditio* of civil law.

Third, there is an even more important reason that makes me doubt whether, in the case of Mancinus, it is right to speak of *noxae deditio*.⁴⁴ In the sources, only the words *dedere*, *deditus*, and *deditio* are used.⁴⁵ In the other cases of surrender of a general, the word *nox*a is not used in combination with *deditio* either.⁴⁶

In my view, the Mancinus case does not confirm the existence of a *noxae deditio* in international law. It only shows that *deditio* in international law resembles *deditio* in sacred law. My conclusion, therefore, must be that there is not one and the same *noxae deditio* in civil, international, and religious law. *Noxae deditio* was part of civil law and implied restriction of liability for damage done by one's son or slave. It had nothing to do with *deditio* in religious and international law.

3. The *regula* of Q. Mucius Scaevola

The second example of the close connection between civil law and pontifical law mentioned by Scheid is the so-called *regula* of Q. Mucius Scaevola. It has come down to us via Varro (116-27 BC) and Macrobius (fifth century AD). I will quote both texts.

Varro, *De Lingua Latina* 6.30

Praetor qui tum fatus est, si imprudens fecit, piaculari hostia facta piatur, si prudens dixit, Q. Mucius aiebat eum expiari ut impium non posse.

“The praetor who has spoken at such a time, purifies himself by the sacrifice of an atoning victim, if he did it unknowingly; but if he spoke knowingly, Q. Mucius said that he could not atone for his offence, being *impius*.”

Macrobius, *Saturnalia* 1.16.9-11

Adfirmabant autem sacerdotes pollui ferias, si indictis conceptisque opus aliquod fieret. Praeterea regem sacrorum flaminesque non licebat videre feriis opus fieri, et ideo per praeconem denuntiabant, ne quid tale ageretur: et praecepti neglegens multabatur. 10. Praeter multam vero adfirmabatur eum, qui talibus diebus (i.e. festis) imprudens aliquid egisset, porco piaculum dare debere. Prudentem expiari non posse Scaevola pontifex adseverabat, sed Umbro negat eum pollui, qui opus vel ad deos pertinens sacrorumque causa fecisset vel aliquid ad urgentem vitae utilitatem respiciens actitasset. 11. Scaevola denique consultus, quod feriis agi liceret, respondit: quod praetermissum noceret....

“[9] The priests used to maintain that a rest day was desecrated if, after it had been duly promulgated and proclaimed, any work was done on it. Furthermore, the *rex sacrorum* and the *flamines* might not see work in progress on a rest day, and for this reason they would give public warning by a herald that nothing of the sort should be done. Neglect of the command was punished by a fine, [10] and it was said that he who had unknowingly done any work on such days, had – in addition to the fine – to make atonement by the sacrifice of a pig. For work done knowingly no atonement could be made, according to the pontiff Scaevola, but Umbro says that to have done work that concerns the gods or is connected with a religious ceremony, or any work of urgent and vital importance does not defile the doer. [11] Scaevola, in fact, when asked what might be done on a rest day replied that anything might be done which it would be harmful to have left undone. ...”⁴⁷

Varro's text is the oldest one. A praetor had done official business on a *dies fastus*. By doing so, he had committed sacrilege. When his mistake was discovered, he wanted to make atonement. He may have turned to the *pontifices* for advice. One of them, identified as Q. Mucius, distinguished between the case of the praetor having intentionally violated religious rules and the case of his doing so unintentionally: in the latter case, he could expiate himself by the sacrifice of an atoning victim, in the former case he could not.

From Macrobius' text, it can be deduced that the Q. Mucius mentioned by Varro must have been the pontiff Q. Mucius Scaevola. It is not clear who the other advisor, Umbro, may have been. Scheid calls both Scaevola and Umbro jurists but no jurist of the name Umbro is referred to in the sources. He may just as easily have been another pontiff. The case as described by Macrobius differs in two ways from the one described by Varro: first, the person committing the sacrilege is not specified as a praetor, and second, the consequences of the sacrilege are less severe in that both Umbro and Scaevola toned down Scaevola's original advice by allowing exceptions for work connected to religious ceremonies and other important work. It is not clear whether these differences are based on a different view in Macrobius' day or whether they are just accidental.

In both texts, the words *prudens* and *imprudens* are used to qualify the way in which the sacrilege had been committed. They are adjectives connected with the noun *prudencia*, all words deriving from *pro-videre*. It is clear that *providencia* is coterminous with *divinatio*, as Santangelo remarks elsewhere in this volume. He describes the word *prudens* as follows: 'The word *prudens* is very suitable to convey the concept of a deliberate action: it indicates the conduct of someone who is aware of the implications of an action, and can foresee its consequences.'⁴⁸ In other words, *prudens* is not an equivalent of *dolo* ('to have the intention to commit sacrilege') but has a broader meaning. By using this word, Scaevola (and Umbro)

were able to allow exceptions to the rule that someone who works on a *dies fastus* commits sacrilege.⁴⁹

It is striking that the *regula* of Scaevola is well-known among the students of Roman religion whereas students of Roman law will hardly know of its existence.⁵⁰ On the other hand, it seems that students of Roman religion do not realize that the same Q. Mucius Scaevola introduced a similar distinction into civil law, namely between intentionally and unintentionally committing a delict.⁵¹ Students of Roman law, and particularly of the Roman law of obligations, are quite familiar with this distinction.

In Roman law, a delict was a source of obligation for which the praetor would grant an action against the guilty person or his *pater familias/dominus*. In the Law of the XII Tables, the delicts *furtum* (theft) and *iniuria* (physical injury) are mentioned; there was only theft or injury when it had been committed with *dolus* (intentionally). The *lex Aquilia* of 286 BC introduced the delict of *damnum iniuria datum* (damage to property). We do not know how, originally, the word *iniuria* in this delict was interpreted. According to Jolowicz and Nicholas, it meant *non iure*, ‘in the sense that once it was proved that the defendant had caused the damage (in the appropriate way) he was liable unless he could show a recognised justification, such as self-defence.’⁵²

The earliest jurist known to have interpreted this word was Q. Mucius Scaevola. His opinion is quoted in a famous text of the jurist Paul on a tree-lopper who threw branches on the ground and thereby killed a slave. Scaevola compared a number of situations, each time indicating whether the tree-lopper was liable under the *lex Aquilia*:

Paul, *Dig.* 9.2.31

Si putator ex arbore ramum cum deiceret vel machinarius hominem praetereuntem occidit, ita tenetur, si is in publicum decidat nec ille proclamavit, ut casus eius evitari

possit. Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi: culpam autem esse, quod cum a diligente provideri poterit, non esset provisum aut tum denuntiatum esset, cum periculum evitari non possit. Secundum quam rationem non multum refert, per publicum an per privatum iter fieret, cum plerumque per private loca volgo iter fiat. Quod si nullum iter erit, dolum dumtaxat praestare debet, ne immittat in eum, quem viderit transeuntem: nam culpa ab eo exigenda non est, dum divinare non potuerit, an per eum locum aliquis transiturus sit.

“If a pruner threw down a branch from a tree and killed a slave passing underneath (the same applies to a man working on a scaffold), he is liable only if it falls down in a public place and he failed to shout a warning so that the accident could be avoided. But Mucius says that even if the accident occurred in a private place, an action can be brought if his conduct is blameworthy; and he thinks there is fault when what could have been foreseen by a diligent person, was not foreseen or when a warning was shouted too late for the danger to be avoided. Following the same reasoning, it does not matter much whether the deceased was making his way through a public or a private place, as the general public often make their way across private places. But if there is no path, the defendant should be liable only for positive wrongdoing, so he should not throw anything at someone he sees passing by; but, on the other hand, he is not to be deemed blameworthy when he could not have guessed that someone was about to pass through that place.”⁵³

It is striking that Scaevola does not use the word *iniuria* but, instead, *culpa* to qualify the causing of damage. His description of *culpa*: ‘there is fault when what could have been foreseen by a diligent person but was not foreseen’ has become standard, as well in Roman times as in modern times. In this case, the tree-lopper was liable for killing the slave when he

could have foreseen that someone would walk underneath the tree he was lopping and yet did not shout a warning. Only when there was no path and when there was no reason to expect someone to walk by did he not need to shout. But, of course, he would be liable if he would intentionally throw a branch at someone passing by: then he would be acting with *dolus*.

It is generally assumed that this interpretation of *iniuria* as *culpa* was new, and that, from then on, persons who not intentionally but through negligence caused damage to someone else's property were liable to pay a penalty. In this way, Scaevola considerably increased liability under the *lex Aquilia*.

Both in his legal *responsum* and in his pontifical *regula*, Q. Mucius Scaevola distinguished between intentional and unintentional behaviour, but he did so using different concepts and aiming at different effects. In pontifical law, he used the word *prudens* in a sense that is reminiscent of the derivation of *pro-videre*, i.e. being able to foresee the consequences of an action and so behaving in a well-considered way. He thereby introduced a more lenient criterion for deciding whether sacrilege had been committed or not. For civil law, however, Scaevola did the reverse: by interpreting *iniuria* in the sense of *culpa*, he extended liability under the *lex Aquilia*. From now on, not only was someone who intentionally caused damage to someone else's property liable, but so too was someone who did not intend to do so, but could have foreseen the consequences of his behaviour. *Providere*, to foresee, is the keyword, but its meaning vis-à-vis the gods is different from that vis-à-vis human property.

Both rules have come down to us, but in very different ways. The *responsum* on *iniuria* has been preserved in the Digest of Justinian, in a text by the jurist Paul (turn of the third century). It came to form part of a legal literature that expanded along with the Empire. But it is only thanks to Justinian that we know this along with so many other *responsa* from the classical jurists; if it were not for him, we would have known only a handful of texts

through fourth and fifth century collections such as the *Pauli Sententiae*, the *Fragmenta Vaticana*, and the *lex Romana Visigothorum*.

We know the *regula on impietas* thanks to Varro and Macrobius. It did not form part of a pontifical literature for, as Scheid points out, both authors were scholars and antiquarians, not priests.⁵⁴ In his view, there has never been a pontifical literature. Augustus may have tried to reconstruct the rules regarding religious institutions that had been abandoned and neglected for two or three generations, but his attempt came too late. All sorts of religions had been and were introduced in Rome during the expansion of the Empire, Roman religion was only one among many, even though it was a very important one. The rise of Christianity put an end to all that.

That Justinian as emperor of the Greek speaking Eastern Roman Empire in the sixth century ordered the Digest – a collection of Latin texts from the first two centuries AD – to be put together, may in itself be hard to understand. However, it does make sense that, as head of the Christian Church, he did not order the pontifical decisions of pagan Rome to be collected and codified.

4. Conclusion

The central question in this contribution is the extent to which pontifical law was connected with civil law. According to Scheid, they had enough in common to allow us to reconstruct procedures of pontifical law with the help of civil law procedures. By way of example, he reconstructed the punishment of a religious offence. For the first element of this procedure, the designation of the guilty person, he used the *noxae deditio* in civil and international law to explain *deditio* in sacral law. However, from the point-of-view of Roman law, this

comparison does not hold. The *deditio* in sacred and international law cannot be identified with *noxae deditio* in civil law, for they were two basically different concepts.

For the second element, the establishment of guilt, Scheid used a *regula* of the jurist and pontiff Q. Mucius Scaevola who modified the existing distinction between intentional and unintentional wrongdoing in sacred law in order to relax the rules. The same Scaevola introduced the same distinction in civil law, but in order to harden the rules.

The conclusion must be that there is only a parallel in procedures in a non-technical sense. In the Roman republic, sacred law and civil law were closely linked because they were created and interpreted by the same persons using the same methods. However, they differed as to subject matter and purpose and therefore they remained two separate sets of law. To what extent there was interaction between pontifical law and civil law at the level of substantive law remains to be seen.

¹ Cicero, *Brutus* 42.156

² Franz Wieacker, *Römische Rechtsgeschichte, I Einleitung, Quellenkunde, Frühzeit und Republik* (Munich, 1988), p. 361 with bibliography.

³ Cicero, *De oratore* 3.134; *De legibus* 2.47 and 2.52-53.

⁴ B.G. Niebuhr, *Historische und philologische Vorträge über römische Geschichte an der Universität zu Bonn gehalten*, 1 (Berlin, 1846), pp. 4-10.

⁵ Livy, 1.20.5-7.

⁶ It was particularly G. Wissowa, *Religion und Kultus der Römer* (Munich, 1912) who stimulated this kind of work. Thus, Jörg Rüpke, *Fasti Sacerdotum, Die Mitglieder der Priesterschaften und das sakrale Funktionspersonal römischer, griechischer, orientalischer und jüdisch-christlicher Kulte in der Stadt Rom von 300 v. Chr. bis 499 n. Chr.*, 3 (Munich, 2005), pp. 1547-1566. For an overview of the problems involved in these reconstructions, see John North, "The Books of the Pontifices," in *La memoire perdue. Recherches sur*

l'administration romaine, Collection de l'École française de Rome 243 (Rome 1998), pp. 45-63, with bibliography.

⁷ John Scheid, "Oral tradition and written tradition in the formation of sacred law in Rome," in *Religion and Law in Classical and Christian Rome*, eds. Clifford Ando and Jörg Rüpke (Stuttgart, 2006), pp. 14-33, particularly pp. 15-18, with bibliography.

⁸ Scheid, "Oral tradition," p. 20. André Magdelain, *De la royauté et du droit de Romulus à Sabinus* (Rome, 1995), pp. 73-75.

⁹ See, for instance, Richard A. Bauman, *Lawyers in Roman Republican Politics* (Munich, 1983).

¹⁰ See Cicero, *De oratore*, 2.142 about the custom of jurists to record opinions. The earliest known jurists to do so are M. Porcius Cato Licinianus and Manius Manilius, both living in the middle of the second century. The oldest known texts stem from Sex. Aelius Catus, be they only indirect allusions. On this jurist, see F. D'Ippolito, "Sex. Aelius Catus," *Labeo* 17(1971) 271-283 and Bauman, *Lawyers*, pp. 123-126.

¹¹ Scheid, "Oral tradition," p. 28 referring to Fernand de Visscher, *Le régime de la noxalité. De la vengeance collective à la responsabilité individuelle* (Brussels, 1947) pp. 50-51.

¹² De Visscher, *Noxalité*, p. 53.

¹³ Scheid, "Oral tradition," p. 30.

¹⁴ De Visscher, *Noxalité*, p. 137.

¹⁵ Scheid, "Oral tradition," p. 28. On the *causa Mancina*, see below, p. ##.

¹⁶ Scheid, "Oral tradition," p. 29. In this connection, he distinguishes *deditio noxae* from *sacratio* of criminals, as studied recently by Roberto Fiori, *Homo sacer. Dinamica politico-costituzionale di una sanzione giuridico-religiosa* (Naples, 1996).

¹⁷ Scheid, "Oral tradition," p. 27. In n. 56, he mentions the case of the Crotonians who complained before the Roman senate about the Roman general Pleminius for violation of

Hera Lacinia's grove, and he refers to Livy, 29.18.9. However, this section forms part of Livy's story about the Locrians who, in 204 BC, complained before the Roman senate about the outrages committed by the same general Pleminius against their temple of Proserpina. They beg the senators to atone for this crime before undertaking any action in Italy or Africa in order to prevent public disaster.

¹⁸ On these documents, see Scheid, "Oral tradition," pp. 23-26.

¹⁹ Th. Mommsen, *Das römische Strafrecht* (1899, repr. Graz, 1955), p. 811; K. Wissowa, *Religion und Kultus der Römer*, 2nd ed. (Munich, 1912), pp. 392-393.

²⁰ Cicero, *De legibus*, 2.22. On this distinction, see Scheid, "Oral tradition," pp. 23-26.

²¹ Thus Scheid, "Oral tradition," p. 29. He refers to Yan Thomas, "Se venger au forum. Solidarité familiale et procès criminel à Rome (Premier siècle av.-deuxième siècle ap. J.C.)," in *La Vengeance, Études d'ethnologie, d'histoire et de philosophie. 3. Vengeance, pouvoirs et idéologies dans quelques civilisations de l'Antiquité*, eds. R. Verdier and P. Poly (Paris, 1984), pp. 65-100, particularly p. 67. Thomas, p. 65, turns against the distinction that is commonly drawn between (archaic) vengeance and (modern) justice: he rather sees justice as offering the means to take vengeance. It is evident that penalties always have an element of vengeance, but, in my view, vengeance is basically different from justice in that it is not necessarily proportional to the original crime.

²² Scheid, "Oral tradition," p. 30.

²³ Translation based on F. de Zulueta, *The Institutes of Gaius. Text with critical notes and translation*, 1 (Oxford, 1946), p. 267.

²⁴ All we know is that, according to Gaius, *Inst.* 4.76, the Law of the XII Tables established a noxal action for theft.

²⁵ See the critical reviews by G.I. Luzzatto, *Studia et Documenta Historiae et Iuris* 13/14 (1947/1948), 412-422 and M. Sargenti, *IURA* 1 (1950), 447-452. See also Max Kaser, *Das*

römische Privatrecht 1, 2nd ed. (Munich, 1971), pp. 163-165, and H.F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge, 1972), pp. 172-174. Recently, C.F. Amunátegui Perello, “Lucretia and the Historical System of Noxality,” *Revue Internationale des Droits de l’Antiquité* 55 (2008) 67-81 compared the older theory of P.F. Girard, “Les actions noxales,” *Nouvelle Revue Historique* 11 (1887), 409-449 with that of De Visscher.

²⁶ See the review of De Visscher’s book by A.H. Campbell in *Journal of Roman Studies* 39 (1949), 162-164 for a useful summary.

²⁷ For literature, see Max Kaser-Karl Hackl, *Das römische Zivilprozessrecht*, 2nd ed. (Munich, 1996), p. 88 n. 15.

²⁸ Max Kaser, *Das altrömische Jus* (Göttingen, 1947), pp. 225-232.

²⁹ Cf. Dieter Nörr, *Aspekte des römischen Völkerrechts. Die Bronzetafel von Alcántara* (Munich, 1989), p. 81.

³⁰ O.F. Robinson, *Penal Practice and Penal Policy in Ancient Rome* (London, 2007), pp. 181-182 does not include vengeance as one of the purposes of punishment nor (184-187) does she mention *noxae dedito* as a penalty for particular crimes.

³¹ Appian, *Hist.* 80 and 83 ; Plutarch, *Tib. Gracchus* 5-7. For a complete overview of the sources, see G. Crifò, “Sul caso di C. Ostilio Mancino,” in *Studies in Roman Law in Memory of A. Arthur Schiller*, eds. R. Bagnall and W.V. Harris (Leiden, 1986), p. 19 n. 1.

³² Translation by E.W. Sutton and H. Rackam for Loeb Classical Library (1942). For the extensive literature on this case, see Bauman, *Lawyers*, p. 237 note 93. See also J. Arias Ramos, “Apostillas jurídicas a un episodio Numantino,” *Revista de Estudios Políticos* 68 (1953), 33-49, not mentioned by Bauman.

³³ Appian, *Hist.* 80.

³⁴ Plutarch, *Tib. Gracchus* 5

³⁵ Thus Plutarch, *Tib. Gracchus* 7.

³⁶ According to Appian, *Hist.* 83, Mancinus was taken to Spain by L. Furius Philus.

³⁷ P. Mucius' argument is described by Pomponius, *Dig.* 50.7.18. On this text and the vast amount of literature, see Crifò, "Mancino," pp. 19-32.

³⁸ We know from Modestinus, *Dig.* 49.15.4 that, in this debate, Scaevola was opposed by Brutus. It is not certain that Brutus used the argument mentioned above, but he may have because it is the argument that, according to Cicero in *Topica* 37, could be used against Scaevola in the Mancinus case.

³⁹ Scheid, "Oral tradition," p. 28.

⁴⁰ Thus, Livy, 38.42.7.

⁴¹ In this connection, it is interesting to mention a theory put forward by Jacques-Henri Michel, in "L'extradition du général en droit romain," *Latomus* 39 (1980), 681-693, particularly 688. He thinks that, originally, the Roman jurists used to analyse *deditio* as a bilateral act, comparable to *emancipatio*, for which the cooperation of the enemy was necessary. However, by the end of the second century BC, some jurists tended to regard *deditio* as a unilateral act, comparable to *devotio*. The latter word refers to a general who, before a battle, dedicates the enemy and himself to the gods of the underworld in order to secure victory for the Roman people. It is attested three times by Livy: for the years 340, 295, and 279 BC. Michel suggests that, by the end of the second century BC, the rise of this new theory shows that *deditio* underwent a crisis.

⁴² In the same vein, C. Lovisi, *Contribution à l'étude de la peine de mort sous la République romaine* (Paris, 1999), pp. 50-51.

⁴³ Plutarch, *Caes.* 22.1-3; Cato minor 51.1. See Linda Zolschan's paper on the longevity of the Fetials in this volume, p. [13]

⁴⁴ According to Arias Ramos, “Apostillas,” p. 43, the international *deditio* offers a perfect parallel to the *noxae datio* of civil law. However, he only mentions the surrender aspect, not the full context.

⁴⁵ Cicero, *Topica* 37 (*deditio*); *pro Caecina* 34 (*deditus*); *De oratore* 1.181(*dedidisset*); Modestinus, *Digest* 49.15.4 (*deduntur, deditus*); Pomponius, *Digest* 50.7.18 (*dedi, deditus*). According to Michel, “L’extradition,” p. 681 n. 22, it seems that R. von Jhering, *Der Geist des römischen Rechts* 1, 9th ed. (1890, repr. Aalen, 1968), pp. 215-216 was the first to identify *noxae deditio* and international *deditio*. However, Jhering does not refer to *noxae deditio* there at all.

⁴⁶ See, for instance, Valerius Maximus, 6.6.3: ‘per fetiales dedendos’; idem, 6.6.5: ‘per fetiales legatis dedidit.’; Livy, *Ab urbe condita* 38,42,7: ‘... per fetiales traditi sunt et Carthaginem avecti.’

⁴⁷ Translation based on that by P.V. Davies in *Macrobius, The Saturnalia* (New York and London 1969), pp. 106-107.

⁴⁸ Federico Santangelo, “Law and Divination in the Later Republic,” above [14-20, particularly 16].

⁴⁹ The formulation of general rules is usually regarded as a first step towards the development of a science. See on this subject, recently, Claudia Moatti, “Experts, mémoire et pouvoir à Rome, à la fin de la République,” *Revue historique* 309/2 (2003), 303-325, particularly 311-315, with bibliography.

⁵⁰ The *regula* is mentioned by Kurt Latte, *Römische Religionsgeschichte* (Munich, 1967), p. 203 n. 4, but not by Kaser, *Privatrecht*. It is referred to in books on the rise of Roman legal science, but only in the context of jurists formulating general clauses: Fritz Schulz, *History of Roman Legal Science* (Oxford, 1946), p. 65; Wieacker, *Römische Rechtsgeschichte*, p. 579 n. 39. Alan Watson, *The State, Law and Religion: Pagan Rome* (Athens, GA and London,

1992), pp. 10-12 refers to this *regula* to draw attention to the fact that the offence, no matter how deliberate, did not disturb the secular legal validity of the act.

⁵¹ In case of murder, this distinction was made already in the Law of the XII Tables: in VIII 24, it is stated that, ‘if the weapon sped from his hand rather than was thrown by him’, then a sacrificial ram was substituted. See Jolowicz-Nicholas, *Roman Law*, p. 174.

⁵² Jolowicz-Nicholas, *Roman Law*, p. 275.

⁵³ Text and translation by Colin Kolbert, *The Digest of Justinian* ,1, eds. Th.Mommsen, P. Krüger, and A. Watson (Philadelphia, 1985), p. 288.

⁵⁴ Scheid, “Oral tradition,” p. 3.