



THE STRAUS INSTITUTE
for the ADVANCED STUDY
OF LAW & JUSTICE

The NYU Institutes on the Park

THE JOSEPH AND GWENDOLYN STRAUS INSTITUTE
FOR THE ADVANCED STUDY OF LAW & JUSTICE

Professor J.H.H. Weiler

Straus Working Paper 05/12

Janez Kranjc

**Virtues in the Law:
The Case of *Pietas***

NYU School of Law • New York, NY 10011
The Straus Institute Working Paper Series can be found at
<http://nyustraus.org/index.html>

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN 2160-8229 (print)
ISSN 2160-8253 (online)
Copy Editor: Danielle Leeds Kim
© Janez Kranjc 2012
New York University School of Law
New York, NY 10011
USA

<p>Publications in the Series should be cited as: AUTHOR, TITLE, STRAUS INSTITUTE WORKING PAPER NO./YEAR [URL]</p>
--

VIRTUES IN THE LAW: THE CASE OF PIETAS

By Janez Kranjc*

Abstract:

Pietas was one of the three original Roman virtues. It formed part of the ancestral custom and required a reciprocal dutiful and appropriate conduct between relatives, primarily between children and their parents. The particular significance of the concept of *pietas* was that it served as a vehicle to transpose moral considerations into legal discourse, thereby making them both more apparent and consequential. This paper examines the influence that *pietas* had on the development of Roman law and its possible traces in the original modern-day versions of the French, Austrian and German Civil Codes as well as the US case law.

*I would like to express my gratitude to Joseph H. H. Weiler, Jeremy Waldron and to the Straus Institute for the Advanced Study of Law and Justice for their generous hospitality. I would also like to thank all the colleagues and friends at the Institute for their support and cooperation.

Table of contents

I. The virtues and their legal importance	4
II. <i>Pietas</i> in Roman tradition	8
A. The notion of <i>pietas</i>	10
B. The word <i>pietas</i> and its meaning	11
C. The origins of <i>pietas</i>	14
III. <i>Pietas</i> in the Roman literature	17
A. Plautus	18
B. Cicero	23
C. Vergil	29
D. Other Roman writers	32
IV. <i>Pietas</i> in Roman legal texts	34
A. Justinian's Digest	35
a. The nature of <i>pietas</i> in legal texts	35
b. <i>Pietas pro servis</i>	42
c. Mourning	44
d. Maintenance	46
e. Management of a business of another	47
f. Burial of the deceased	49
g. Dowry	53
h. Inheritance and trusts	57
B. Codex Iustinianus	66
a. Imperial title	68
b. Religious devotion	68
c. <i>Piae causae</i>	70
d. <i>Humanity and compassion</i>	73
e. <i>Pietas</i> as parental affection	75
f. Donations	81
g. Inheritance	83
V. The survival of the Roman <i>pietas</i> in modern law?	85
A. The method	88
B. The Civil codes	94
a. Reverence towards parents and other aspects of inter-family relations	95
b. The French Code civil	98
c. The Austrian Civil code – ABGB	104
d. The German Civil code – BGB	109
e. Mourning the dead relatives	114
f. Management of business of another and the reimbursement of funeral costs	115
g. <i>Pietas</i> related to testamentary provisions	120
- Code civil	121

- The Austrian Civil code	122
- The German Civil code	123
IV. The US Case law	127
A. <i>Pietas</i> , piety and charity	129
B. Maintenance of family members	135
V. Instead of a conclusion	138

I. The virtues and their legal importance

Legal values have a manifold importance for the functioning of a legal system. They shape the mindset of a lawyer, influence in a decisive way the interpretation of legal norms and inspire the fundamental legal principles. They are the core element that can motivate the lawyer to believe in the ideal of justice and try to achieve it. It is presumed that a good lawyer has a strong value-based engagement in terms of adhering to basic legal principles and to the rule of law. Furthermore, they play an important role in the process of interpreting and applying legal norms.

A firm system of values is an essential part of any social order. It forges social coherence, stability and predictability. Family life, civil society, and the state are to a great extent conditioned by the concept of basic values. Ethical norms arising from the convergence of individual subjective values and those objective values present in the society are essential elements of social stability. This convergence contributes to law abidance, stimulates honoring various promises, contracts, obligations etc.

Civil law in Europe has been decisively shaped by the Roman law contained in the codification of the emperor Justinian I. The rich Roman case law of Justinian's Digest, the imperial legislation of the Code and the text-book of his Institutes influenced the development of law in Europe not only by legal norms and techniques but also by principles and values referred to by Roman lawyers and lawgivers. Together with the rules of Roman law, these principles and values influenced the substance of the emerging legal culture in Europe.

The traditional values represented an essential and visible part of everyday life in Rome. Their observance was regarded as a crucial element of an honorable life. It was not limited to a private moral life of an individual but was largely determining his or her position in the society. According to Cicero, the best heritage the fathers could bestow on their children, worth much more than property was the illustriousness of their virtues and deeds.¹

During the time of the Roman Republic the basic virtues were not philosophical categories but customs and habits without a broader theoretical background. They were

¹Cic. De off. I, 121.

regarded as elements of *mos maiorum*, ancestral custom, i.e. the unwritten code of time-honored principles. The *mos maiorum* contained values, behavioral models, and social practices everybody was supposed to know and to observe.

Their content was interpreted in an authoritative way by censors who were maintaining and supervising public morality (*cura morum*, *regimen morum*) and had a sort of “moral jurisdiction” by issuing *nota censoria* (“censorial mark”) or *animadversio censoria* (“censorial reproach”). The censors gave no special motivation for their decision. It was most likely obtained by comparison of the particular comportment not with the moral ideal but rather with the current tradition. A virtue was therefore a practical and not a philosophical notion. We can find such an approach even in Roman legal texts. The classical jurist Ulpian gives us an example of understanding virtue as a concrete practice:

We should understand the expression, “mother of a family,” to signify one who does not live dishonorably, for her behavior distinguishes and separates her from other women. Hence, it makes no difference whether she is married or a widow, freeborn or emancipated, as neither marriage nor birth, but good morals (behavior) constitute the mother of a family.²

A philosophical elaboration of existing virtues – to some extent this occurred in Rome in the last century of the Republic, especially through Cicero's writings – also signified their transformation. But the realization of virtues as philosophical notions is far from self-evident. Although we can assume that the philosophical concept of particular virtues had no specific influence on everyday practice, it constitutes a new quality. With the philosophical elaboration of individual values a new question emerged regarding their

² Ulp. D. 50, 16, 46, 1: ‘*matrem familias*’ accipere debemus eam, quae non inhoneste vixit: *matrem enim familias a ceteris feminis mores discernunt atque separant. proinde nihil intererit, nupta sit an vidua, ingenua sit an libertina: nam neque nuptiae neque natales faciunt matrem familias, sed boni mores*. The English translations of the texts quoted from the Digest of Justinian in this paper were taken from The Digest of Justinian. Latin text edited by Theodor Mommsen with the aid of Paul Krueger. English translation edited by Alan Watson, University of Pennsylvania Press, Philadelphia, Pennsylvania 1985, revised edition 2009, or from the older translation by Samuel P. Scott, available at http://webu2.upmf-grenoble.fr/DroitRomain/Anglica/digest_Scott.htm.

application: the closeness of a concrete practice to the ideal. In a concrete case, the classical lawyer Gaius³ put it this way:

If the vendor makes some assertion about a slave and the purchaser complains that things are not as he was assured that they were ... All these expressions of the vendor are not to be charged against the vendor with absolute literalism but should be reasonably interpreted. Hence, if he declare the slave to be loyal, one does not expect the absolute gravity and fidelity of a philosopher; if he declare him hardworking and watchful, he is not required to work all day and all night. All these qualities should be expected within reason and we hold the same of other assertions of the vendor. ...⁴

Gaius was well aware of the discrepancy between an ideal and its practical application. In law the parties were expected to apply virtues in a practical, and realistic manner close to life. Nevertheless, such considerations did not reduce the level of responsibility but only made it more realistic.

An important element stimulating the scrupulous and thorough implementation of a moral rule or value can be its religious character. In such a case, trespassing against the rule invokes not only moral consequences but also a divine punishment.

In Roman Antiquity, morality was closely connected to the Roman religious tradition. Some of the basic virtues had a divine connotation and stood under the protection of individual Roman deities.

We learn from Cicero that Romans tended to deify particular virtues, like *Fides*, *Mens*, *Honos*, *Virtus*, *Ops*, *Salus*, *Concordia*, *Libertas*, *Victoria*, *Pietas* or *Spes*.⁵ Some of them were personifications of different aspects of well-being (like *Ops* signifying wealth and

³ Worked between AD 130 and 180. Nothing is known about his life, not even his full name. That provoked several speculations regarding his identity and provenance. See Tony Honoré, *Gaius*, Oxford, Clarendon Press, 1962 and Renato Quadrato, *Gaius dixit. La voce di un giurista di frontiera*, Cacucci Bari 2010. There were even speculation that Gaius was a woman. See A. Wacke, *War 'Gaius' das männliche Pseudonym einer Juristin?: zur Stellung römischer Frauen in Recht und Justiz*, OIR, *Orbis Iuris Romani: journal of ancient law studies*, Vol. XII, 2008, pp. 63 ss. More on Roman classical jurists see in: Wolfgang Kunkel, *Die Römischen Juristen. Herkunft und soziale Stellung*, Böhlau Verlag, Köln - Weimar 2001 - reprint of the 2nd edition 1967. Basic data on single jurists see in: Adolf Berger, *Encyclopaedic Dictionary of Roman Law*, Transactions of the American Philosophical Society, New Series – Volume 43, Part 2, Philadelphia 1953 and in: John Hazel, *Who's Who in the Roman World*, Routledge, London and New York 2001.

⁴Gai. D. 21, 1, 18 pr.

⁵ Cic. De leg. II, 28.

fertility, or *Salus* health and prosperity), others were features of other gods that became independent deities (*Fides*, *Libertas* and *Victoria* from Jupiter, *Honos* and *Virtus* from the cult of Mars, *Mens* from the Sibylline oracles), while others still were deifications of abstract concepts and virtues.⁶ The reasons behind the last group were, in Cicero's words, the benefits derived from them. The Romans "were persuaded that whatever was of great utility to human kind must proceed from divine goodness, and the name of the Deity was applied to that which the Deity produced. ... Everything, then, from which any great utility proceeded was deified; and, indeed, the names I have just now mentioned are declaratory of the particular virtue of each Deity."⁷

But already during the period of the Republic the religious nature of these virtues faded more and more into the background. The religious element seems to have been replaced by the general legal, or rather civic, culture. Indirectly, Cicero in his work on duties,⁸ gives us an interesting explanation of this process: we do not keep our word because of the fear of the wrath of Jupiter, but because a solemn promise has to be kept: 'for the question no longer concerns the wrath of the gods (for there is no such thing) but the obligations of justice and good faith.'

In legal texts of the classical period (27 BC – 232 AC), the basic Roman virtues have no religious connotation. They are secular, with the religious element replaced by the cultural one: what once might have been the fear of the wrath of gods has become the conviction that it should be that way because it was right to be so.

Roman virtues were not separate entities. They were perceived as a network of different interconnected qualities, depending largely upon one another.⁹ Thus, it is often difficult to examine one of the Roman virtues without taking into consideration the others. Although the following passages will focus on but one of these virtues, *pietas*, it is

⁶ See. Georg Wissowa, *Religion und Kultus der Römer*. Handbuch der klassischen Altertumswissenschaft V.4, C.H. Beck, München, 2. Aufl. 1912, reprint 1971, pp. 327 ss.

⁷ Cic. De nat. deor. II, 61.

⁸ Cic. De off. 3, 102 ss.

⁹ See Cic. De fin. V, XXIII, 65: ... *Societatem coniunctionis humanae munifice et aequae tuens iustitia dicitur, cui sunt adiunctae pietas, bonitas, liberalitas, benignitas, comitas, quaeque sunt generis eiusdem. Atque haec ita iustitiae propria sunt, ut sint virtutum reliquarum communia* (This sentiment, assigning each his own and maintaining with generosity and equity that human solidarity and alliance of which I speak, is termed Justice; connected with it are dutiful affection, kindness, liberality, good-will, courtesy and the other graces of the same kind. And while these belong peculiarly to Justice, they are also factors shared by remaining virtues).

necessary to bear in mind that it often appears in conjunction with other virtues and that sometimes it can only be understood in connection with them.

II. *Pietas* in the Roman tradition

There are several reasons to be interested in the Roman concept of *pietas*. Among Roman virtues it was the most comprehensive embracing all the relationships an individual could enter. It stood for the appropriate relationship towards other family members, towards the republic, towards the dead and towards gods. It was both an obligation and a standard of behavior marking out what was appropriate.

The Roman *pietas* was one of the most prominent Roman virtues originating in the ancestral custom (*mos maiorum*). Roman poets and writers often referred to '*pietas*' to denominate different aspects and features of the aforementioned relationships and dutiful behavior that they required.

In Roman legal sources *pietas* was perceived as a (moral) duty (*officium*), although it seems to have been more than a mere moral obligation. When the classical jurist Marcian, commenting on a rescript of emperor Hadrian, wrote that the paternal power should consist in *pietas*, meaning compassion and affection,¹⁰ this reflected not only to the propriety of behavior but also the extent of the paternal power which *pietas* could (and in the given case also should) shape and restrain.

In Roman classical legal texts *pietas* initially stood for dutiful and appropriate conduct between relatives, especially between children and their parents. As such it required a certain comportment but was also used as a standard to evaluate a particular action or to uphold (or reject) a provision in a contract or a will.

In imperial enactments, *pietas* also referred to religious devotion and Christian orthodoxy, as well as to charity and humanism. Unlike in works of literature, in legal texts *pietas* was used in a narrower sense, as a rule being limited to relations between family members. It encompassed non-relatives only in connection to the interment of the deceased as well as in connection to charity and humanism.

¹⁰ Marcian. D. 48, 9, 5. Marcian (*Aelius Marcianus*) was Roman jurist who worked at the beginning of the third century AD.

In Roman legal texts *pietas* was used in order to soften a position seeming too harsh and legalistic, to facilitate an equitable or just solution, and to maintain or refine interpersonal relations. It can be regarded as an important lever with which the Roman lawyers could make the law more just, more human and less harsh.

The concept of *pietas* had a strong influence upon the development of legal and general culture during the middle ages and in later periods. In Christian theology *pietas* was regarded as one of the gifts of the Holy Spirit.¹¹ It was not limited to religious devotion but entailed other features found in Roman legal texts. In his essay on the seven gifts of Holy Spirit (*Collationes de septem donis Spiritus sancti*)¹² the medieval theologian Johannes Bonaventura (1221-1274) describes the following aspects of *pietas*: *pietas* prevails to (accomplish) all things (*Collatio* III, 1); the exercise of piety consists in the reverence of divine veneration (*Collatio* III, 4); piety as the fear of God is wisdom (*Collatio* III, 5), consisting in the custody of intrinsic sanctification (*Collatio* III, 6); piety prevails to become acquainted with true things (*Collatio* III, 17) and to turn away all evils (*Collatio* III, 18). Besides these theological features *pietas* also has very human(ist) aspects, like mercy (*Collatio* III, 8 and 11) and charity: who wants to be pious to his neighbor, should support him patiently and love him charitably (*Collatio* III, 9).

In *ius commune*, i.e. the medieval and later elaboration of the Justinian's legislative work *pietas*, understandably, retained the meaning it had in Roman law. It formed part of the legal culture. Its influence was twofold: on the one hand through legal developments based on Roman legal texts interpreted and applied on the European continent and on the other hand – since the comportment required by *pietas* has become part of a general culture - as a cultural value or standard of cultural behavior.

In the following chapters I endeavor to show two things. Firstly, by means of Roman literary texts I try to discern what meaning *pietas* generally had in Roman society. I then attempt to show its different meanings and uses in Roman legal texts. In addition I try to find traces of different concepts related to *pietas* in the first three major civil codes

¹¹ They were deduced from Isaiah 11, 2.

¹² See the Latin text with the English translation at <http://www.franciscan-archive.org/bonaventura/opera/collat3.html>

which are still in use in Europe; i.e. the French, the Austrian and the German Civil Code. Since all the three were amended several times and since it is less likely that the amendments were inspired by Roman law, I will be using the original texts of the three Civil Codes.

I will also try to find some traces of the Roman concept of *pietas* in American case law. There was obviously no reception of Roman law. However, it is quite possible that it informed or influenced some of the decisions by virtue of arguments brought into discussion by knowledgeable judges.

A. The notion of *pietas*

In Roman mythology, *Pietas* was the goddess personifying attachment, love and veneration, as well as duty to the state, gods and family. *Pietas* was one of indigenous Roman goddesses. At first she had a small sanctuary, replaced in 191 BC by a larger temple in the *forum Holitorium*.¹³ *Pietas* was represented as a female figure offering incense upon an altar or with a baby in her arms.

Together with *fides* (the trust or trustworthiness) and *virtus* (the martial courage), *pietas* was one of the three old original Roman virtues representing the three pillars of the ancient Roman society. Whereas *virtus* characterized the courage in fighting the enemies, *pietas* and *fides* were regulating the relations in the society: *fides* was aimed at governing the contractual relations outside the Roman family, and *pietas* was predominantly focused on the relations inside the family and among the kinfolk. As such *pietas* was a moral attitude comprising and governing different aspects of inter-personal relations: respect for parental authority, the reciprocal loyalty of the spouses, the dutiful relation towards the republic and devotion to gods. The Romans regarded *pietas* as an essential and particular feature of their national character that distinguished them from

¹³ Liv. 40, 34: ... *aedes duae eo anno dedicatae sunt, una Ueneris Erycinae ad portam Collinam: dedicauit L. Porcius L. f. Licinus duumuir, uota erat a consule L. Porcio Ligustino bello, altera in foro holitorio Pietatis* (...Two temples were dedicated during the year, one to Venus Erycina, by the Porta Collina - this temple had been vowed by L. Porcius in the Ligurian war and was dedicated by his son - the other, the temple of Pietas in the Forum Olitorium). The English translations of quotations from Roman literary texts were predominantly taken from the translations published in The Loeb Classical Library or published online on the Attalus website at <http://www.attalus.org/info/sources.html>.

others. Its best example and archetype was '*pius Aeneas*' leaving the burning Troy after the *pietas*¹⁴ of his kin merited an omen sent by Jupiter:

'You, father, take the sacred objects, and our country's gods,
in your hands: until I've washed in running water,
it would be a sin for me, coming from such fighting
and recent slaughter, to touch them.' So saying, bowing my neck,
I spread a cloak made of a tawny lion's hide over my broad
shoulders, and bend to the task: little Iulus clasps his hand
in mine, and follows his father's longer strides.
My wife walks behind.¹⁵

The Romans were proud of their *pietas*. They regarded it as one of the reasons for their supremacy over other nations. In one of his Elegies Propertius states that the goddess Fama is not ashamed of Rome's history, because Romans stand strong both in arms and in *pietas* (i.e. loyal and dutiful patriotism), their wrath restraining victorious hands.¹⁶

Other virtues which made the Romans believe that they were better than others were the abovementioned *fides* and *virtus*. Their courage in fighting their enemies and the ability to keep their promises and honor the treaties they entered into, together with their patriotism and dutifulness, were regarded as the main pledges of their expansion and might.

B. The word *pietas* and its meaning

The etymology of the word *pietas* is not entirely clear. There were some attempts in the antiquity to elucidate it. Describing the term '*herba impia*' Pliny the Elder gives an interesting explanation of the word *impius*. He says that the plant is called '*herba impia*' (literally: irreverent, undutiful plant) because the new branches protrude from a sort of a head, i. e. 'the progeny surmounts the parent'. It is possible to assume that the designation of the plant was alluding to the 'impertinent behavior' of the new branches,

¹⁴ Verg. Aeneid. II. 690 s: ... *aspice nos, hoc tantum, et si pietate meremur/ da deinde auxilium, pater, atque haec omina firma* (see us, and, grant but this: if we are worthy through our virtue, show us a sign of it, Father, and confirm your omen).

¹⁵ Vergil. Aeneas II, 717 ss. Translation by A. S. Kline, accessible online at http://www.poetryintranslation.com/PITBR/Latin/VirgilAeneidII.htm#_Toc536009324.

¹⁶ Prop. III, 22: *Famam, Roma, tuae non pudet historiae./ nam quantum ferro tantum pietate potentes/ stamus: victricis temperat ira manus.*

prevailing over the stem like disrespectful children over their parents. The idea behind this expression was that the children surmounting their parents behaved contrary to the concept of *pietas*.¹⁷

In the late antiquity there were some further attempts at explaining the term *pietas*. According to the late 4th-century grammarian Maurus Servius Honoratus the word *pietas* was derived from the adjective *purus*, meaning clean and innocent, free from any crime (*purus et innocens et omni carens scelere*) and from the verb *piare*, which the ancients used for *purgare* (to clean, cleanse, purify): thence also the substantive *piamina* (means of expiation, atonement) through which the people are purified.¹⁸ Therefore, the purified are not *impīi* (irreverent, ungodly, undutiful, unpatriotic; impious). This etymology is to some extent shared by modern linguists who also connect the adjective *pīus* with the adjective *purus* or the verb *piare*.¹⁹

Some two centuries later Isidore of Seville (Isidorus Hispalensis, c. 560 –636), whom Charles de Montalembert called ‘the last scholar of the ancient world’ (le dernier savant du monde ancien), examined in his Etymologies the meaning of the word *impius* in its religious dimensions.²⁰ For him impious (*impius*) is “someone who is without the piety (*pietas*) of religion. Unjust (*iniquus*) in the strict sense is so called because one is not even-handed (*aequus*), but is unequal (*inequalis*). However, between impious and unjust there is sometimes a difference, in that all impious persons are unjust, but not all

¹⁷ Plin. Nat. Hist. 24, 173 - *Herba impia vocatur incana, roris marini aspectu, thyrsi modo vestita atque capitata. inde alii ramuli exsurgunt sua capitula gerentes; ob id impiam appellavere, quoniam liberi super parentem excellant. alii potius ita appellatam, quoniam nullum animal eam attingat, existimavere* (The plant called "impia" is white, resembling rosemary in appearance. It is clothed with leaves like a thyrsus, and is terminated by a head, from which a number of small branches protrude, terminated, all of them, in a similar manner. It is this peculiar conformation that has procured for it the name of "impia," from the progeny thus surmounting the parent.).

¹⁸ Servii Grammatici qui feruntur in Vergilii Aeneidos libros I–III commentarii. Recensuit Georgius Thilo. Lipsiae in aedibus B. G. Teubneri. 1878, p. 127, 378: ... *sane 'pius' potest esse et purus et innocens et omni carens scelere. piare enim antiqui purgare dicebant; inde etiam piamina, quibus expurgant homines, et qui purgati non sunt impīi* ...

¹⁹ See e. g. A. Walde, Lateinisches etymologisches Wörterbuch, 2. umgearbeitete Aufl., Carl Winter, Heidelberg 1910, p. 587.

²⁰ See Isidori Hispalensis Episcopi Etymologiarum sive Originum, Liber X (De vocabulis), 132; critical edition by W. M. Lindsay, Oxford University Press, Oxford, 1911 available also on the webpage http://penelope.uchicago.edu/Thayer/L/Roman/Texts/Isidore/10*.html#I, English translation: The etymologies of Isidore of Seville, [translated by] Stephen A. Barney, W. J. Lewis, J. A. Beach, Oliver Berghof; with the collaboration of Muriel Hall. Cambridge, Cambridge University Press 2006, p. 221. More on Isidore of Seville and his work Ernest Brehaut, An encyclopedist of the dark ages - Isidore of Seville, Studies in History, Economics and Public Law, Columbia University 1912, especially pp. 30 ss.

the unjust are impious. Thus impious means “not of the faith” (*pro infideli*), and such a person is called impious because he is a stranger to the piety of religion (*et dictus impius quod sit a pietate religionis alienus*). On the other hand, an unjust person is so called because he is not fair but stained with wicked works – and this is the case [if] he were appraised in the name of Christianity (*pravis operibus maculatur, vel si Christianitatis nomine censeatur*).”

Less speculative than its etymology was the meaning of the word *pietas*. It stood for a comportment of man towards god, of son or daughter towards his or her father or mother, of a client towards his patron, of a citizen towards the state, of a subject towards his or her emperor, but also the other way around of god towards man, of father or mother towards his or her son or daughter, of a brother towards his brother, of a ruler towards his co-ruler.²¹ The essential part of *pietas* was thus mutuality. *Pietas* normally had a touch of a sacred object or at least of something exceeding normal legal regulation. Similarly, Liegele defines it as “the quality or a way of conduct that corresponds to close relationship “*interpositis rebus sacris*”.”²²

In Roman texts the word *pietas* had different meanings depending on whether it was used in a legal or non-legal context.²³ In its original and most general meaning, *pietas* stood for a *dutiful conduct* towards the gods, one's parents, relatives, benefactors, country, etc., as well as for a *sense of duty*. But it also meant *conscientiousness* and *scrupulousness* as well as *duty*, *dutifulness*, *affection*, *love*, *loyalty*, *patriotism*, *gratitude* with respect to one's parents, children, relatives, country, benefactors, etc. *Pietas* could also mean *gentleness*, *kindness*, *tenderness*, *pity* and *compassion* or even *justice*.

C. The origins of *pietas*

²¹ Josef Liegele, *Pietas*, Zeitschrift für Numismatik, 1932, 42. Bd., p. 72 (Römische Wertbegriffe, Herausgegeben von Hans Oppermann, Wissenschaftliche Buchgesellschaft, Darmstadt 1983, p. 243).

²² Josef Liegele, *Pietas*, p. 72 (p. 243): ... pietas ist die Beschaffenheit oder Handlungsweise, die einer Bindung, und zwar einer Bindung ‚interpositis rebus sacris‘, entspricht.

²³ See A Latin Dictionary. Founded on Andrews's; edition of Freund's Latin dictionary. Revised, enlarged, and in great part rewritten by Charlton T. Lewis, Ph.D. and. Charles Short, LL.D. Oxford. Clarendon Press. 1958. Available also at Perseus Digital Library

The origins of the word *pietas* stem from the times when the agnate Roman family was trying to shape its life in harmony with the spirits of their dead ancestors, the *di parentes*. Initially *pietas* represented the state of a person scrupulously fulfilling all the duties required by the *di parentes* of his or her tribe. There were two groups of these duties:

- those related to the cult of the *di parentes*, i.e. of the divine members of the tribe, and
- the reverence and consideration towards the living members of the family.²⁴

In the first case the duty of family members was to secure a permanent, inviolate home for the family spirits, as well as to perform rites and make offerings to them.²⁵ This was believed to propitiate them and to win their favor and support. In the second case the reverence towards the living family members paid tribute to the existing social order which, again, was rooted in religious beliefs and protected by family gods. The idea behind this double reverence was probably the belief in the existence of human and divine *parentes*.²⁶

In both cases it was a religious and not a general moral rule that required a pious conduct of the family members. Thus, in both cases the violation of this rule invoked a religious sanction, with the perpetrator regarded as *impius* and therefore doomed to the revenge of family gods. Festus mentions two examples of such an impious conduct as well as the ensuing sanctions. He ascribed them to the laws of the Roman kings, the first one to the founder of Rome Romulus and the second one to the third of the Roman kings Servius Tullius.²⁷ In both cases the reason for punishment was not the gravity of

²⁴ See C. Koch, Pauly Wissowa Reallencyklopädie der klassischen Altertumswissenschaft ..., s. v. *Pietas*, pp. 1221 ss.

²⁵ See C. B. Pascal, Catullus and the Di Parentes, The Harvard Theological Review, Vol. 52, No. 2 (Apr., 1959), p. 75 ss, esp. p. 78.

²⁶ C. Koch, Pauly Wissowa Reallencyklopädie der klassischen Altertumswissenschaft ..., p. 1222.

²⁷ The English translation is taken from: Ancient Roman Statutes: A Translation With Introduction, Commentary, Glossary, and Index. By Alan Chester Johnson, Paul Robinson Coleman-Norton, Frank Card Bourne. General Editor, Clyde Pharr. The Lawbook Exchange, Ltd. Clark, New Jersey 2003, Fourth Printing 2009, pp. 4 s. On the quite controversial existence of the laws of Roman kings (*leges regiae*) see Alan Watson, Roman Private Law and the Leges Regiae, The Journal of Roman Studies, Vol. 62 (1972), p. 100-105, *Leges Regiae*, Editors: Frederic P. Miller, Agnes F. Vandome, McBrewster John, Verlag Dr. Mueller e.K. 2010, Franz Wieacker, Römische Rechtsgeschichte, Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur. Erster Abschnitt, Einleitung, Quellenkunde, Frühzeit und Republik, C.

the consequence in terms of injury or corporal damage but the violation of a (religious) duty of respectful conduct:

If a daughter-in-law strikes her father-in-law she shall be dedicated as a sacrifice to his ancestral deities.

If a son beats his father but the latter cries aloud the son shall be dedicated as a sacrifice to his ancestral deities.²⁸

It is interesting to note the difference between the two norms. In the first case the daughter-in-law was punished because she struck her father-in-law. It seems that the intensity of the blow was not important. She had to be punished because her deed desecrated the sacrosanctity of the relationship between her and her father-in-law. In the second case the son was punished if the blow was strong enough to make his father cry out with pain. We can imagine that a child striking his father while playing with him did not violate *pietas* and was not liable to be punished because his deed did not offend the *di parentes*. They were offended if the blow was delivered by a (probably adult) son aiming at insulting or humiliating his father.

In both cases the punishment was the same. It was called *sacratio*. The perpetrator was dedicated to the *di parentes*. The consequence of this dedication was that he or she became *homo sacer* and lost all divine and human protection. Killing a *homo sacer* was not regarded as murder.

The idea behind this religious anchorage of *pietas* was the belief that the father and the patron together with the main pattern of family relations stood under a special protection of family gods (*di parentes*) requiring respectful treatment. From this double relationship limited to the head of the family and the *di parentes* the *pietas* was

H. Beck, München 1988, p. 307 ss with literature. The text and Italian translation see in: *Leges regiae a cura di Gennaro Franciosi*, Jovene editore Napoli 2003.

²⁸ Fest., F. 230, *plorare*: *Plorare, flere, inclamare nunc significat, et cum praepositione inplorare, id est invocare : at apud antiquos plane inclamare. in regis Romuli et Latii legibus : «si nurus sacra divis parentum estod.» in Servi Tulli haec est : «si parentem puer verberit ast olle plorassit, puer divis parentum sacer esto.»* The English translation available at http://webu2.upmf-grenoble.fr/DroitRomain/Anglica/leges_regia_johnson.htm.

gradually extended to other family members, to the broader community and to gods in general.²⁹

In a situation similar to the both aforementioned the religious penalty of *sacratio* can also be found in the XII Tables. A patron who defrauded his client was dedicated to the gods of the underworld. It is possible to see certain parallels between this deed and that of the daughter-in-law striking her father-in-law or of the son doing the same to his father. The relationship between a patron and his client was rooted in the ancestral custom (*mos maiorum*) and characterized by the trust (*fides*) and *pietas*. Although the relationship between patron and client was hierarchical, the obligations were mutual. The client was regarded as a member (*gentilicius*) of his patron's gens, taking part in and contributing to its religious rites. This religious background was, at least initially, an important element of the relationship.³⁰ Even though the duty of a respectful conduct was more visible with the client, the patron was equally bound by *pietas* and *fides*. Thus, it can be assumed that a patron defrauding his client became *impius* his action being a breach of *pietas*. This might have been the result of the concept of *pietas* broadened beyond the family in a narrower sense of word.

The above norm of the XII Tables indicates the mutual nature of *pietas*. As can also be deduced from the much later legal texts of Roman jurists and as we will try to present below, *pietas* was a reciprocal relation requiring dutiful respect in both directions. It was not aimed at punishing the insubordination of those under the paternal or other power but at steering the inter-family relations in accordance with ancestral custom. Thus a patron deceiving his client was undoubtedly punished the same way as a client deceiving his patron.³¹

²⁹ See C. Koch, Pauly Wissowa Realenzyklopädie der klassischen Altertumswissenschaft ..., p. 1222. See also Naevius speaking of an old man relying upon piety and addressing Neptune, the brother of the supreme god - Cn. Naevi Belli Poenici fragmenta, II, 9: *senex fretus pietatei deum adlocutus/ summi deum regis fratrem Neptunum/ regnatorem marum* (the old man relying upon *pietas* addressed the god, Neptunus, the brother of the supreme king of gods). Naevius was a poet of the 3rd century BC.

³⁰ Despite the changed nature of patronage in the classical law – the patron was normally the former owner of a slave whom he freed – the nature of the relationship remained more or less the same. In this sense Ulpian wrote: 'A freedman and a son should always consider the person of a father and patron honorable and inviolable' (Ulp. D. 37, 15, 9: *Liberto et filio semper honesta et sancta persona patris ac patroni videri debet*).

³¹ We do not know why only the punishment of the patron was regulated in the XII Tables. But we can assume that this was because the punishment of a client was not at all open to doubt.

It is possible to obtain an idea of the contents of *pietas* and of a pious conduct towards members of the family from Catull. At the end of his poem on Argonauts and the nuptial song for Peleus and Tetis³² he describes the impious wickedness that spread over the earth a very interesting and colorful way while showing some extremes of impious conduct:

“all fled from justice with eager minds,
the brother’s hand was stained with a brother’s blood,
the child ceased to mourn for its dead parents,
the father chose the younger son’s death to acquire
a single woman in her prime, the impious mother
spread herself beneath the unknowing son,
not afraid of desecrating the household shrine (*diuos scelerare penates*).
All piety was confused with impiety in evil frenzy (*fanda nefanda malo permixta furore*)
turning the righteous will of the gods from us.
So such as they do not visit our marriages,
nor allow themselves to approach us, in the light of day.”

If we take the opposite of this nefarious conduct, described by Catull, we can see what *pietas* was requiring of a Roman: the pursuit of justice, non-violent dispute resolution, mourning of the dead, respect of marital relations and those between close-relatives, as well as worship of the family gods.

III. *Pietas* in the Roman literature

Roman writers were using the word *pietas* as an obvious part of their vocabulary without trying to define it. A modern reader lacking the deeper insight into the traditional substance of Roman values has to discern the concrete meaning of the word *pietas* from its context. Like in the writings of the classical Roman jurists who only exceptionally defined or explained a legal notion, the concrete meaning seems to have been obvious to their readers. An exception in this regard to some extent is Cicero. In

³² C. Valerius Catullus, LXIV : *Argonautia et epythalamium Thetidis et Pelei*, i. f. Translation by A. S. Kline, accessible at <http://www.poetryintranslation.com/PITBR/Latin/Catullus.htm>.

some of his writings he discussed the very notion of *pietas* trying to define it and to examine its importance in a broader context.

A. Plautus

The earliest surviving works of Latin literature are those of Titus Maccius Plautus (c. 254–184 BC). Plautus was the most successful comic poet of the ancient world and the first known professional playwright.³³ He was adapting works of Greek playwrights for a Roman audience by bringing them closer to the Roman taste and social realities. Even during his lifetime Plautus enjoyed an incredible popularity. This was to a great extent due to his ability to find a direct contact with the people by giving them what they wanted. His texts are full of simple and understandable humor presented by stock characters. They are rich in puns, exaggeration, stereotypes, word play, proverbs on a variety of issues, as well as in Greek words and phrases.

Plautus' comedies were provocative and abounded in stereotypes. Plautus was contrasting the traditional Roman sense of discipline and order with confusion, mocking hierarchies and parental authority and disrespecting elders.³⁴ He probably shocked (and at the same time pleased) the public with irreverence, impiety and blasphemy, and by turning everyday attitudes³⁵ and everyday values upside down. There are many examples of such a style in his comedies. We may quote only four related to different aspects of *pietas*: the reverence towards gods, the scrupulous performance of ritual acts, the respectful relationship between spouses and between the parents and the children.

In the *Poenulus* (line 1190) Hanno is asking Jupiter to free his daughters and show him that there is a reward for his indomitable piety (*invicta pietas*). The young Agorastocles who is in love with one of Hanno's daughters replies with an obvious blasphemy: "Jupiter will do whatever I say, he is indebted to me and he fears me."³⁶

³³ Erich Segal, *Roman Laughter: The Comedy of Plautus*. 2d ed. New York and London, Oxford University Press, 1987, pp 1 ss.

³⁴ Erich Segal, *Roman Laughter*, p 12 s.

³⁵ This could be one of the reasons for the poor reputation Plautus had among later Roman writers. See Horat. *Ars Poetica* 277 ss.

³⁶ Plaut. *Poenulus*, v. 1191 s.

In *Pseudulus Calidorus*, the young son of an Athenian nobleman and his clever slave Pseudulus intercept the pimp Ballio who sold Calidorus' love, Phoenicium, as a slave to the Macedonian general Polymachaeroplages. Ballio refuses to talk to them using harsh words ("May Jupiter confound you, whoever you are" - Pseudulus, 250). He agrees to listen only when Pseudulus says he will benefit from that ("And can't you, Ballio, only once give a look this way for your own profit?" - Pseudulus, 263). The answer of Ballio was extremely clear and must have been a colossal provocation:³⁷

‘At that price I'll give a look; for if I were sacrificing to supreme Jupiter, and were presenting the entrails in my hands to lay them on the altar, if in the meanwhile anything in the way of profit were offered, I should in preference forsake the sacrifice. There's no being able to resist that sort of piety, however other things go.’

He was not only saying he was ready to interrupt a sacrifice to the supreme god for the sake of some profit, but even called such a comportment piety. Plautus was aware of the extent of this provocation and let Pseudulus comment on Ballio's words by an aside: "The very gods, whom it is especially our duty to reverence, them he esteems of little value" (Pseudulus, 269).

A similar provocation mocking *pietas* as a marital devotion to the spouse can be found in *Asinaria*. When Demaenetus is asked by his son Argyrippus if he loves his mother, he replies: "Who - I? I love her just now, because she isn't present." Argyrippus: "How [do you feel], when she is present?" Demaenetus: "Then, I wish she was dead."³⁸

It was not much better with the filial devotion to the parents. In *Mostellaria* the young Philolaches upon seeing his mistress Philematium exclaims: "I do wish that news were brought me now that my father's dead, that I might disinherit myself of my property, and that she might be my heir."³⁹

Such and similar provocations were probably amusing to Plautus' audience. But this was the world of theatre. Is it, as a result, possible to seek in the satire of Plautus the traces of genuine Roman virtues or at least the proper sense of the terms denominating them?

³⁷ Plaut. *Pseudulus*, 265-68.

³⁸ Plaut. *Asinaria*, v. 899 ss.

³⁹ Plaut. *Mostellaria*, v. 233 s. More on this E. Segal, *Roman Laughter*, pp. 15 ss.

Especially because of the particular nature of Plautus' texts one can wonder whether the comedies of Plautus can serve as reliable source in which we can search for the undistorted meaning of the word *pietas*.

We may assume the answer to be positive. It is possible to imagine that Plautus' texts were provocative because they were caricaturing real social patterns. A caricature can work only if the features and concepts it is mocking are genuine. Furthermore, Plautus was deriding particular social behaviors and concepts and this was only possible when the vocabulary he was using corresponded to the established meanings. We can imagine that Plautus, aimed at pleasing a broad public, was using the word *pietas* in its most understandable and widespread meanings. By doing so he was probably trying to achieve the strongest satirical effect.

Besides the aforementioned examples there are many other references to *pietas* in Plautus' comedies. The first use of the word was to name the goddess *Pietas* personifying attachment, love and veneration, as well as duty to the state, gods and family. We find an example of this in *Asinaria* (III, 1):⁴⁰ Philaenium, a young courtesan (*meretrix*), living with her mother Cleæreta, a procuress, is in love with Argyrippus, the son of Demænetus. Diabolus wants to hire Philaenium exclusively for himself for a year. Cleæreta has promised to transfer the girl to him on condition that Argyrippus, who loves the girl and wants to have her for himself, does not preempt this by paying the sum of twenty *minæ* before Diabolus. Cleæreta forbids Philaenium to talk to Argyrippus.⁴¹ And in this situation we come to the following exchange of words between the mother and the daughter:

Cleæreta: And am I unable to render you obedient to my injunctions? Can it be that you feel inclined to rid yourself of your mother's authority?

Philaenium: How should I be showing myself duteous to Filial Duty, mother, if I tried to please you by practicing such practices and doing as you prescribe?

⁴⁰ More on the plot of the comedy David Konstan, Plot and Theme in Plautus' *Asinaria*, *The Classical Journal*, Vol. 73, No. 3, Feb. – Mar. 1978, p. 215 ss.

⁴¹ Plaut. *Asin.* III, 1, l. 522 s.: *quotiens te votui Argyrippum filium Demæneti /compellare aut contrectare, conloquive aut contui?* (How often have I forbidden you to speak to Argyrippus, the son of Demænetus, or to touch him, or to hold discourse with him, or to look at him?).

Cleaereta: Is this regarding filial duty, to lessen a mother's authority? ⁴²

The dialogue is peculiar because there seem to be two different understandings of what the goddess Pietas may require. On the one hand there is the daughter. She is persuaded that the goddess would be upset if she turned Argyrippus out of doors as a sign of reverence to her mother. The mother, on the other hand, believes that worshipping Pietas can have only one outcome: the strengthening of filial obedience. Therefore weakening the authority of the mother would be contrary to the dutiful conduct towards Pietas.

In the same comedy there is also the third mention of the word *pietas*. This time it does not refer to the goddess but to the duty of a child towards his parent. Demænetus, the father of Argyrippus, promised the latter his help in obtaining twenty minæ which Argyrippus needed to hire Philaenium. Demænetus obtains them by defrauding his rich wife Artemona. But he is ready to give the money to his son on condition that he himself will have the privilege of a night with Philaenium (*Noctem huius et cenam sibi ut dares*).⁴³ Argyrippus, albeit devoured by jealousy consents. When Demænetus asks him if it displeases him for Philaenium to take her place by him during the meal he answers:

My duty as a son (*pietas*) takes the sting out of the sight, father. Even though I love her, of course I can persuade myself not to be disturbed at her being with you.⁴⁴

This time the word *pietas* clearly refers to the affection and obedience of a son towards his father. In this particular case the obedience is combined with gratitude. It seems to be quite independent from the shocking behavior of the father who switches from a sympathetic support for his son to an extremely unfair abuse of his son's financial distress. We can assume that in Plautus' time this sort of *pietas* as the *affection* and

⁴² Plaut. Asin. III, 1, 1, 509: *Hocine est pietatem colere, matris imperium minuere?* English translation: Plautus with an English translation by Paul Nixon, Amphitryon, The Comedy of Asses, The Pot of gold, The Two Bacchises, Harvard University Press, Cambridge, Massachusetts, London, England, First published 1916, Reprinted ... 1997. According to the English translation of Thomas Henry Riley 1912, Perseus Project 1997 (<http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0093%3Aact%3D3%3Ascene%3D1>) the second mention of *pietas* in line 509, too, refers to the goddess Pietas (Cleaereta: Is this worshipping Pietas, to lessen the authority of a mother?).

⁴³ Plaut. Asin. v. 736.

⁴⁴ Plaut., Asin. V, 1: *Argyrippus: Pietas, pater, oculis dolorem prohibet. quamquam ego istanc amo, possum equidem inducere animum, ne aegre patiar quia tecum accubat.*

gratitude with respect to one's parents was the required and expected attitude of children towards their parents. And since this relationship was reciprocal we can assume that in the case of Demænetus it was him who violated his *pietas*, i.e. the dutiful conduct towards his son.

Among many passages in Plautus' comedies mentioning *pietas*, there is probably one that merits our particular attention. It is the beginning of *Stichus*.⁴⁵ Two sisters, Panegyris and her younger sister who is unnamed, are married to brothers Epignomus and Pamphilippus, who have been away in Asia for three years. During this time both wives were taking care of the affairs of their husbands. Lamenting the absence of their husbands, Panegyris notes that it is proper and fair to perform their duties (line 5: *ita ut aequom est*). The younger sister agrees by saying it is fair (*aequum*) to fulfill their obligations (*officium*) to their husbands no less than it is required by their dutifulness (*pietas*).⁴⁶

What is surprising is the quantity of moral words that characterize the language of the two sisters, especially the younger one. She is talking about *officium*, *pietas* and about what is *aequum*. We can imagine that these expressions had a particular effect in the context of the comedy. Their seriousness and solemnity must have increased the comedian effect of later developments. For us this passage is interesting because it reveals an important role *pietas* could play as a standard quantifying the *officium* as a moral obligation.

So we see that there are quite different meanings of *pietas* to be found in Plautus' works. Besides referring to the goddess⁴⁷ the word also refers to the (filial) affection.⁴⁸ It can

⁴⁵ More on the comedy. M. Owens, Plautus' *Stichus* and the Political Crisis of 200 BC, *American Journal of Philology*, Vol. 121, Nr. 3, Fall 2000, pp. 285 ss.

⁴⁶ Plaut. *Stichus*, l. 6-8a: *Nostrum officium / nos facere aequomst* (7a), / *neque id magis facimus / quam nos monet pietas*. ('Tis right that we should do our duty; and we do not that any further than affection bids us).

⁴⁷ See also Plaut., *Curculio*, V, 2, l. 639 s: Plan.: *Pietas mea, serva me, quando ego te servavi sedulo frater mi, salve* (Oh god of filial love, do keep me, for I have loyally kept thee in honour!).

⁴⁸ Plaut. *Poenulus*, 1190 : Han. : ... *invictae praemium ut esse sciam pietati* (...that unflinching affection is rewarded); l. 1255: ... *quom nostram pietatem adprobant decorantque di immortales* (since by them, the immortal gods, our affection is approved and honoured); Plaut. *Pseudolus*, l. 291, Plaut. *Trinummus* l. 281: ... *patrem tuom si percoles per pietatem* (respect and filial affection for your father).

indicate intimacy and love without a particular reference to the family,⁴⁹ a pious way,⁵⁰ filial duty,⁵¹ reverence⁵² and loyalty.⁵³

Apart from some passages in which it relates to the religious piety the meaning of the word *pietas* in Plautus' comedies was more or less limited to family relations. It is probable that in *Stichus* it refers also to patriotism. Plautus seems to have indirectly commented the events during the political crisis of 200 BC⁵⁴ It is speculated that he was inserting in his comedies allusions pushing for the plan of war against Hannibal favored by the plebs but not very popular with the senate.⁵⁵

B. Cicero

Although we can find the word *pietas* in the works of practically all Roman authors the most important seem to be corresponding texts of Cicero. Among the Roman authors he is an exception because he not only uses the term *pietas* but to some extent also discusses the notion as such. Cicero is also the only Roman author to define the term. He defined *pietas* several times, albeit unfortunately never in the same way. It is therefore difficult to speak about a true Ciceronian definition of *pietas*. It is likely, as Hendrik Wagenvoort⁵⁶ argued, that Cicero's idea about *pietas* changed in connection with the political events of the 40s. Initially Cicero was using the term *pietas* primarily in connection with parents, relatives and the country. After 46 BC, i.e. after the *de facto* end of the Roman Republic, *pietas* was applied in Cicero's texts above all in relation to the gods.

⁴⁹ Plaut., *Bacchides*, V, 2, l. 1177: *Sine, mea pietas, te exorem*. In this case *mea pietas* can be translated as 'my love'.

⁵⁰ Plaut. *Casina*, l. 383: *Olympio Vilicus: Tibi quidem edepol, credo, eueniet: noui pietatem tuam* (I know your pious way) and *ibid.* l. 418: *Olympio Vilicus: Pietate factum est mea atque maiorum meum* (It all comes of the pious ways of me and my forbears).

⁵¹ Plaut. *Pseudolus*, l. 121: *CAL. verum, si potest, pietatis causa—vel etiam matrem quoque*. (But filial duty leads me to suggest that if possible you even try my mother too).

⁵² Plaut. *Rudens*, l. 11: *... facta hominum, mores, pietatem et fidem* (deeds and ways of men, their reverence and loyalty).

⁵³ Plaut. *Stichus*, l. 8a: *... quam nos monet pietas* (our loyalty dictates).

⁵⁴ William M. Owens, Plautus' "*Stichus*" and the Political Crisis of 200 BC, *The American Journal of Philology*, Vol. 121, No. 3 (Autumn, 2000), p. 385 ss.

⁵⁵ See Andrew F. West, On a Patriotic Passage in the *Miles Gloriosus* of Plautus, *The American Journal of Philology*, No. 1, 1887, p. 28.

⁵⁶ Hendrik Wagenvoort, *Pietas: Selected Studies in Roman Religion*, Leiden 1980, p. 5 ss, esp. p. 9.

Pietas constituted an important part of Cicero's philosophy and life.⁵⁷ Even though there are some reservations about his personal commitment to *pietas* there can be no doubt about the place *pietas* occupied in the value system he developed in his writings.

In his Dialogue concerning oratorical partitions (*De partitione oratoria* 22, 76 ss) Cicero discusses the problem of virtues. He presents a logical system of several divisions. According to Cicero virtue can be distinguished either by theory (*scientia*) or by practice (*actione*). Prudence (*prudencia*), shrewdness (*calliditas*), or wisdom (*sapientia*) belong to theory, whereas temperance (*temperantia*) regulating the passions, and restraining the feelings of the mind, is practical (*in actione*). Temperance is divided again according to the sphere of influence: it can influence one's own affairs and be called domestic (*domestica*), or those of the state and be named civil (*civilis*). There are even further divisions of *temperantia*. The ability to resist imminent evils is called fortitude (*fortitudo*) and that which endures and carries present evil is called patience (*patientia*). If we put these two virtues together we get magnanimity (*magnitudo animi*). In dealing with money it can be expressed as generosity (*liberalitas*) and in enduring disadvantages, especially injuries as loftiness of spirit (*altitudo animi*).

All the mentioned virtues are primarily influencing the comportment of an individual by controlling and containing passions. But there are also virtues which influence broader social interactions. According to Cicero these are justice (*iustitia*), religion (*religio*), affection (*pietas*), goodness (*bonitas*), faithfulness (*fides*), lenity (*lenitas*), and friendship (*amicitia*). Cicero defines them in a following way:

But that division of virtue which is exercised between one being and another is called justice (*iustitia*). And that when exercised towards the gods is called religion (*religio*); towards one's relations, affection (*pietas*); towards all the world, goodness (*bonitas*); when displayed in things entrusted to one, faith (*fides*); as exhibited in moderation of punishment, lenity (*lenitas*); when it develops itself in goodwill towards an individual its name is friendship (*amicitia*).⁵⁸

⁵⁷ See Sister Gertrude Emilie, Cicero and the Roman *pietas*, The Classic Journal, Vol. 39, No. 9 (June 1944), pp. 536 ss.

⁵⁸ Cic. Part. Orat. 22, 78.

The impression is that there was in fact one virtue manifesting itself in particular shapes related to different situations. These habits of mind (*habitus animi*) are distinguished from one another by some peculiar kind of virtue (*propria virtutis genere*). Accordingly, if everything is done by them, it must be honorable (*honeste*) and praiseworthy (*laudabilis*).⁵⁹ The guardian of all the virtues, according to Cicero, is modesty (*verecundia*). It avoids all that which causes shame, and attains the greatest praise.⁶⁰

We see that Cicero placed *pietas* among other virtues steering one's relations with the social environment. Surprisingly, he limited it to the relationships with relatives (*erga parentes*), which was rather narrow, although the same position can be witnessed also in the texts of Roman classical jurists.

In Cicero's writings we encounter some passages referring to such piety. Cicero mentions Scipio's devotion to his mother (*pietas in matrem*),⁶¹ and Cato's distinction for filial duty⁶² as well as many other examples.⁶³ Writing about how a young man can gain popular esteem, he suggests to proceed from self-restraint (*modestia*), filial affection (*pietas in parentes*) and kindness (*benivolentia*) to kinsfolk. To obtain this he should attach himself to wise and renowned men who are good counselors to the republic.⁶⁴

We encounter a broader definition of *pietas* in Cicero's youth work, the handbook for orators (*De inventione* II, 161). He writes about it in connection with natural law. *Pietas* is one of its manifestations, together with religion (*religio*), gratitude (*gratia*), revenge (*vindicatio*), attention (*observantia*), and truth (*veritas*).

This time Cicero defines *pietas* as "that feeling under the influence of which kindness and careful attention is paid to those who are united to us by ties of blood, or who are devoted to the service of their country".⁶⁵ We see that *pietas* is not limited to one's kin, but is equally due to the relatives and to the fatherland. This concept of *pietas* is in line with Cicero's concept of the republic which embodies and upgrades the ties among

⁵⁹ Cic. Part. Orat. 23, 79.

⁶⁰ Cic. Part. Orat. 23, 79.

⁶¹ Cic. Lael. 3, 11.

⁶² Cic. Cato maior, 23, 84.

⁶³ See e. g. Cic. Ad fam. 5, 2, 6 and 10; Ad fam. 11, 22, 1; Ad fam. 1, 9, 1; Ad fam. 1, 9, 8; Ad fam. 1, 9, 9.

⁶⁴ Cic. De off. 2, 46.

⁶⁵ Cic. De inv. II, 161: ... *pietas, per quam sanguine coniunctis patriaeque benivolum officium et diligens tribuitur cultus*.

family members and friends. For him there is no social relation closer and dearer than the one which links every citizen with the republic. The love for parents, the love for children, relatives and friends, they are all embraced by the love towards the fatherland for which a good citizen is ready to sacrifice his life.⁶⁶ Cicero also believes that most of our duties (*officia*) are owed in the first place to the fatherland and to the parents, next to the children and the whole family, and finally to our kinsmen.⁶⁷

This is also the context in which *pietas* is manifested. In the sixth book on the republic, the so called *Dream of Scipio*, in which Cicero describes a fictional dream vision of Scipio Aemilianus, the latter is advised by his father to honor justice and duty (*iustitiam et pietatem*) which are indeed strictly due to parents and kinsmen, but most of all to the fatherland.⁶⁸ It is interesting to notice that here the *pietas* as loyalty to the republic comes first, even before the affections for parents and relatives.⁶⁹

According to Cicero, the origins of *pietas*, as well as of other virtues, lie in the knowledge of the nature and of gods.⁷⁰ The science of nature alone can “impart a conception of the power of nature in fostering justice and maintaining friendship and the rest of affections; without the explication of nature we cannot understand piety towards gods or the degree of gratitude that we owe to them”.⁷¹ And it is the nature that is the foundation of justice and of all other virtues:

⁶⁶ Cic. De off. 1, 57.

⁶⁷ Cic. De off., 1, 58.

⁶⁸ Cic. De Rep., 6, 16: *Sed sic, Scipio, ut avus hic tuus, ut ego, qui te genui, iustitiam cole et pietatem, quae cum magna in parentibus et propinquis tum in patria maxima est; ea vita via est in caelum et in hunc coetum eorum, qui iam vixerunt et corpore laxati illum incolunt locum, quem vides.* ... (Follow the examples of your grandfather here, and of me, your father, in paying a strict regard to justice and piety; the influence of which, towards parents and relations is great indeed, but that to our country greatest of all. Such a life as this is the true way to heaven, and to the company of those, who, after having lived on earth and escaped from the body, inhabit the place you now behold.).

⁶⁹ See also Cic. Ad fam., 2, 15, 3. See also Cic. Ad fam., 7, 28, 3: ... *sed mehercule et tum rem publicam lugebam, quae non solum suis erga me, sed etiam meis erga se beneficiis erat mihi vita mea carior* (But, by Hercules, at that time I was mourning for the Republic—which by its services to me, and no less by mine to it, was dearer to me than my life).

⁷⁰ Cic. De nat. deor., 2, 41, 153: ... *Quae contuens animus accedit ad cognitionem deorum, e qua oritur pietas, cui coniuncta iustitia est reliquaeque virtutes, e quibus vita beata existit par et similis deorum, nulla alia re nisi immortalitate, quae nihil ad bene vivendum pertinet, cedens caelestibus.* (From the contemplation of these things the mind extracts the knowledge of the gods - a knowledge which produces piety, with which is connected justice, and all the other virtues; from which arises a life of felicity inferior to that of the gods in no single particular, except in immortality, which is not absolutely necessary to happy living.)

⁷¹ Cic. De fin. 3, 21, 73.

And if Nature is not to be considered the foundation of Justice, that will mean the destruction of the virtues on which human society depends. For where then will be place for generosity, or love of country, or loyalty, or the inclination to be of service to others or to show gratitude for favors received? For these virtues originate in our natural inclination to love our fellow-men, and this is the foundation of Justice. Otherwise not only consideration for men but also rites and pious observances in honor of the gods are done away with; for I think that these ought to be maintained, not through fear, but on account of the close relationship which exists between man and God.⁷²

Piety and the rest of the virtues can exist only on the assumption that there is a reciprocal relationship between gods and the human race. The piety towards gods makes possible the existence of other virtues: ⁷³

[H]ow can piety, reverence or religion exist? For all these are tributes which it is our duty to render in purity and holiness to the divine powers solely on the assumption that they take notice of them, and that some service has been rendered by the immortal gods to the race of men. But if on the contrary the gods have neither the power nor the will to aid us, if they pay no heed to us at all and take no notice of our actions, if they can exert no possible influence upon the life of men, what ground have we for rendering any sort of worship, honor or prayer to the immortal gods. Piety however, like the rest of the virtues, cannot exist in mere outward show and pretence (*in specie fictae simulationis*); and, with piety, reverence and religion must likewise disappear. And when these are gone, life soon becomes a welter of disorder and confusion (*perturbatio vitae sequitur et magna confusio*); and in all probability the disappearance of piety towards the gods will entail the disappearance of loyalty and social union among men as well, and of justice itself, the queen of all the virtues (*pietate adversus deos sublata fides etiam et societas generis humani et una excellentissima virtus iustitia tollatur*).’

Disputing Epicurus’ position on religion Cicero conveys these thoughts in another definition of *pietas*. It is “justice towards the gods”.⁷⁴ Epicurus, so Cicero, has destroyed the very foundations of religion with his arguments. The main argument of Epicurus

⁷² Cic. De leg. 1, 15, 43 : *Atqui si natura confirmatura ius non erit, uirtutes omnes tollantur. Vbi enim liberalitas, ubi patriae caritas, ubi pietas, ubi aut bene merendi de altero aut referendae gratiae uoluntas poterit existere? Nam haec nascuntur ex eo quod natura propensi sumus ad diligendos homines, quod fundamentum iuris est. Neque solum in homines obsequia, sed etiam in deos caerimoniae religionesque toll<e>ntur, quas non metu, sed ea coniunctione quae est homini cum deo conseruandas puto.*

⁷³ Cic. De nat. deor. 1, 2, 3 s.

⁷⁴ Cic. De nat. deor. 1, 41, 116: ... *Est enim pietas iustitia aduersum deos.*

seems to have been that gods ‘do not only pay no respect to men, but care for nothing and do nothing at all.’ To Cicero, a logical consequence of such an assertion is that it is not possible to ‘owe piety to someone who has bestowed nothing upon you,’ since piety is justice towards gods.

It is not entirely clear what justice in this case stands for. But we can assume that by using the word justice, Cicero wanted to stress the mutual nature also in the relations between the human and the divine society: the humans owe piety towards gods because they receive from them diverse benefits and advantages.

We can assume that this sort of piety Cicero is talking about is not something new or special. It is likely that Cicero’s intention was to reassert the abovementioned mutual nature of *pietas*. Piety is not a relationship that would go only in one direction, but rather has to apply in both directions. It has to be just: “[B]ut how can any claims of justice exist between us and them, if god and man have nothing in common?”⁷⁵ Since piety and the rest of the virtues can exist only on the assumption that there is a reciprocal relationship between gods and the human race, the existence of these virtues seems to prove to Cicero that this relationship between gods and humans really exists.

Summarizing Cicero’s views on piety we can above all observe that he thought of it in close interconnection with other virtues. Furthermore, *pietas* was presupposing a certain reciprocal relationship. As far as its general attributes are concerned in Cicero’s works *pietas* was not any different from its traditional meaning. It can be described as the affection that motivated benevolent and diligent performance of duties to the parents, to one’s kin, to the fatherland, and to gods.

In Cicero’s texts *pietas* did not constitute a basis for a legal obligation. It was more precisely a motive justifying and at the same time requiring certain comportment. It is inseparably connected with justice,⁷⁶ both as its expression⁷⁷ and as its foundation. At the same time it is the foundation of all other virtues.⁷⁸ And it was one of the manifestations of gratitude, the greatest virtue and also the mother of all the other

⁷⁵ Cic. De nat. deor. 1, 41, 116.

⁷⁶ Cic. De nat. deor. 2, 153. See the text above in Fn. 70.

⁷⁷ Cic. Part. Orat. 22, 78, Cic. Laelius, 3, 11.

⁷⁸ Cic. Pro Cn. Plancio 12, 29: ... *nam meo iudicio pietas fundamentum est omnium virtutum* (... for in my opinion filial affection is the foundation of all the virtues). In this case *pietas* refers to filial affection.

virtues.⁷⁹ Since it was requiring particular comportment towards the most important elements of the Roman society (i.e. parents, children, relatives, one's kin, fatherland and gods), the Ciceronian *pietas* was the basis of the social order. It was "a public virtue identified with the ethos of the ruling class."⁸⁰

C. Vergil

Regarding the popular perception of *pietas* the most famous among the Roman authors is probably Vergil. To a broader public his *pius Aeneas* represents the archetype of a traditional Roman and the best representative of *pietas* at the beginning of Augustus' principate. Aeneas is a man "noted for virtue".⁸¹ He impresses the reader by being pious, heroic, and lacking all crime.

Vergil does not define the term *pietas* that he is using in connection with Aeneas. But it is more or less obvious that it refers to the traditional features of *pietas* since Aeneas is *pius* towards his father, his son, his country and the gods. The most important outward signs of Aeneas' *pietas*, was the saving of his father from the burning Troy⁸² and the submission to the divine will.⁸³ Aeneas is most often reported as *pius* in connection with religious ceremonies. But Aeneas' *pietas* comprises also selflessness, sympathy, thoughtfulness of others, magnanimity and meticulous performance of rites.⁸⁴ Aeneas' *pietas* is also tenderness and a brotherly love for mankind.⁸⁵

There seems to be at least one additional meaning of *pietas* in Vergil's poem. Besides devotion and *humanitas*, *pietas* and *pius* can also mean compassion and

⁷⁹ Cic. Pro Cn. Plancio 33, 80: *Quid est pietas nisi voluntas grata in parentes?* (What is filial affection, but a grateful inclination towards one's parents?)

⁸⁰ James D. Garrison, *Pietas from Vergil to Dryden*, The Pennsylvania State University Press, Pennsylvania 1992, p. 11.

⁸¹ Verg. Aen. 1, 10: *insignem pietate virum ...*

⁸² Verg., Aeneas II, 717 ss. See also Senec. De benef. 3, 37.

⁸³ See e. g. Verg., Aeneas 4, 393-6: But dutiful (*pius*) Aeneas, though he desired to ease her (i.e. Dido's) sadness/ by comforting her and to turn aside pain with words, still, / with much sighing, and a heart shaken by the strength of her love, / followed the divine command, and returned to the fleet.

⁸⁴ See Kenneth McLeish, Dido, Aeneas, and the Concept of 'Pietas'. *Greece & Rome*, Second Series, Vol. 19, No. 2 (Oct., 1972), p. 127 ss, esp. p. 128; see also: E. Adelaide Hahn, *Pietas versus Violentia in the Aeneid*, *The Classical Weekly*, Vol. 25, No. 2 (Oct. 12, 1931), p. 9 ss.

⁸⁵ See Nicholas Moseley, *Pius Aeneas*, *The Classical Journal*, Vol. 20, No. 7 (April 1925), p. 388 ss, reproducing also some of the opinions in the literature.

compassionate.⁸⁶ When Aeneas mourns the dead Misenus or heaps up a great mound for his tomb, his deeds are not only motivated by loyalty and devotion but also by compassion.⁸⁷

Christian apologists saw in Aeneas' *pietas* an important connection not only to *iustitia* but also to the *arma*.⁸⁸ This quality of Aeneas was stressed by Vergil himself:

Aeneas was our king, no one more just than him
in his duty (*pietate*), or greater in war and weaponry.⁸⁹

And since for the Christian apologists a really pious man could not be a violent personality they were disputing the identification of *pietas* with the character of Aeneas who was, as we already mentioned, characterized by Vergil as *insignis pietate vir* (Aen. 1, 11).⁹⁰ This argument, however, does not fit well with the value system of the heroic period of Roman history. It is difficult to imagine an ancient hero who would not fight his enemies and use his arms. As said in the introduction, *pietas* was one of the three oldest Roman virtues, together with *fides* and *virtus*, the last of these in the sense of the military valor. The martial qualities were no less important than the personal ones. Together and inseparably they represented the main virtues of the early republican Roman.

In Roman literature there are many passages mentioning the connection of *pietas* and military bravery. We already mentioned the Elegy of Propertius asserting that the might

⁸⁶ See W. R. Johnson, Aeneas and the Ironies of Pietas, The Classical Journal, Vol. 60, No. 8 (May 1965), p. 361.

⁸⁷ See: Verg., Aeneid. 6, 176 and 6, 232, but also 4, 393-6.

⁸⁸ James D. Garrison, Pietas from Vergil to Dryden, p. 11.

⁸⁹ Verg., Aeneid. 1, 544-5: *Rex erat Aeneas nobis, quo iustior alter, /nec pietate fuit, nec bello maior et armis.*

⁹⁰ Lactantius, The Divine Institutes, 5, 10: Where then, O poet, is that piety which you so frequently praise? Behold the pious Æneas ... What! can any one imagine that there was any virtue in him who was fired with madness as stubble, and, forgetful of the shade of his father, by whom he was entreated, was unable to curb his wrath? He was therefore by no means pious who not only slew the unresisting, but even suppliants. Here some one will say: What then, or where, or of what character is piety? Truly it is among those who are ignorant of wars, who maintain concord with all, who are friendly even to their enemies, who love all men as brethren, who know how to restrain their anger, and to soothe every passion of the mind with calm government. Translated by William Fletcher. From Ante-Nicene Fathers, Vol. 7. Edited by Alexander Roberts, James Donaldson, and A. Cleveland Coxe. (Buffalo, NY: Christian Literature Publishing Co., 1886.) Revised and edited for New Advent by Kevin Knight. <<http://www.newadvent.org/fathers/0701.htm>>.

of Rome consisted of both arms and *pietas*. In a fragment of the Roman fabulist Phaedrus (c. 15 BC – c. AD 50) the Delphic oracle is reproduced. There Pythia gives the following instruction: ⁹¹

Abide in piety; make good your promises to the gods in heaven; defend with military might your homeland and your parents, your children and your faithful wives; drive the enemy away with the sword; sustain your friends and be kind to the victims of misfortune; give aid to honest people and oppose lying scoundrels; avenge acts of crime and rebuke the wicked; punish all those who pollute the marriage bed with perverted adultery; watch out for evil-doers and trust no one too much.

This text shows how closely interrelated *virtus* (in the sense of courage and military valor) and *pietas* were. We can assume that the will and readiness to defend family members and homeland was regarded as an essential part of *pietas* or at least as something very close to it.

In his work on civil war Lucan writes about the inhabitants of Massilia who are said to have always shared in the fortunes of the Roman people and have always been ready to fight against foreigners alongside them. But “if Romans are divided, and if you purpose ill-omened battles and accursed strife, then we offer tears for civil war, and we stand aside.” They refused to enter into the civil war by saying that if the earthborn Giants assailed the sky, ‘the piety of man, nevertheless, would shrink from aiding Jupiter either with arms or with prayers.’⁹² From the context it is clear that in a normal situation *pietas* would require to defend with arms an ally, relative or some other person being the subject of piety. But since the ally was engaged in a domestic conflict, there was no such requirement. It was even impossible to help the ally since it was at the same time the aggressor and the attacked.

⁹¹ Appendix Perottina fabularum Phaedri, VIII: ... *pietatem colite, uota superis reddite; /patriam, parentes, natos, castas coniuges /defendite armis, hostem ferro pellite;/amicos subleuate, miseris parcite;/bonis fauete, subdolis ite obuiam; /delicta uindicate, corripite impios, /punite turpi thalamos qui uiolant stupro; /malos caute, nulli nimium credite.* Translation quoted from <http://aesopus.pbworks.com/w/page/1472874/phaedrus096>.

⁹² Lucan, *Bell. civ.* III, 316 ss: *si terrigenae temptarent astra gigantes,/non tamen auderet pietas humana uel armis /uel uotis prodesse Ioui, ...* On the influence of Vergil's Aeneas on the main protagonists of Lucan's *Bellum civile* see Lynette Thompson, A Lucanian Contradiction of Virgilian Pietas: Pompey's Amor, *The Classical Journal*, Vol. 79, No. 3 (Feb. - Mar., 1984), p. 207 ss.

This becomes even more evident if we take into account that *pietas* was not limited to relatives and gods but also extended to the fatherland. The essence of the *pietas erga patriam* was precisely in the readiness to defend it with arms. In his History of Rome Livius describes the war with Veii and how an unexpected disaster united all the classes and strengthened their resolve to prosecute the siege of Veii. The senate passed a resolution requiring that the consular tribunes should convene a public meeting and give thanks to the infantry and the knights, and proclaim that the senate would never forget this proof of their affection for their country (*pietatis eorum erga patriam*).⁹³ It was their military valor by which they showed their affection for the country and which merited the thanks of the senate.

The connection between *pietas* and the duty to defend the country is clearly visible in the term *bellum iustum piumpque*⁹⁴ meaning a war not infringing any human or divine law. The war could be waged in accordance with piety if it was launched in a ritual way. Then fighting the enemy and defending the country was a part of *pietas erga patriam*.

D. Other Roman writers

Among many literary works mentioning *pietas* there is at least one more deserving our attention. This is Seneca's tragedy Thyestes. In a rather complicated story about power hunger, vengeance, cannibalism etc., one also finds the following dialogue between the king Atreus and his attendant:

Atreus [176] [*In soliloquy.*] O undaring, unskilled, unnerved, and (what in high matters I deem a king's worst reproach) yet unavenged, after so many crimes, a brother's treacheries, and all right broken down, in idle complaints dost busy thyself – a mere wrathful Atreus? By now should the whole world be resounding with thy arms, on either side their fleets be harrying both seas; by now should fields and cities be aglow with flames and the drawn sword be gleaming everywhere. Let the whole land of Argolis resound with our horses' tread; let no forests shelter my enemy, nor citadels, built on high mountain tops; let the whole nation leave Mycenae and sound the trump of war; and whoso hides and protects that hateful head, let him die a grievous death. This mighty palace

⁹³ Liv. Ab U. c. V, 7: ... *peditibus equitibusque gratias agerent, memorem pietatis eorum erga patriam dicerent senatum fore.*

⁹⁴ See e. g. Liv. Ab U. c. 9, 8, 6.

itself, illustrious Pelops' house, may it e'en fall on me, if only on my brother, too, it fall. Up! my soul, do what no coming age shall approve, but none forget. I must dare some crime, atrocious, bloody, such as my brother would more wish were his. Crimes thou dost not avenge, save as thou dost surpass them. And what crime can be so dire as to overtop his sin? Does he lie downcast? Does he in prosperity endure control, rest in defeat? I know the untamable spirit of the man; bent it cannot be – but it can be broken. Therefore, ere he strengthen himself or marshal his powers, we must begin the attack, lest, while we wait, the attack be made on us. Slay or be slain will he; between us lies the crime for him who first shall do it.

Attendant: [204] Does public disapproval deter thee not?

Atreus: [205] The greatest advantage this of royal power, that their master's deeds the people are compelled as well to bear as praise.

Attendant: [207] Whom fear compels to praise, them, too, fear makes into foes; but he who seeks the glory of true favour, will wish heart rather than voice to sing his praise.

Atreus: [211] True praise even to the lowly often comes; false, only to the strong. What men choose not, let them choose.

Attendant: [213] Let a king choose the right; then none will not choose the same.

Atreus: [214] Where only right to a monarch is allowed, sovereignty is held on sufferance.

Attendant: [215] Where is no shame (*pudor*), no care for right (*cura iuris*), no honor (*sanctitas*), virtue (*pietas*), faith (*fides*), sovereignty is insecure (*instabile*).

Atreus: [217] Honour (*sanctitas*), virtue (*pietas*), faith (*fides*) are the goods of common men (*private bona*); let kings go where they please.⁹⁵

⁹⁵ Sen., *Thyestes*, 176-217. Translation by Frank Justus Miller; translation available at <http://www.theoi.com/Text/SenecaThyestes.html>. For more on Seneca's drama see Joe Park Poe, *An Analysis of Seneca's Thyestes*, *Transactions and Proceedings of the American Philological Association*, Vol. 100 (1969), p. 355 ss, Aristeia Sideri-Tolia, *Seneca's Thyestes: Myth and Perspective*, *Veleia* 21, 2004, p. 175 ss, William M. Calder III, *Secreti loquimur: An Interpretation of Seneca's Thyestes, Ramus* 12 (1983) pp. 184 ss. See also Norman T. Pratt, *Seneca's drama*, The University of North Carolina Press, 1983, Berthe Marti, *Seneca's Tragedies. A New Interpretation*, *Transactions and Proceedings of the American Philological Association*, Vol. 76 (1945), p. 216 ss, esp. 238 ss., R. J. Tarrant, *Senecan Drama and Its Antecedents*, *Harvard Studies in Classical Philology*, Vol. 82 (1978), p. 213 ss, C. J. Herington, *Senecan Tragedy, Arion*, Vol. 5, No. 4 (Winter, 1966), p. 422 ss.

What is in peculiar in this passage is the juxtaposition of some virtues that are closely linked to law. They are presented as the most important pillars of a good and stable government. Seneca lists the following: *pudor*, *cura iuris*, *sanctitas*, *pietas* and *fides*. *Sanctitas* stands for integrity, moral purity and irreproachableness. The most adequate meaning of *pudor* in the above case is probably decency and propriety. In the political language of the post-Augustan period the word *cura* relates to the administration of state affairs; *cura iuris* would therefore mean the administration of justice. As the quality that produces confidence in a person, *fides* would mean trustworthiness and credibility.⁹⁶

We can assume that the reason why Seneca mentioned *pietas* was not only its eminent position among the Roman virtues but also that he wanted to allude to social and political circumstances of the time. Irrespective of whether Seneca's depiction of Atreus constituted a reproof of Nero, the emperor's deeds were obviously impious. He seized power by assassination of his adoptive father Claudius, he consolidated it by murdering his brother by adoption Britannicus, his mother Agrippina and his wife Octavia. All these crimes, and many more, were a clear violation of *pietas*. *Pietas* as a dutiful comportment towards relatives (in the case of Seneca's tragedy towards the king's brother, but also towards other people) is presented as an essential element of a stable government. Together with other virtues it can give rise to justice which is obviously missing among the virtues listed by Seneca.

Seneca's text does not bring a new meaning of the word *pietas*. But it provides us further information about its position among other cardinal virtues.

IV. *Pietas* in Roman legal texts

In Roman legal texts the meaning of the word *pietas* is less diverse than in the literary ones. In the subjective sense it stands for a dutiful way of thinking and the corresponding comportment of an individual. In the objective sense it denominates a relationship between two or more persons requiring such a way of thinking and its

⁹⁶ To the meaning of these terms see Charlton T. Lewis, Charles Short, A Latin Dictionary, s. v.

fulfillment.⁹⁷ Consequently, in legal texts *pietas* is related to the sense of a dutiful comportment towards different groups of relatives. Sometimes it denominates the sense of duty and decent attitude in the relations outside the family. In some cases it stands for the correct attitude towards the Church and its institutions, as well as for religious fervor. In some of the texts it means compassion, pity, humanity or mercy, and in the imperial enactments it stands also for one of the titles of the emperor or his self-denomination.

The legal texts, obviously, bring no new meaning to the word *pietas*. Nevertheless, the case law they discuss gives us a useful insight into the practical meaning of the word and especially in the role it played in different legal relationships. Furthermore, it is obvious that the legal texts rather than Roman literature influenced the use and the notion of *pietas* in modern law.

A. Justinian's Digest

There are over 50 fragments containing the word *pietas* or one of its derivatives in the Justinian's Digest.⁹⁸ More or less all of them deal with the problem of a dutiful comportment towards relatives. The term *pietas* describes the due respect that should be expected from a decent Roman. It resulted from the general lines of the ancestral custom (*mos maiorum*) and was its concretization in a particular case.

In the majority of cases *pietas* is referred to in a phrase, together with a pronoun or noun, like *pietatis gratia* or *pietatis causa* (because of *pietas*), *ratio pietatis* (consideration of *pietas*) etc. This could mean that it was not regarded as a moral or legal obligation in the narrow sense of word but as a broader set of value-related deliberations requiring a particular comportment.

a. The nature of *pietas* in legal texts

There were several instances in which the classical jurists referred to *pietas*. Accordingly the term was used in different meanings or stressing certain of its aspects. Yet, for the

⁹⁷ Hugo Krüger, *Die humanitas and die pietas nach den Quellen des römischen Rechts*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 19. Band, Weimar 1898, p. 38.

⁹⁸ This number does not contain the rather numerous mentions of the adjective *pious* referring to the emperor Antoninus Pius.

most part in Roman legal texts *pietas* stands for reciprocal dutiful and appropriate conduct between relatives, mainly between the children and their parents. The children had to revere their parents the same way the clients had to revere their patrons.⁹⁹

The Romans regarded the dutiful respect between the parents and their children as something entailed by nature. This was also the reason why legally inexistent family relations between slaves were sometimes taken into consideration as genuine ones.

If several slaves were sold, especially if only one price was paid for all of them, the transaction was regarded as one sale. In such a case if any of the slaves was ill all of them could be returned on account of the defect of a single one. This was also the case when it was evident that the intention of the parties was to purchase or to sell them all together even if the price was fixed separately for each of the slaves. An example of such transaction was the sale of a group of slaves, who were actors.¹⁰⁰

If one or more of the slaves, sold in this way, were unhealthy the purchaser could return them to the vendor. The latter was obliged to accept the sound ones as well if they could not be separated from the diseased ones without great inconvenience or violation of consideration of family ties (*pietatis ratio*). Such would be the case if the parents were returned without their children or vice versa. But the same was also true in respect of brothers or those slaves who lived in a *contubernium*, i.e. as husband and wife in a servile quasi-matrimonial relationship.¹⁰¹ It was regarded as contrary to *pietas* to separate members of the same family, even if the latter existed only as a natural and not as a legal community. This point of view again proves that *pietas* was regarded as something anchored in the nature of things and because of that requiring a legal appreciation. It had clear legal implications without being a legal category. Thus the natural tie also existed between a mother and a son who were slaves. The consideration of this natural tie (*pietatis ratio*) resulting in a dutiful conduct had to be preserved in accordance with the nature if they have become free together.¹⁰²

⁹⁹ Ulp. D. 37, 15, 9: A freedman and a son should always consider the person of a father and patron honorable and inviolable (*Liberto et filio semper honesta et sancta persona patris ac patroni videri debet*).

¹⁰⁰ African. D. 21, 1, 34.

¹⁰¹ Ulp. D. 21, 1, 35.

¹⁰² Ulp. D. 37, 15, 1, 1.

Not even soldiers who enjoyed many privileges were exempted from the dutiful comportment towards parents. If a soldier committed some offense against his father he had to be punished correspondingly.¹⁰³ A soldier who alleged that the father and mother whom he claimed to have brought him up were criminals had to be adjudged unworthy of military service¹⁰⁴

Children owed their parents respect and obedience. A harsh treatment or even violence towards parents as such was regarded as impious. The hand a child raised against his parent was also regarded as such.¹⁰⁵

Therefore the children maltreating their parents had to be punished. If a son insulted his mother or father, whom he should revere, or laid his “impious hands” upon them it was a crime pertaining to the public *pietas* (*ad publicam pietatem pertinens*) and the prefect of the city had to punish the crime according to its gravity.¹⁰⁶

It is not clear what the expression *public pietas* might mean. Bruce Frier and Thomas McGinn speculate that the term could mean something like “legally protected *pietas*”.¹⁰⁷ Yan Thomas maintains that *pietas publica* was the *pietas* between the citizens.¹⁰⁸ Yet, it seems more plausible that it simply referred to the general sense of decency offended by the outrageous behavior of the son. This general sense of dignity required a respectable treatment of parents. For this reason it was not possible to cite the parents into court,¹⁰⁹ not even the adoptive father as long as the adoptive son was under his control.¹¹⁰ This dutiful respect was due even towards the parents who have become such in slavery. For the same reason, this much was also true for illegitimate children. In consequence an illegitimate son was not allowed to bring his mother to court.¹¹¹

If a son denied being in his father’s power, the praetor required him first to prove this.

¹⁰³ Ulp. D. 37, 15, 1 pr.

¹⁰⁴ Ulp. D. 37, 15, 1, 3.

¹⁰⁵ Ulp. D. 37, 15, 1, 2, Iust. C. 8, 55, 10 pr.

¹⁰⁶ Ulp. D. 37, 15, 1, 2.

¹⁰⁷ Bruce W. Frier, Thomas A. J. McGinn, *A Casebook on Roman Family Law*, Oxford University Press, 2004, p. 204.

¹⁰⁸ Yan Thomas, *Les opérations du droit*, Edition établie par Marie-Angèle Hermitte et Paolo Napoli, Hautes études, Ehes Gallimard Seuil 2011, p. 25.

¹⁰⁹ Paul. D. 2, 4, 6.

¹¹⁰ Ulp. D. 2, 4, 8.

¹¹¹ Ulp. D. 2, 4, 4, 3.

According to Paulus¹¹² this was necessary because of the dutiful respect the son owed his father (*pro pietate quam patri debet*). It is necessary to note that the assertion of the son that he was *sui iuris* was not as such regarded as contrary to *pietas*. It was only impious to deny being in the father's power if this was then not proven true.

The dutiful relationship between the parents and their children was sometimes the reason for certain procedural concessions. One of them was the extension of the right to bring a charge against a suspicious guardian and to denounce him to the tutelary authority. A guardian could be considered suspicious before or after he started the administration of the ward's property. The reasons that rendered a guardian untrustworthy were negligent or careless administration of the ward's property resulting in a significant loss, an inexcusable absence, open enmity against the ward or his family, a questionable moral conduct etc. In principle, everybody was able to bring a charge of untrustworthiness, since this action was public and therefore open to all.¹¹³

Yet, at that time "everybody" did not necessarily entail women who were not allowed to initiate a procedure against the guardian. Therefore, an exception was made regarding those women who took this necessary step under the compulsion of duty and affection (*pietate necessitudinis ductae*). Thus the ward's mother, a grandmother, a nurse or a sister were allowed to bring a charge of untrustworthiness in connection with a guardian alleged to be dishonest or negligent. Any other women, "whose sincere affection the praetor knew to exist (*perpensam pietatem*)" and who was not transgressing the modesty of her sex, but was led by such an affection (*pietate productam*) that she could not hold back seeing the injuries inflicted upon the ward, was allowed to bring such an accusation.¹¹⁴

Another example of a procedural concession was an appeal made by a mother. It was not customary for appellants to be heard apart from those whose interest was affected, who have been given a mandate or were without authorization administering another's

¹¹² Paul. D. 22, 3, 8.

¹¹³ Ulp. D. 26, 10, 1, 6. More on the removal of the guardian A Text-Book of Roman Law from Augustus to Justinian by the late W. W. Buckland. Third edition revised by Peter Stein, Cambridge 1963, p. 160 s, Fritz Schulz, Classical Roman Law, Oxford 1951, p. 178 ss, Andrew Borkowski, Textbook on Roman Law, 2nd edition, Blackstone Press London 1997, p. 145 s.

¹¹⁴ Ulp. D. 26, 10, 1, 7.

business and it was obvious that their action would be soon ratified.¹¹⁵ A mother that appealed because she was concerned that her son's property was ruined by a judgment, was given a hearing because of the relationship between her and her son requiring dutiful comportment (*pietati dandum est*). And although she could not defend him initially, she was not regarded as bringing an obstructive action if she preferred to undertake the preparation of a lawsuit.¹¹⁶

Although the reverence for parents was more visible than that for children, the relationship was reciprocal. Most of all, the father was not allowed to maltreat his children. According to a rescript of emperor Trajan, the father who contrary to his paternal duty (*contra pietatem*) was maltreating his son, had to emancipate him. In the quality of a manumitter such a father was not entitled to claim the inheritance after the death of his manumitted son because he did not fulfill his paternal duty (*propter necessitatem solvendae pietatis*).¹¹⁷

In the same way, emperor Hadrian sentenced a certain man to deportation because he had killed his son in the course of a hunt for the reason that his son had been committing adultery with his stepmother. According to the emperor, in killing his son the culprit behaved more like a brigand than like a father. The reason for the emperor's decision was the behavior of the father, contrary to the nature of the paternal power which should consist of dutiful comportment (*pietas*) and not of cruelty (*atrocitas*).¹¹⁸

The dutiful comportment towards relatives seems to have been a criterion and a rule of principle for evaluating the proper behavior concerning particular action, as well as the nature of this action.

The consideration of *pietas* was a quality that could set right an action which would normally be regarded as improper or even as a crime. In this sense someone who did not produce his son, freedman or foster son in court in accordance with the interdict *de homine libero exhibendo* but retained him for the reason of genuine affection (*pietas genuina*) was not held to be doing it fraudulently. The interdict *de homine libero exhibendo* was created by the praetor to prevent free persons from being deprived of

¹¹⁵ Ulp. D. 49, 5, 1 pr.

¹¹⁶ Ulp. D. 49, 5, 1, 1.

¹¹⁷ Pap. D. 37, 12, 5.

¹¹⁸ Marcian. D. 48, 9, 5.

their liberty. The praetor issued it at the request of a claimant by ordering someone who was unlawfully holding a free man to produce him in court.¹¹⁹ The adversary had to comply with this order or face a sanction. But if he had a just cause, like genuine affection, for retaining a freeman in his keeping he was regarded as acting without fraud.

Another example of *pietas* excluding criminal responsibility was related to the right of a father to kill a man who committed adultery with his daughter while she was under his paternal power. If the family father apprehended his daughter, who was under his paternal power or whom he gave into a *manus* marriage, with an adulterer in his house he could lawfully kill both of them or inflict on them a rough treatment.¹²⁰ He could inflict on him verbal and physical abuse without risking an action for damages.

The reason why the father and not the husband was allowed to kill the woman and any adulterer caught with her was, according to Papinian, that “for the most part, the concern for dutiful comportment implicit in the title of father (*pietas paterni nominis*) takes counsel for his children: but the heat and impetuosity of a husband too readily jumping to a decision should be restrained”.¹²¹

We can imagine that Romans understood *pietas* (comprising all the family members, living and dead) also in the sense of responsibility for the good name of the family. All the family members were interested in an untainted family name. Any deed tarnishing it represented an offence to all family members and in particular to the family father. On the other hand, the family father was responsible for the behavior of the persons under his paternal power. In the early times he had the power of life and death (*ius vitae ac necis*) over those in his *potestas*.¹²² Partly this power was manifested in rejecting and

¹¹⁹ Ulp. D. 43, 29, 1 pr. and 1.

¹²⁰ Pap. D. 48, 5, 21 and Pap. D. 48, 5, 23, 3: *Sed qui occidere potest adulterum, multo magis contumelia poterit iure adficere* (However, a person who has the power to kill an adulterer is all the more able lawfully to inflict rough treatment on him). Richard A. Bauman, *Crime and Punishment in Ancient Rome*, Routledge London and New York, 1996, p. 34 maintains that this choice was only open to the enraged husband.

¹²¹ Pap. D. 48, 5, 23, 4.

¹²² See William V. Harris, *The Roman Father's Power of Life and Death*, *Studies in Roman Law in Memory of A. Arthur Schiller*, ed. Roger S. Bagnall and William V. Harris, E. J. Brill Leiden, 1986, p. 82 ss, Raymond Westbrook, *Vitae Necisque Potestas*, *Historia: Zeitschrift für Alte Geschichte*, Bd. 48, H. 2 (2nd Qtr., 1999), p. 203 ss, and Antti Arjava, *Paternal Power in Late Antiquity*, *The Journal of Roman Studies*, Vol. 88 (1998), p. 147 ss.

exposing of deformed newborns. But, the father also had the right and the duty to punish those children who committed a crime, especially a crime against the state.¹²³ There were some famous cases of paternal justice: Cassius executed his son Spurius after the end of his mandate as popular tribune for the crime of seeking the kingship (*adfectati regni crimine*),¹²⁴ A. Fulvius killed his son for trying to join the conspiracy of Catilina,¹²⁵ and Quintus Fabius Maximus killed his son because of an unacceptable sexual comportment (*dubia castitas*).¹²⁶

There were two reasons behind this aspect of paternal power. On the one hand the father, at least in early times, was filling in for the lack of public judicial institutions. On the other hand he was defending the good name of the family and preventing the possible revenge the victim of the crime or his relatives could take. The possible arbitrariness of the father was contained by the usual practice according to which the perpetrator had to be tried and sentenced by the family council.¹²⁷ The paternal power of life and death became less and less acceptable until Constantine made the use of it a capital crime.¹²⁸

The right to kill the adulterous daughter and her adulterer had its probable origin in the the *ius vitae ac necis*. It seems to have been one of its aspects. Initially, however, according to Cato as quoted by Gellius, this right pertained to the husband. Cato said that the husband killing his adulterous wife judged her as a censor would do.¹²⁹ This casts some doubt on the assumption that only the Augustan *lex Iulia de adulteriis coercendis* transferred this right to the father.¹³⁰ It is more likely that this right, corresponding to *mos maiorum*, existed all the time and that the right of the husband was parallel to it or at least existed in the case when the wife was under the *manus* power of her husband who then acted as a family father. At least by the time of classical

¹²³ Liv., Ab U. c. 2, 5 gives us an account of a consul who takes on the horrible duty of putting his traitor son to death.

¹²⁴ Liv., Ab U. c. 2, 41, 10, Val. Max. 5, 8, 2.

¹²⁵ Val. Max. 5, 8, 5, Sall. Catil. 39, 5.

¹²⁶ Val. Max. 6, 1, 5

¹²⁷ Seneca, Clem. 1, 15, 2.

¹²⁸ Const. C. Th. 9, 15, 1. Killing any of the close relatives was regarded the same crime as *parricidium*.

¹²⁹ Gell. N. A. 10, 23, 5. According to Cato's words the inequality between husband and wife was extreme. He wrote: "If you should take your wife in adultery, you may with impunity put her to death without a trial; but if you should commit adultery or indecency, she must not presume to lay a finger on you, nor does the law allow it." However, the Roman wife could still divorce her adulterous husband.

¹³⁰ See Westbrook, *Vitae Necisque Potestas*, p. 215.

law the right of the husband to kill his adulterous wife was restrained or even terminated and left to the father alone.

The father was responsible for the behavior of the persons under his paternal power. If their conduct violated *mos maiorum* and damaged the image of the family he had to take appropriate steps. He had to react, even by killing his daughter and her adulterer. It was regarded as a part of *pietas*, i.e. dutiful comportment towards the relatives, including those who were no more alive but contributed to the reputation of the family. And yet the *pietas* of the father did not necessarily mean that he would kill his daughter and her adulterer. It meant that he had to act dutifully. What Papinian wanted to say was that the father would act with more prudence, taking into consideration all aspects of family relations whereas the husband, enraged by the event, would see only his hurt honor and would react impulsively.

In a certain sense the idea of protecting family honor can be traced even in modern times to the so called honor killing or crime of honor (known in Italy as *delitto d'onore*). Those who perpetrated a crime to retaliate against the person (normally a female family member) who was held to have brought dishonor upon the family were punished less than a perpetrator who had no such motive.¹³¹ Such crimes are nowadays more common in some of the third-world societies.

b. Pietas pro servis

In Roman legal texts *pietas* was limited to the dutiful conduct towards the free and deceased persons as well as deities. In Justinian's Digest there is however one text of Callistratus in which *pietas* might relate to the sense of duty in relation to slaves (*pietas pro servis*).¹³² Callistratus quotes a rescript of emperors Marcus Aurelius and Commodus¹³³ in which they give instructions how to interpret the will of a certain Iulius

¹³¹ See art. 587 of the Italian Penal Code of 1930: Who killed his wife, daughter or sister in the moment of illegitimate sexual intercourse and in a state of rage caused by the violation of his honor or the honor of his family was punished with a reclusion of three to seven years. He was punished the same way if he killed the person having sex with his wife, daughter or sister. According to art. 575 of the same Penal code a usual murderer was punished with a reclusion of minimal 21 years. Article. 578 was abrogated in 1981 (art. 1, L. 05.08.1981, n. 442).

¹³² Call. D. 29, 5, 2.

¹³³ The Quotation is not clear. In the Digest the emperor Commodus is quoted 4 times (Call. D. 12, 3, 10, Pap. D. 22, 3, 26, Marc. D. 40, 10, 3 and Marc. D. 49, 14, 31), each time under the name Commodus. There are 8 texts quoting the rescripts he published together with his father Marcus Aurelius. In all of them the

Donatus. After he had fled his country house, terrified by the arrival of robbers, he was wounded. He made a will in which he “cleansed” the service of his slaves, i.e. he acknowledged that they had done their duty. The heirs wanted to punish the slaves. The emperors rejected this option by saying that the master himself absolved them.

The critical part of the text reads: *nec pietas pro servis nec sollicitudo heredis optinere debet, ut ad poenam vocentur*. S. P. Scott translated it as follows: “neither his regard for them, nor the solicitude of the heir should allow punishment to be inflicted upon those whom the master himself has absolved”. Watson’s translation is slightly different. It reads: “neither a sense of duty in relation to slaves nor the anxiety of the heir ought to lead to those whom the master himself absolved being brought to punishment”.¹³⁴ Both translations obviously assume the existence of some sense of duty towards slaves. The usage of ‘*pietas*’ in this context would indicate the same quality of the relationship as between family members. It is difficult to believe that a Roman master would owe his slaves such a sense of duty. It is highly unlikely that Callistratus would wish to use the word *pietas* in this novel sense of a dutiful conduct the master would owe his slaves. Rather, it is much more plausible that in this case as well, *pietas* refers to the dutiful conduct the heir owed to the testator in punishing the slaves who had not defended him.

The new German translation of Justinian’s Digest offers a reading that proves this assumption. In this translation the word *pietas* stands for the sense of duty of the heirs towards the testator concerning their obligation to punish the slaves. The words *sollicitudo heredis* indicate the fear of the heirs not to show enough enthusiasm for punishing those slaves who were present when their master was attacked by the robbers:

emperors are quoted as Marcus et Commodus. The phrasing in this text is using both names and is in singular. Although Commodus among many other names was using the name Marcus, it is more likely, that he published the rescript together with his father and should read *Divi Marcus et Commodus rescripserunt*. This detail is of course not important. But it can indicate that there were further incorrect spellings or mistakes of the transcriber.

¹³⁴ See The Digest of Justinian, Translation edited by Alan Watson, Revised English-language edition, University of Pennsylvania Press, Vol. 2, Philadelphia 1998, p. 440. See also Das Corpus juris civilis in’s Deutsche übersetzt von einem Vereine Rechtsgelehrter und herausgegeben von Dr. Carl Eduard Otto ... Dr. Bruno Schilling .. und Dr. Carl Friedreich Ferdinand Sintenis, 3. Band, Zweite, durchaus verbesserte .. Auflage, Leipzig 1839, p. 200: ... so soll weder der innere Drang, welcher für die Bestrafung der Slaven spricht, noch die Besorglichkeit des Erben es vermögen, die, welche der Herr selbst freisprach, zur Strafe zu rufen. The translators obviously sidestepped the crucial passage.

...can neither the duty of family members [towards the testator] with regard to the [punishment] of slaves nor the concern of the heirs [to miss the revenge] lead to the punishment of slaves whom the master himself has absolved.¹³⁵

Although there can be little doubt about the meaning of Callistratus' words, the confusion presumably arose from the linguistic problem concerning the meaning of the phrase *pietas pro servis*. Since the preposition *pro* can also mean 'in relation to',¹³⁶ however, the expression *pietas pro servis* could mean the dutiful conduct towards the late testator in relation to the supposed omission of the slaves to protect their master. In such a case, the word *pietas* would as such implicitly refer to the testator as the subject of this dutiful relationship.

This brings us to the conclusion that there is no reason to believe that there was a particular form of *pietas* towards slaves. For a mild treatment of slaves, the Romans normally used the word *clementia*.¹³⁷

c. Mourning

In Rome it was part of the *mos maiorum* to mourn the deceased relatives and friends. During the time of the Republic men and women were wearing black in mourning, laid aside ornaments and did not cut their hair or beard. Mourning was a customary duty and not a legal obligation.¹³⁸ Not even a widow or a widower was legally compelled to mourn the deceased spouse. The only legal consequence related to mourning was the infamy (*infamia*) that befell the head of a Roman family who allowed the marriage of a daughter under his paternal power before the customary period of mourning for her deceased husband was over.¹³⁹ The same consequence befell a family father who allowed

¹³⁵ See Corpus Iuris Civilis, Text und Übersetzung, Band V, Digesten 28-34, Gemeinschaftlich übersetzt und herausgegeben von Rolf Knütel, Berthold Kupisch, Hans Hermann Seiler, Okko Behrends; mit Beiträgen von Christoph Krampe, Martin Schermaier und Karl-Heinz Ziegler. C. F. Müller Verlag Heidelberg 2012, p. 229: ... darf weder die Pflicht der Angehörigen [gegenüber dem Erblasser] im Hinblick auf [die Bestrafung der] Sklaven noch die Besorgnis des Erben (die Vergeltung zu versäumen) dazu führen, daß die Sklaven bestraft werden, die doch ihr Eigentümer selbst freigesprochen hat.

¹³⁶ See Ausführliches lateinisch-deutsches Handwörterbuch aus den Quellen zusammengetragen ... Ausgearbeitet von Karl Ernst Georges. Achte verbesserte und vermehrte Auflage von Heinrich Georges, Hannover und Leipzig, 1918, s. v. 4: 'im Verhältnis zu'.

¹³⁷ See e. g. Sen., *Epist.* 47, 1.

¹³⁸ Iul. D. 3, 2, 1, Marcell. D. 11, 7, 35, Vat. 321: ... *nam lugendi eos mulieribus moris est*.

¹³⁹ According to the Pauli Sententiae (PS 1, 21, 13) the customary mourning period for parents and children over six years was one year. Children of less than six years were to be mourned for a month. The

his son to marry a widow before the end of the customary mourning period as well as a man who married her without an order of the person under whose power he was.¹⁴⁰ The reason behind this provision was to prevent the confusion of blood.¹⁴¹ For this reason husbands were not compelled to mourn for their wives.¹⁴² There was no prescribed mourning for a fiancé, either.¹⁴³

Since mourning the dead was part of a custom and not a legal obligation¹⁴⁴ the decision to mourn or not to mourn was a personal one. We can imagine that there was a considerable social pressure to act in accordance with the tradition. Nevertheless, there was no legal means by which it would be possible to enforce it:

Parents, children of either sex, as well as all other agnates or cognates should be mourned in accordance with the sense of propriety (*secundum pietatis rationem*), grief of mind, and wish of each individual. A person who has not mourned them does not incur infamy.¹⁴⁵

Pietas, meaning the due comportment, was the pivotal element behind the decision concerning the way and duration of mourning for a dead relative. It was neither a moral nor a legal category but rather an aspect of a particular culture and cultural behavior. It is important to note that in this context Ulpian was using the phrase '*secundum pietatis rationem*' and not '*secundum pietatem*'. By this nuance he probably wanted to stress that, together with personal emotions, *pietas* was the consideration that inspired the decision (not) to mourn. In general, as part of the Roman tradition *pietas* required the mourning of the dead, yet not indiscriminately. By the ancestral custom some dead ought not to be mourned, such as enemies or those condemned for treason, those who hanged themselves as well as those who laid hands on themselves not from weariness of

time in which it was customary to mourn a husband was ten months. The closer cognate relatives had to be mourned for eight months. See also Vat. 321.

¹⁴⁰ Iul. D. 3, 2, 1 and Ulp. D. 3, 2, 11, 4.

¹⁴¹ Ulp. D. 3, 2, 11, 1: ... *qui solet elugeri propter turbationem sanguinis* (... for this is customary in order to prevent confusion of blood).

¹⁴² Paul. D. 3, 2, 9 pr.: *Uxores viri lugere non compelluntur* (Husbands are not compelled to mourn for their wives).

¹⁴³ Paul. D. 3, 2, 9.

¹⁴⁴ Ulp. D. 23, 2, 6 is not about mourning. By saying that the wife should mourn for her deceased husband Ulpian wants to say that despite the absence of the bride at the wedding the marriage had been concluded.

¹⁴⁵ Ulp. D. 3, 2, 23. According to PS 1, 21, 13, non-mourning a deceased relative or husband was marked with infamy.

life, but from a bad conscience.¹⁴⁶ In such cases, too, the decision was taken in accordance with the reason of *pietas* being one of the main considerations.

d. Maintenance

A considerably large number of classical texts containing the word *pietas* deals with the problem of reclaiming the resources spent on maintenance of a (relative's) child. In these cases *pietas* represents the motivation that excludes such a claim:

[I]f Titius supported his sister's daughter from a sense of duty (*pietatis respectu*), he did not have an action against her on this account.¹⁴⁷

In this case the sense of duty towards the sister was the reason why Titius supported her daughter. It was presumed that a relative decided to maintain his or her relative because of the family relationship between them and not for economic reasons. If the person that supported a relative wanted to reclaim the expenses it was necessary to prove the initial intention to do so:¹⁴⁸

If a father provided an allowance for his emancipated son while he was living abroad in pursuit of his studies and if it is proved that the father did not intend this to be a loan when he sent it, but was influenced by natural affection (*pietate debita*), then in all justice the allowance cannot be taken into account when one is reckoning what share of the deceased's property has passed to the son.¹⁴⁹

The duty of reciprocal maintenance was most obvious between parents and children. Ulpian wrote that this duty was not conditioned by the paternal power. Even where children were not in power, they had to be supported by their parents and they, on the other hand, had to support their parents.¹⁵⁰ According to Ulpian, the obligation to support parents or children was derived from justice (*aequitas*), and from the attachment due to blood (*caritas sanguinis*).¹⁵¹ Yet, the basis of this reciprocal duty was *pietas* generating also a moral obligation (*officium pietatis*). In this sense an imperial rescript stated that “the heirs of the deceased son, if unwilling, were not compelled to

¹⁴⁶ Ulp. D. 3, 2, 11, 3.

¹⁴⁷ Mod. D. 3, 5, 26, 1.

¹⁴⁸ Paul. D. 3, 5, 33.

¹⁴⁹ Ulp. D. 10, 2, 50.

¹⁵⁰ Ulp. D. 25, 3, 5, 1: *Et magis puto, etiamsi non sunt liberi in potestate, alendos a parentibus et vice mutua alere parentes debere* (I think the better opinion is that even where the children are not under paternal control, they must be supported by their parents, and that, on the other hand, their parents should also be supported by them).

¹⁵¹ Ulp. D. 25, 3, 5, 2.

furnish such assistance to their grandfather that a son while living would provide him with through motives of filial duty, unless the father was in the greatest poverty”.¹⁵² The regard of filial duty requires (*pietatis exigit ratio*) that also a son who is a soldier support his parents, provided he is in funds.¹⁵³ The same sense of duty was also behind the obligation of a son to take care of his mentally ill mother. His obligation originated in the aforementioned natural bond between parents and children. Ulpian stated that although the position of the parents was legally different and only the father could have the paternal power over his children, the children owed the same piety equally to both parents.¹⁵⁴

The considerations of piety were also central in setting the age of puberty when the deceased left aliments for the period up to puberty. In such a case emperor Hadrian established that boys had to be maintained up to the age of eighteen and the girls up to the age of fourteen. This was not in accordance with the usual definition of puberty. According to Ulpian, however, it was not contrary to the principles of law (*non est incivile*) to define it this way as an exception in the case of maintenance since this exception was based on the considerations of piety (*pietatis intuitu*).¹⁵⁵

e. Management of a business of another¹⁵⁶

¹⁵² Ulp. D. 25, 3, 5, 17: *Item rescriptum est heredes filii ad ea praestanda, quae vivus filius ex officio pietatis suae dabit, invitos cogi non oportere, nisi in summam egestatem pater deductus est.*

¹⁵³ Ulp. D. 25, 3, 5, 15.

¹⁵⁴ Ulp. D. 27, 10, 4.

¹⁵⁵ Ulp. D. 34, 1, 14, 1.

¹⁵⁶ There are some English equivalents of the term *negotiorum gestio*. The official translation of the German Civil code (Book II, title 13 - http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2916) uses the term ‘agency without specific authorization’ (Geschäftsführung ohne Auftrag). In the official translation of the French Civil code the French term ‘les engagements qui se forment sans convention’ is translated as ‘undertaking formed without an agreement’ (French Civil code Book III, Title IV - <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=492>). In his *Encyclopedic Dictionary of Roman Law* (Transactions of the American Philosophical Society, New Series, Volume 43, Part 2, Philadelphia 1953, Reprinted 2002 by The Lawbook Exchange, Ltd., p. 593) Adolf Berger translates the term *negotiorum gestio* as ‘management of another’s affairs without authorization’, William L. Burdick (The Principles of Roman Law and their Relation to Modern Law, Rochester, New York 1938, reprint The Lawbook exchange, Clark, New Jersey, 2004, p. 476) uses the term ‘voluntary agency’ and W. W. Buckland (A Text-book of Roman Law from Augustus to Justinian, 3d ed., rev. by Peter Stein, Cambridge, University Press, 1963, p. 537) describes it as ‘looking after another man’s affairs, without his authority’. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press 1996, p. 875 uses the term ‘unauthorized management of somebody else’s affairs’ which is together with the term ‘management of another’s affairs without authorization’ probably the closest

In the texts of Roman classical jurists one of the issues involving *pietas* was also the delimitation between a usual agency without specific authorization entitling in principle the *gestor* to reimbursement and the management of a business of another without authorization the motive of which was a (reciprocal) sense of duty. A general rule to be found in the Digest was that no claims for reimbursement could arise from the management of another's affairs without authorization (*negotiorum gestio*) if it was set off by the sense of duty (*pietas*).

Paulus provides an example:¹⁵⁷ A grandmother managed the affairs of her grandson. Both died and the heirs of the grandmother brought an action for unauthorized administration of another's affairs without authorization against the heirs of the grandson. The heirs of the grandmother were trying to take into account maintenance provided for the grandson. In Paulus' view, this could not be regarded as management of another's affairs without authorization, since the grandmother had provided the maintenance at her own expense *iure pietatis*, i.e. because she regarded it as her duty towards a family member. In the same way, a mother that provided maintenance to her son, i.e. the grandson of the grandmother in question, was not entitled to claim what she had provided to her family from the same sense of duty (*pietate cogente*). But, if the mother had made a public statement, that in providing maintenance for her son, she had in mind to take either her son or his tutors to court for reimbursement, she would have been granted against her son the action for management of business of another without authorization.

Sometimes only a portion of the expenses could be recovered. If the person was partly acting as an unauthorized agent and partly out of a sense of duty (*pietatis gratia*), he could recover only the portion of expenses he was not intending to donate but to claim back.¹⁵⁸

equivalent of the Roman original. On the topic see: Max Kaser, *Stellvertretung und 'notwendige Entgeltlichkeit'*, Zeitschrift der Savigny Stiftung, Romanistische Abteilung, 91 (1974) pp. 186 ss.

¹⁵⁷ Paul. D. 3, 5, 33.

¹⁵⁸ Ulp. D. 11, 7, 14, 9. This case is dealing with burial costs.

f. Burial of the deceased

The dutiful and respectful comportment was not limited to living members of the family. It was, in a way, even more significant in relation to the deceased. An important event in this respect was the funeral.¹⁵⁹ The Romans believed that a properly performed burial was crucial for a successful transit to the next world. The way of interment depended to a large extent on the social status of the deceased. The dead corpses of important personalities were put on display and funeral orations extolling the virtues of the deceased were held.¹⁶⁰ After the display, the funerary procession consisting of musicians, the mourners, relatives carrying portraits or masks of the deceased, and freedmen followed. It stopped outside the town¹⁶¹ where the corpse of the deceased was cremated. The number of mourners and especially of freedmen contributed largely to the prestige of the funeral and thereby also of the deceased.¹⁶²

Romans often belonged to so called *collegia funeraria* (funeral societies). These were ensuring a proper funeral for members by collecting a membership fee used to cover the funerals cost.

In general the interment had to be performed by the person nominated for this purpose by the deceased, either during his lifetime or in his will. If there was no such nomination, it was the heir who was required to bury the testator's corpse. If there was neither a person to be nominated for this task nor an heir, or if they refrained from organizing the funeral, anybody could perform it.

If a stranger, without legal liability to make funeral arrangements, properly intervened and buried the deceased, he could claim with the *actio funeraria* the reimbursement of

¹⁵⁹ For some general information on this topic see F. R. Cowell, *Everyday Life in Ancient Rome*, London New York 1972, p. 91 ss, Ugo Enrico Paoli, *Vita Romana*, Decima edizione, prima ristampa, Le Monnier Firenze 1972, pp. 299 ss.

¹⁶⁰ See The Histories of Polybius, Fragments of Book VI, 53-55, English translation published in Vol. III of the Loeb Classical Library edition, 1922 thru 1927, pp. 389 ss.

¹⁶¹ The Twelve Tables forbade to bury or cremate the dead inside the city. See Tab. X, 1: *Hominem mortuum in Urbe ne sepelito neue urito* (Do not inter or cremate a dead person in the city) - Cic., *de leg.*, 2, 23, 58.

¹⁶² Because a funeral visibly symbolized the reputation of a family, it often tried to make it as splendid as possible. The frugal republican Romans tried to keep funeral costs in check already by the provisions of the Twelve Tables – Tab. X, 2-4 (Cic. *De leg.* 2, 59). It was prohibited to exceed the limit established by the laws for the celebration of funeral rites.

his expenses from the person who was legally liable to lay the deceased to rest.¹⁶³ He could claim a reasonable amount that was determined by the judge in accordance with what was just and fair (*bonum et aequum*). This depended on the property as well as on the social prestige of the buried person.¹⁶⁴ Even if the deceased himself wished for excessive luxury, his wishes were not to be obeyed if that meant expenditure above a reasonable limit. The costs had to be proportionate to the resources of the deceased.¹⁶⁵

Praetor created *actio funeraria* for two reasons: to enable a party who conducted the funeral to recover the expenses and to prevent dead bodies to lie unburied and that some stranger would need to conduct their funeral.¹⁶⁶ In order to recover the expenses the person who conducted the funeral could take to court the person, whose obligation it was to inter the deceased.

The *actio funeraria* was granted to the person who took care of the funeral and paid for it. It was similar to *actio negotiorum gestorum*, i.e. the action for having managed another's affairs without authorization. What was stated about this action above also applied to the *actio funeraria*. It could not be used if the person who took care of and paid for the funeral did this with the clear intention of doing an act of generosity or piety. Ulpian wrote:

But sometimes the person who has paid for the funeral does not recover his expenses, when he paid because of a sense of duty with no intention of recovering his outlay; this has been laid down in a rescript by our own emperor. So the arbitrator must assess and weigh up the motive for the incurring of expenditure; was the person acting as unauthorized agent for the deceased or the heir or for humanity (*humanitas*) itself, or was he moved by compassion (*miserericordia*), a sense of duty (*pietas*), or affection (*affectio*)? We can distinguish degrees of compassion: that is, the person who arranged the funeral may have been compassionate (*misericors*) or dutiful (*pius*) to the extent of burying the deceased in order to prevent him from remaining unburied, but not to the extent of doing so at his own expense. If that is how it appears to the judge, he should not absolve the defendant. For who can bury a corpse which is

¹⁶³ Ulp. D. 11, 7, 12, 2 and Ulp. D. 11, 7, 14, 17.

¹⁶⁴ Ulp. D. 11, 7, 12, 5, Ulp. D. 11, 7, 14, 6. In this context, probably, we have to seek also the meaning of Ulp. D. 11, 7, 1 (Where anyone expends anything on account of a funeral, he is considered to have made the contract with the deceased and not with his heir).

¹⁶⁵ Ulp. D. 11, 7, 14, 6.

¹⁶⁶ Ulp. D. 11, 7, 12, 3. On the action see Ph. J. Thomas, The *actio funeraria*, *Fundamina*, A Journal of Legal History, Essays in Honor of Eric H. Pool, Volume 11 Issue 1, 2005 pp. 321 ss. The text is also available at <http://hdl.handle.net/10500/3546>.

somebody else's responsibility without in some measure feeling a sense of duty?
So one ought to declare before witnesses whom one is burying and with what motives, so that there will not have to be an investigation later.¹⁶⁷

The text is instructive. It shows that the intensity of *pietas* had important legal consequences. If someone, without a legal obligation to do so, buried the corpse to prevent it from remaining unburied, his action was regarded as an act of piety. But this act of piety did not inevitably require of him also to bear the funeral costs. And yet, in the absence of countervailing evidence there seemed to be a presumption that he conducted the funeral with no intention of recovering the costs. That is why Ulpian advises those who think about doing it to declare their motives in advance and in front of witnesses to avoid possible problems.

The idea behind this advice was the same as that behind the declaration of a potential heir who did not intend to accept the inheritance but was acting as if he were the heir. If he “acted as an heir”, i.e. if he used the property of the deceased, sold or leased things belonging to it, paid or claimed debts, etc., he was usually regarded as having accepted the inheritance and become heir. By interfering in the inheritance (*se immiscere hereditati*) he lost his right to refuse it. He could avoid such consequences, however, if he declared before witnesses beforehand and explicitly that his acts did not imply the acceptance of the inheritance, but were intended to prevent losses and damages that could occur if the estate of the deceased were not properly administered.

According to Julian, acting as an heir was not so much a matter of action as of the mind: the person acting as an heir had to have in mind that he wished to be an heir. Therefore, if he did something out of sense of duty (*pietatis causa*), to protect something, etc., he was not regarded as having acted as an heir.¹⁶⁸

In this connection the question arose if burying the deceased had to be regarded as “behaving as an heir” and consequently as the acceptance of the inheritance. Ulpian writes¹⁶⁹ that the burial itself does not create a presumption that the sons who bury their parents are behaving as heirs and accepting the inheritance. But to avoid a possible

¹⁶⁷ Ulp. D. 11, 7, 14, 7.

¹⁶⁸ Ulp. D. 29, 2, 20 pr.

¹⁶⁹ Ulp. D. 11, 7, 14, 8. See also Ulp. D. 29, 2, 20, 1.

assertion that they were behaving as heirs and thereby accepted the inheritance, the heirs used to declare before witnesses that they were burying the parents out of the sense of duty (*pietatis gratia*). However, such a declaration was not sufficient to recover the expenses. For this to occur, they had to make a more detailed and explicit declaration.

Again we see that even in the case of children burying their parents it was not assumed that they were doing so because of their sense of duty and that they were not intending to claim the costs from those who inherited their parents' property. Although the costs of burial had more to do with the heirs than with the parents, this case nevertheless shows how complex the contents of *pietas* concerning the relationship between the parents and their children were.

The main concern of *pietas* was that the deceased parent was properly buried. This was certainly the duty of a child if the testator did not determine otherwise. The *pietas* required of a child to bury his parent, or of anybody, not to leave a dead person unburied. The funeral costs were not necessarily part of the relationship governed by *pietas*. If there was someone who failed to perform his legal duty to carry out the funeral, then the person who buried the dead had the usual claim for reimbursement against him. We can imagine that this claim was not related to *pietas* because it had nothing to do with the relationship between the child and his late parent or with the sense of duty which induced a citizen to bury the dead person.

The reimbursement of costs was settled in the proceedings involving the *actio funeraria*. The judge deciding in accordance with what was just and fair could reject the reimbursement if the expenses of the funeral were too small. When a wealthy person had a modest funeral this could be valued as an insult to the deceased. If it appeared that the claimant insulted the deceased by burying him in such a manner, the judge was not to take any account of the expenditure.¹⁷⁰ Ulpian does not say so, but such comportment was certainly regarded as contrary to the *pietas* because it represented an offense against the dead. *Pietas* did not require only a certain action as such (i.e. the burial) but also the proper manner in which it was performed. The principle of just and

¹⁷⁰ Ulp. D. 11, 7, 14, 10.

fair allowed the judge to take into consideration all these nuances and to evaluate them accordingly.

g. Dowry

Two of the texts in Justinian's Digest mentioning *pietas* deal with the dowry.¹⁷¹ In Roman law a dowry (*dos* or *res uxoria*) was goods given to the bridegroom by the bride, by her father, or by someone else on behalf of the bride as a contribution to the maintenance of the common household.¹⁷² The purpose of the dowry was permanent and it was intended to remain with the husband. In classical law, the husband formally became the owner of what had been given as dowry. According to Justinian's law, he obtained only the personal servitude of usufruct on it. But even in classical Roman law, despite of his formal ownership the dowry was merely in the possession of a husband (*in bonis mariti*). The husband administered the dowry for the purpose intended, but could not sell or mortgage the land or free the slaves pertaining to the dowry without the wife's consent.

If the marriage ended during the lifetime of the spouses the husband, as a rule, had to restitute the dowry. In this connection different agreements regulating the restitution of the dowry were concluded.¹⁷³ Independently of them a particular action (*actio rei uxoriae*) was created for the purpose of recovering the dowry from the husband.

The dowry was of great importance in Roman society. It was a socially expected part of the marriage.¹⁷⁴ An undowered woman had a much lesser chance of finding a husband than a dowered one.¹⁷⁵ The dowry gave the woman a certain degree of independence and influence in the relationship to her husband which was probably proportionate to its size. This independence was maintained by the fact that a wife desiring to end a

¹⁷¹ More on different aspects of Roman dowry August Bechmann, *Das römische Dotalrecht*, Erlangen 1863, Carla Fayer, *La familia romana : aspetti giuridici ed antiquari*, Parte II. Sponsalia. Matrimonio. Dote. L'Erma di Bretschneider, Roma 2005, Jakob Fortunat Stagl, *Favor dotis: die Privilegierung der Mitgift im System des römischen Rechts*, Böhlau, Wien Köln Weimar 2009, Flavio M. Mazzante, *Dos aestimata, dos vendita?: Die geschätzte Mitgift im römischen Recht*, Tectum Verlag, Marburg 2008, Riccardo Astolfi, *Il matrimonio nel diritto romano preclassico*, 2. ed. CEDAM Padova 2002.

¹⁷² Paul. D. 23, 3, 56, 1: *Ibi dos esse debet, ubi onera matrimonii sunt* (The dowry should be where the burdens of marriage are).

¹⁷³ See D. 23, 4: *De pactis dotalibus*.

¹⁷⁴ Bruce W. Frier, Thomas A. J. McGinn, *A casebook on Roman family law*, p. 79.

¹⁷⁵ Ven. D. 42, 8, 25, 1: ... as he would not have married a wife who had no dowry (*cum is indotatam uxorem ducturus non fuerit*).

marriage could easily get a divorce. In such a case, provided the spouses had no children, the husband had to give back the dotal property.¹⁷⁶ If there was no adultery, the divorce as such had no stigmatizing effects in Roman society.

Despite its social importance, there was no legal obligation on the father, the bride or some other person to provide a dowry. It seems to have been only a moral duty (*officium*)¹⁷⁷ or a sort of social obligation.

In consequence, there was no direct link between dowry and *pietas*. A case quoted by Julian, however, shows that in particular circumstances *pietas* could matter even in relation to dowry:

Where a woman believes that she is bound to provide a dowry, she cannot recover anything given on that account; for, not taking into account her wrong belief, the consideration of dutiful conduct (*pietatis causa*) remains, and a payment based on that cannot be reclaimed.¹⁷⁸

Normally, a payment made in error could be recovered as a nonexistent debt with a special action called *condictio indebiti*. Julian held that in this case such a claim was not possible because the woman's wrong belief was based on *pietas*. At first glance, it is not clear which aspect of *pietas* Julian had in mind. It is likely that in this case *pietas* is not only about the general relationship between husband and wife underlying the principle of dutiful comportment. It rather seems that she could not claim back the dowry because it would be impious to detract her support which she believed she was owing to the maintenance of the common household. If she wrongly believed that it was her (legal) duty to contribute to the maintenance of the household and she gave her husband a dowry it would be unfair and contrary to *pietas* to deprive her family of these means referring to her initial error in motive. We can assume that the dutiful conduct (*pietas*) she owed concerned not only her husband but the entire family. Therefore, not claiming the reimbursement as such but referring to her initial error was probably regarded as

¹⁷⁶ If the divorce was an un-reflected reaction to an argument and the spouses regretted it, it was regarded as if there were no divorce and the dowry remained. See Pap. D. 23, 3, 31: Where no divorce, but only a quarrel occurs, a dowry of the same marriage will continue to exist.

¹⁷⁷ Cels. D. 37, 6, 6. See also Ulp. D. 23, 3, 5, 8.

¹⁷⁸ Iul. D. 12, 6, 32, 2.

impious. It is therefore likely that she could not claim back the dowry by saying she was wrong in assuming that she had to contribute to the maintenance of the family.

Another case involving the dowry in connection with *pietas* is a rescript of emperor Severus. It concerns an interpretation of an agreement concluded between the bride's father and the bridegroom. The father promising a dowry agreed not to reclaim it during his lifetime or as long as the marriage lasted. In his rescript the emperor decreed that the pact should be interpreted as if the words "in his lifetime" were also added to the second part of the agreement dealing with the existence of the marriage. Such a reading had to be accepted in consideration of paternal piety and the wishes of the parties, so that also the second part of the agreement would be held to apply to the lifetime of the father. Without this addition the profits of the dowry would be separated from the marriage. Accordingly the women would be held to have no dowry. As a consequence the dowry could be reclaimed only after the death of the father. If the daughter died before him or was divorced the dowry could not be reclaimed.

The paternal piety invoked by the emperor has to be understood as the usual dutiful comportment that the parents owed their children. The father promising the dowry had to bear in mind the interests of his daughter. Particular in this case is the fact that piety is used as a standard of interpreting an agreement or testamentary provisions.

An interesting indirect explanation of the contents of *pietas* related to dowry is provided in Papinian's text Pap. D. 48, 5, 12, 3. It does not mention the word *pietas* but describes a comportment that could be considered impious. Thus, despite the fact that there is no mention of the word the case clearly bears the features of what the Romans understood as *pietas*.

A father-in-law filed a criminal complaint with the provincial governor, noting that he would accuse his daughter-in-law of the adultery.¹⁷⁹ Later he changed his mind. Instead

¹⁷⁹ According to the Augustan legislation even outsiders (*extranei*) were allowed to initiate the prosecution of a married woman for adultery. In 326 Constantine changed this by two constitutions on adultery accusations – C. Th. 9, 7, 1 and C. Th. 9, 7, 2. Under the new regulation only husband and close male relatives of the woman could accuse the married woman of adultery. Constantine excluded from the list the woman's father. Justinian's compilers, inserting the constitution into Justinian's Code (Const. C. 9, 9, 29), slightly changed the list. More on this Judith Evans Grubbs, *Law and Family in Late Antiquity. The Emperor Constantine's Marriage Legislation*, Oxford University Press, Oxford New York 1999, pp. 205 ss.

of accusing her he preferred to seek the profit (*lucrum*) from the dowry. The question was whether such a fabrication (*commentum*) was admissible.

Papinian responded: It sets a dreadful precedent (*turpissimo exemplo*) that a man, after he had begun to accuse his daughter-in-law, preferred (instead) to profit from the dowry on the theory that the woman was at fault (*culpa*) for the marriage's breakup. So he will not unfairly (*inique*) be repulsed (i.e. his claim to a portion of the dowry should be refused), since he did not blush to prefer benefit from the dowry over revenging his own home.¹⁸⁰

The logic of the father-in-law was clear. In Roman law a wife that caused the breakup of a marriage by her adulterous behavior could not reclaim her dowry. If in this case the daughter-in-law would agree to divorce on the assumption that she committed adultery, her former husband could retain the dowry. We can assume that the father-in-law used the announcement of the accusation to intimidate his daughter-in-law, trying to coerce her into accepting the divorce as if she had committed adultery. One supposes that the father of the husband hoped to share the dowry with his son, i.e. the ex-husband, once the daughter-in-law would accept the divorce instead of being accused of adultery. It is likely that in this case the dowry was not negligible and that its value was the main reason for the intrigue.

Papinian regarded the behavior of the father-in-law as shameful. In Papinian's words he should have blushed if confronted with the idea to "prefer the benefit from the dowry over revenging his own home". His duty in the case of an adulterous behavior of his daughter-in-law would be to defend the good name of his home and family. Instead, the father-in-law opted for profit he was expecting to obtain. Hence his behavior was contrary to the dutiful conduct of a family father and could be summarized by another Papinian's text stipulating that: "for any acts which offend our sense of duty (*pietas*), our reputation (*existimatio*), or our sense of shame (*verecundia*), and, if I might speak

On the penalty for adultery Richard A. Bauman, *Crime and Punishment in Ancient Rome*, Routledge London and New York, 1996, pp. 32 ss.

¹⁸⁰ English translation by Bruce W. Frier, Thomas A. J. McGinn, *A Casebook on Roman Family Law*, Oxford University Press, 2004, p. 83.

generally, which are done against sound morals (*contra bonos mores*), it is not to be accepted that we are even able to do".¹⁸¹

h. Inheritance and trusts

Although the impact of Roman *pietas* reached into material sphere, it was not primarily focused on property. Its principal emphasis was the respect and appropriate behavior between family members and sometimes members of a broader society.

In Roman legal texts, the domain of *pietas* was by and large limited to different aspects of family law and the law of succession. Both areas have always been interconnected. The law of succession and family law are two spheres of law in which the social conditions and especially the predominant values in a given society are the most visible. At the same time, however, it should be noted that the changes occurring in the family behavior influence the law of succession because the intestate succession is still more or less reserved to the family members.

Even in Roman times the idea of family was not exempt from changes. It evolved from an autarkic basic economic unit comprising all persons who were under the same paternal power to a group of blood-relatives descending from the same ancestor.¹⁸² Initially it also referred to the entire property of a family father. Despite this transformation, the basic idea of Roman family was stable and until recently more or less dominated the law in Europe. The same can be said also about the basic concept of marriage.¹⁸³

In the field of the law of succession, there are two trends characteristic of both Roman law and modern law. On the one hand, it tries to preserve the property for the family by keeping, in the case of intestate succession, the circle of potential heirs as small as

¹⁸¹ Pap. D. 28, 7, 15. The text relates to a case of a son in parental power who was appointed heir under a condition, disapproved by the senate or the emperor. Such a condition invalidated the will as if it were one not in his power to fulfill.

¹⁸² Ulp. D. 50, 16, 195, 2. Ulp. D. 50, 16, 195, 4: The word "family" also applies to all those persons, who are descended from the last father, as we say the Julian Family, referring, as it were, to persons derived from a certain origin within our memory (*Item appellatur familia plurium personarum, quae ab eiusdem ultimi genitoris sanguine proficiscuntur (sicuti dicimus familiam Iuliam), quasi a fonte quodam memoriae*).

¹⁸³ See Inst. 1, 9, 1: Marriage, or matrimony, is the union of man and wife entailing the obligation to live together (*Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens*).

possible.¹⁸⁴ On the other hand, there is a tendency to give the testator a more or less unlimited freedom of testation.¹⁸⁵ The latter in particular has also been influenced by the notion of *pietas*.

The XII Tables regulated both options, but gave preference to the will. The testator could dispose of his estate at will and appoint heirs or guardians.¹⁸⁶ As a result, intestate succession was possible only in the case when the testator died without a valid will.¹⁸⁷ In ancient Rome, the testamentary succession was a rule, at least *de iure*, and the intestate one a subsidiary option. This is already evident from the term “intestate”, the negative form of the adjective “testate” meaning “having left a will, having written a testament”.

The broad provision of the XII Tables giving the *pater familias* the power to dispose of his estate at will seems to have given the testator the possibility of exhausting his entire estate by legacies and manumissions of slaves. According to Gaius the heirs, who in such a case obtained nothing but an empty name, abstained from accepting the inheritance. Consequently, the majority of persons died intestate.¹⁸⁸

It is impossible to verify this assertion. But it is probable that despite this possibility the Roman family fathers, at least in the oldest periods of Roman law, did not make much use of their power to make a will and to institute an heir. It is probable that in ancient Roman law, upon the death of *pater familias* there was, at least initially, an automatic

¹⁸⁴ See Marius J de Waal, A Comparative Overview, in: Exploring the Law of Succession, Studies National, Historical and Comparative, Edited by Kenneth G C Reid, Marius J de Waal and Reinhard Zimmermann, Edinburgh Studies in Law, Volume 5, Edinburgh University Press 2007, p. 6.

¹⁸⁵ On the development of freedom of testation see R. Zimmermann, Compulsory Heirship in Roman Law, in: Exploring the Law of Succession, Studies National, Historical and Comparative, Edited by Kenneth G C Reid, Marius J de Waal and Reinhard Zimmermann, Edinburgh Studies in Law, Volume 5, Edinburgh University Press 2007, pp. 28 ss. General on the succession on death in early Roman law H. F. Jolowicz and Barry Nicholas, Historical Introduction to the Study of Roman Law, Third edition, Cambridge at the University Press 1972, pp. 123 ss.

¹⁸⁶ See As he has disposed by will concerning his *familia*, or guardianship, so it shall have the force and effect of law (*Uti legassit super pecunia tutelave suae rei, ita ius esto*) - Ulp. Reg. 11, 14, Pomp. D. 50, 16, 120, Gai. 2, 224.

¹⁸⁷ See Tab. V, 4: If he dies intestate, to whom there be no *suus heres*, the nearest agnate is to have the estate (*Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto*). Ulp. Reg. 26, 1 = Coll. 16, 4, 1. The term ‘*familia*’ refers in this case to the estate – See Ulp. D. 50, 16, 195, 1. More on the Ulpian’s text M. Avenarius, Der pseudo-ulpianische *liber singularis regularum*. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift. Analyse, Neuedition und deutsche Übersetzung, Wallstein Verlag, Göttingen 2005, pp. 489 ss.

¹⁸⁸ Gai. 2, 224: ... and for this reason, those who were appointed heirs rejected the inheritance and therefore the majority of persons died intestate (... *quare qui scripti heredes erant, ab hereditate se abstinebant; et idcirco plerique intestati moriebantur*).

transition of ownership from him to his proper heirs (*sui heredes*).¹⁸⁹ His children and wife who became *sui iuris* acquired the estate automatically and without a particular legal act of acquisition. Gaius¹⁹⁰ explains this by saying that they were to a certain extent deemed co-owners of the estate even during the lifetime of the parent. When their *pater familias* had not made a will they became his heirs, willingly or unwillingly, and had to keep up the family worship. We can imagine that a testator having children in his power felt no particular need to make a will and thusly dispose of his property.

In the case of intestate succession, the heirs became co-owners of the estate and a sort of partnership, called *ercto non cito*,¹⁹¹ emerged among them. It is likely that there were many such cases. Otherwise it would be difficult to understand the provision of the XII Tables introducing a particular action (*actio familiae erciscundae*) aiming at the dissolution of such partnership.¹⁹² According to XII Tables each of the partners could use it and claim the division of property in co-ownership.

The possibility to divide the family property, however, paved the way for atomization of property beyond economic tolerability. There were certainly several reasons for the division of the inherited property in co-ownership. They ranged from the usual problems arising from governing a co-ownership¹⁹³ to the decline of the traditional economic role of the Roman family gradually losing its function as a basic economic

¹⁸⁹ R. Zimmermann, *Compulsory Heirship in Roman Law*, p. 29, calls it 'household succession'. See the literature he quotes in footnote 8.

¹⁹⁰ Gai. 2, 157.

¹⁹¹ According to Gaius (Gai. 2, 154A) this would mean '*dominio non diviso*' (undivided property). Gaius speaks about a partnership typical of Roman citizens (*genus societatis proprium civium Romanorum*). More on this partnership Franz-Stefan Meissel, *Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrages*, Peter Lang Europäischer Verlag der Wissenschaften, Frankfurt am Main, 2004, pp. 78 ss. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Clarendon Press Oxford 1996, p. 451 s.

¹⁹² Gai. 4, 17A, Gai. D. 10, 2, 1 pr.: *Haec actio proficiscitur e lege duodecim tabularum: namque coheredibus volentibus a communione discedere necessarium videbatur aliquam actionem constitui, qua inter eos res hereditariae distribuerentur* (This action is derived from the Law of the Twelve Tables, for it was considered necessary, where co-heirs desired to relinquish ownership in common, that some kind of action should be established by which the property of the estate might be distributed among them).

¹⁹³ See e. g. the Latin maxim *Communio est mater rixarum* (Common ownership is the mother of disputes).

unit. The need to split up the partnership certainly existed at the time of the decemvirs but undoubtedly increased as a consequence of the changes in the society.¹⁹⁴

It is possible to imagine that a testator facing the prospect that his children would break up the inherited estate and do away with its economic strength tried to handle the affairs rationally. He made a will and appointed as his heir the person who was the most likely to maintain the farm. If the instituted heir was but one of his children, it is probable that he provided for the remaining ones in other way.¹⁹⁵ Since such a will was in conformity with the XII Tables, it was not a new power of the *pater familias* but only a new practice. It enhanced the role of the *pater familias* in the process of deciding who would inherit the estate. And it diminished the scope of the automatic intestate succession. The objective of a will was to appoint an heir as a universal successor of the testator. It is generally believed that this was the prevailing practice from the second half of the 4th century BC onward.¹⁹⁶

The freedom of testation was in principle unlimited. The Roman testator could name as his heir anyone he wished. Yet the power of a testator to institute his heirs just as he wished interfered with the rights of his children to inherit the estate. Furthermore, the right to institute a sole heir necessarily implied also the right (and the need) to disinherit those relatives who would in the absence of a will qualify for intestate succession. The *pater familias* had to mention the persons under his paternal power in his will, i.e. to institute or to disinherit them. If he wanted to disinherit a son in his power, he had to do it by mentioning him explicitly by name (*nominatim*). He could disinherit other persons in his paternal power, such as daughters, grandchildren, daughters-in-law married to sons in his paternal power or his wife in his marital power (*in manu*) by a general statement (i.e. among others – *inter ceteros*) without mentioning them by name.¹⁹⁷

¹⁹⁴ A thorough analysis of deep changes the Hannibalic wars had on social and economic life in Rome gives Arnold. J. Toynbee, *Hannibal's Legacy : the Hannibalic War's effects on Roman life*. Oxford University Press, London 1965

¹⁹⁵ R. Zimmermann, *Compulsory Heirship in Roman Law*, p. 30.

¹⁹⁶ See Wieacker, *Hausgemeinschaft und Erbeinsetzung: Über die Anfänge des römischen Testaments*, Leipzig, T. Weicher, 1940, pp. 20 ff., R. Zimmermann, *Compulsory heirship*, p. 29 s. Zimmermann maintains that this was a new power of the *pater familias*.

¹⁹⁷ Gai. 2, 127. See also *Epitome Ulpiani* 22, 16.

The aim of this formal requirement was to make the institution of an heir to the greatest possible extent a product of a rational and responsible consideration of the *pater familias*. In the process of choosing his heir, he had to take into account all persons under his paternal or marital power. To make this evident, he had to mention them in his will in the aforementioned way. At least in the earlier periods of Roman law, the testator could disinherit all the persons who would succeed him by intestacy (the so called *sui heredes*, i.e. all those who at his death were under his paternal power) at will if he only mentioned them in his will. If he failed to do so, such a silent passing over (*praeteritio*) normally invalidated the will.¹⁹⁸ This was always true if he left out the name of his disinherited son. In such a case the will was deemed null and void.¹⁹⁹ If, however, the testator omitted mention of his other children, the will was formally valid and materially invalid. Those who had been passed over had a right to inherit together with the heir named by the testator. If they were in testator's paternal power they inherited equal shares with the instituted heirs. If not they were entitled to half of it.²⁰⁰

In addition to this formal condition, Roman law also developed the legal means whereby the testator's closest relatives could challenge the will disregarding their interests. They were aimed at preventing exclusions related to the *exheredatio* which would satisfy the form, but would be unfair and contrary to the moral duty of the testator. They were in a way bringing into legal discourse non-legal principles and values. The main reason behind this process was the consideration of *pietas* requiring of the family father to treat all his family members in a fair and respectful way. This consideration added to the formal requirements for a valid will a new dimension by putting the institution of heir(s) into a broader context of what was dutiful, fair and correct.

The role of *pietas* in this context reveals both its substance and the role it had played in the legal system. It is possible to assume that without it, formal legal requirements would suffice and it would not be possible to challenge the testator's choice. The formal

¹⁹⁸ General on this issue see: W. L. Burdick, *The principles of Roman Law and their relation to modern law*, New York 1938, p. 605, W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, Third Edition revised by Peter Stein, Cambridge University Press, Cambridge 1963 (digitally printed version 2007), pp. 321 ss. Andrew Borkowski, *Textbook on Roman Law*, 2nd Ed., Blackstone, London 1997, pp. 240 ss.

¹⁹⁹ See Gai. 2, 123.

²⁰⁰ See Gai. 2, 124.

conditions aimed at verifying the testator's ability of a sound judgment were limited to the legal sphere. They did not allow to taking into consideration meta-legal reasons. The considerations of *pietas*, however, added a new dimension. They made possible and necessary the assessment of the fairness of a testator's decision in a broader context of proper and respectful family relations. As such, they exceeded pure legal formalism and confronted the testator's decision with the concept of justice required by concrete circumstances. In a way, the considerations of *pietas* made it possible to revise a legal act which was formally correct but not in line with traditional values.

The considerations of *pietas* entered the legal sphere and without becoming a legal notion served both as an argument in favor of amending concrete legal relationship and as an inspiration to improve the legal protection or prevent formalism from prevailing over substance.

In making his will, the testator had to act in accordance with his moral duty (*officium*), meaning that he could disinherit a close relative only if there was an apparent reason for the exclusion. For the possibility that the testator would unjustly and contrary to his duties disinherit a relative who would be an intestate heir, the Roman law devised a "complaint because of a testament contrary to duty" (*querela inofficiosi testamenti*). This complaint was based on the assumption that the testator was not of sound mind because he acted contrary to his natural duties of piety towards his nearest relatives (*contra officium pietatis*). Marcian put this in the following way:

The supposition on which an action for undutiful will is brought is that the testators were of unsound mind for making a will. And by this is meant not that the testator was really a lunatic or out of his mind but that the while the will was correctly made it was without a due regard for paternal or filial affection (*non ex officio pietatis*); for if he was really a lunatic or out of his mind, the will would be void.²⁰¹

The nearest relatives, parents as well as children, who in the absence of testament would be heirs by intestacy, could argue that the testator acted contrary to his or her²⁰² duty. In

²⁰¹ Marcian. D. 5, 2, 2. See also Inst. 2, 18 pr.

²⁰² Testaments of women were no exception. See e. g. Marcell. D. 5, 2, 5: For those who are not descended in the male line also have the power to bring an action, since they do so in respect of a mother's will (*de matris testamento*) and are constantly accustomed to win. ...

the absence of testator's descendants and ascendants, the *querela* could be successfully initiated by consanguineous brothers and sisters. For other relatives beyond the degree of brother or sister it was less likely to succeed. Ulpian said that it "would be better not to trouble themselves with useless expenses since they are not in a position to succeed".²⁰³

If the plaintiff succeeded in his claim, the testament was declared null.

The relationship between the testator and the persons who could successfully initiate the complaint because of an undutiful will pertained to the domain of *pietas*. The testator acted contrary to his duty stemming from the paternal or filial affection requiring a dutiful conduct towards the nearest relatives. A violation of such a conduct was regarded so preposterous that it could not be attributed to a person of sound mind. It was more than apparent that omitting a nearest relative in a will was impious.

Another area of the law of succession in which *pietas* played an important role was the interpretation of a will, particularly in the event that the testator granted a *fideicommissum*. In such cases, the due regard of loyalty and affection among relatives was considered a decisive factor and a basis for the interpretation of a will.

In a case discussed by Paulus,²⁰⁴ a person outside the family was appointed heir and an emancipated son was passed over. The ownership of the estate was left to the mother of the deceased, the usufruct being withheld. The son initiated the proceedings to obtain from the praetor the possession of the estate of the deceased against his will (*bonorum possessio contra tabulas*). According to Paulus, in the event of success the son had to give the (grand)mother full ownership on the ground of a filial duty to her (*pietatis respectu*). For obvious reasons, this would mean that he had to relinquish his usufruct: the ownership of the mother under reservation of the usufruct had no practical significance for her because she could not exploit or enjoy it. The mother had no legal title to obtain full ownership. But it was in accordance with the filial duty to make it possible for the mother to enjoy the estate and not just to own it. In this case, the consideration of filial duty could be invoked and used in a decisive way. We can see again how the consideration of *pietas* could play a decisive role in legal reasoning. It

²⁰³ Ulp. D. 5, 2, 1.

²⁰⁴ Paul. D. 7, 1, 46 pr.

could soften the rigidity of law and reconcile it with the system of Roman moral values and a sense of justice.

According to certain fragments in Justinian's Digest, the testators were addressing their heirs invoking their affection and piety in order to ensure the fulfillment of a gift in the nature of trust²⁰⁵ (*fideicommissum*) or some other testamentary provision.

Scaevola mentions a father who on his deathbed wrote a letter to his son requesting from him a *fideicommissum* in these words:²⁰⁶

To my son Lucius Titius, greeting. Convinced of your sense of loyalty (*certus de tua pietate*), I charge on you as a *fideicommissum* that you give and discharge a certain sum of money to this and that person; and I wish my slave Lucio to be free.

The son has not become heir and has also not got the praetorian possession of the estate or of some other thing by way of inheritance. The question therefore arose whether an action could be brought against him on the account of the *fideicommissum* by those who were interested in its execution. Scaevola replied that especially after the law of the late emperor Pius, who provided for just such an eventuality, he was liable.²⁰⁷ This case and Scaevola's reply elucidate the nature of *pietas* and the role this notion played in Roman law. It was not a legal obligation. At the same time, it was still more than a mere moral duty. Fulfilling it was regarded as upholding the natural order and contributing to justice. In the stated case, despite the fact that the son has not become an heir, he had to fulfill his father's wish. It is likely that the law of the emperor Pius did not invent this rule but only strengthened and formalized an earlier practice.

Initially the trusts (*fideicommissa*) depended upon the good faith of heirs. Emperor Augustus rendered them obligatory by law.²⁰⁸ From that time onwards, a *fideicommissum* established legal liability. Nevertheless, the decisive parts of a *fideicommissum* were the considerations of a dutiful conduct (*pietas*) and the trustworthiness (*fides*) of the heir.

²⁰⁵ On this English equivalent of the term *fideicommissum* Burdick, o. c. p. 620. On Roman law of trusts see David Johnston, *The Roman Law of Trusts*, Clarendon Press Oxford, 1989.

²⁰⁶ Scaev. D. 32, 37, 3.

²⁰⁷ Scaev. D. 32, 37, 3. See also Scaev. D. 34, 4, 30 pr, Scaev. D. 36, 1, 80 pr. and 3.

²⁰⁸ See Inst. 2, 23, 12.

We can obtain an additional insight into what role *pietas* played in this context from the following case quoted by Scaevola. In this case, the testator appointed as heirs his wife and the son he had with her. He asked his wife not to vindicate for herself a part of the Titian farm, bought by him with his own money “but on account of the affection and respect (*beneficio affectionis et pietatis*) which I owe you, I have let it be understood that we had equal shares in this purchase which I made with my own money”.²⁰⁹ Although the husband was the sole owner of the said Titian farm, the affection and respect he owed to his wife required to use it as if it were their common property. Because of his affection and because of *pietas*, the husband made it possible for his wife to also use the property which belonged to him. We can assume that *pietas* necessitated not only the use of that property but also – and even more so – the establishment of a certain sort of community between the spouses.

The consideration of piety was crucial for Scaevola’s decision. To the question whether the said farm should pertain wholly to the son he replied that the testator wished the farm to be treated just as if the whole of it belonged to the inheritance. Accordingly, both the widow and the son inherited one half of it each. It is obvious that a sense of loyalty did not exist only between the testator and his wife but also between her and their son.

The consideration of piety could play a decisive role in interpreting the testament. There is an example of this kind in a *responsum* quoted by Scaevola.²¹⁰ In a codicil, which he confirmed in his testament, the testator wrote the following provision:

To all my freedmen whom I have manumitted both in my lifetime and in this codicil or shall manumit in future, I bequeath their partners and their sons and daughters, with the exception of such persons of either sex that I have desired in my will to belong to my wife, or have bequeathed or shall bequeath to her by name.”

The testator also wanted his heirs to restore to his wife, their coheir, the lands he had in Umbria, Etruria and Picenum “together with all their appurtenances, including the country or city slaves, and those who transact my business, with the exception of such as have been manumitted”. Eros and Stichus were slaves who until the death of the testator

²⁰⁹ Scaev. D. 32, 41 pr.

²¹⁰ Scaev. D. 32, 41, 2.

ran his business in Umbria and Picenum. They were natural sons of Damas whom the testator manumitted during his lifetime. The question arose on how to interpret his last will and how to bring together the provisions of the codicil and those of the request the testator addressed to his heirs in the subsequent letter. According to the first, Eros and Stichus would belong to Dama, whereas with regard to the request of the testator put forward in the letter they should be given to the widow.

Scaevola replied that *pietatis intuitu* they should belong to their natural father Dama. In Watson's English edition of Justinian's Digest the expression *pietatis intuitu* is translated as "respect for natural loyalty". The older English translation by S. P. Scott is using the expression "the dictates of natural affection". Yet, bearing in mind the case of Ulp. D. 21, 1, 35 we quoted above, the most adequate translation seems to be "in consideration of natural family ties". The reason for Scaevola's decision is namely not the affection or loyalty between Dama and his sons but the natural order requiring that the nearest relatives are not separated without need. The reason behind is family as part of the natural order. Legally Dama and his sons were not relatives. Nevertheless, Scaevola considered the natural tie between them important enough to prevail over the request the testator made in his letter. In the absence of the codicil Scaevola would have probably followed the provisions of testator's letter and would not be in a position to refer to *pietas* and the importance of natural ties between Dama and his sons. This is very probable, in particular because we can assume that the letter was written after the codicil.

B. Codex Iustinianus

The nature of texts in the Justinian's Code in general, but also as far as the texts dealing with *pietas* are concerned, is quite different from the classical texts in Justinian's Digest. Although we also encounter concrete solutions in the Digest, in form of replies to specific practical questions (*rescripta*), and although such opinions of the jurisconsults enjoyed extensive legal authority,²¹¹ they did not have a binding nature or the status of a

²¹¹ See Inst. 1, 2, 8: Inst. 1, 2, 8: The answers of jurisconsults are the decisions and opinions of persons who were authorized to establish laws (*iura condere*). For it was decided in ancient times that the laws should be publicly interpreted by those, who were permitted by the emperor to give answers on questions

law. By and large, the texts of classical lawyers expressed personal views of their authors. The importance of their views was not so much based upon their position and status but rather upon the (professional) authority they gained by solving legal problems and by the arguments underpinning their decisions.

The Code of Justinian was a collection of imperial enactments promulgated in 529. Because of Justinian's sweeping legal reforms it was updated and thoroughly revised in 534, one year after the Digest, and issued as *Codex repetitae praelectionis* (Code of repeated lecture).²¹²

In principle, all of the enactments in the Code had the status of binding legal norms. The earliest among them was a written response (rescript) of Hadrian²¹³ and the latest was Justinian's law of November 4, 534.²¹⁴ Imperial rescripts were written answers of the emperor to inquiries of officials or to petitions of private persons. A *rescriptum* contained the emperor's opinion upon a legal question or a decision in a concrete case. In principle, a rescript was binding only with regard to the case for which it was issued. Nevertheless, it normally obtained a generally binding force, also because it was issued by the emperor who was, after the time of Hadrian, the only legislator.

When we try to find parallels between the texts dealing with *pietas* in Justinian's Digest and those in Justinian's Code, we see for the most part a considerable difference resulting from the nature of the two texts. However, there are also similarities. As far as the structure of the text is concerned, amongst the imperial enactments contained in the Code, the closest to the classical texts are the rescripts which in general do not differ much from the classical responses. Both the rescripts and the responses are dealing with concrete practical cases.

Apart from the nature of texts, the most visible difference between the Digest and the Code as regards the notion of *pietas* are two new meanings which one cannot find in

of law. They were called jurisconsults, and their unanimous decisions and opinions had such force that, according to the *constitutio* (according to Gaius 1, 7 this was a *rescriptum* of the emperor Hadrian), a judge was not permitted to deviate from what they had determined.

²¹² More on the Codes of Justinian see Leopold Wenger, *Die Quellen des römischen Rechts*, Wien 1953, pp. 569 ss and pp. 638 ss.

²¹³ See Hadr. C. 6, 23, 1.

²¹⁴ See Iust. C. 1, 4, 34.

classical texts. Namely, in imperial enactments *pietas* can also relate to the title of the emperor or to the religious devotion.

a. Imperial title

In some imperial enactments, the word *pietas* stands for one of the many official titles of the Roman emperor. In this quality it was in use from the time of the emperor Diocletian onwards.²¹⁵ Therefore, “*pietas mea*”²¹⁶ or “*nostra pietas*”²¹⁷ denotes the emperor or the imperial majesty and can be translated as “we”. The title was probably aimed at stressing the emperor’s mercy and generosity.²¹⁸ In accordance with the use of the word with Church Fathers, the Christian emperors used it to express the mystic relationship of the emperor to God.²¹⁹ The title *pietas* can be therefore regarded as an expression of the true humanity which inspired the emperor to promote just and human laws.

b. Religious devotion

In the imperial laws, *pietas* sometimes relates to the piety in the sense of a religious devotion²²⁰ which resembles the old Roman piety towards gods (*pietas erga deos*). This type of piety existed until Christianity became the official religion of the Roman Empire.

The *pietas* in the later imperial laws is inseparably connected to Christian orthodoxy and is more or less its synonym. Therefore, for an individual a devote attitude towards gods was not enough to be regarded as pious. Consistent performance of religious duties was deemed impious or heresy if addressed to another religion.²²¹ We have no sources that would inform us about the treatment of such cases in earlier times. It is therefore difficult to ascertain whether an individual in republican Rome worshiping non-Roman

²¹⁵ Diocl. Coll. 6, 4, 2: ... *id enim pietati nostrae maxime placuit* ...

²¹⁶ Honor./Theod. C. 11, 24, 1 (C. Th. 14, 16, 2), Nov. Valent. 10, 1, 1, Marc. Nov. 5, 1 pr., Leo. C. 11, 10(9), 7 pr. and Leo C. 11, 12(11), 1 pr. and § 1.

²¹⁷ See e. g. Zeno C. 3, 24, 3 pr., Const. C. 5, 34, 11, Arcad. /Honor. C. 8, 11, 13 pr., Anastas. C. 12, 5, 5, Theod. /Valent. C. 12, 26, 2 pr., Anastas. C. 12, 37, 16, 7, Theod. /Valent. C. 12, 19, 8, 1, Iustinus/Iust. C. 1, 31, 5, 1

²¹⁸ See Hugo Krüger, *Die humanitas und die pietas nach den Quellen des römischen Rechtes*, pp. 42 ss.

²¹⁹ See F. Leifer, *Christentum und römisches Recht seit Konstantin*, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 58 (1938) p. 192 s.

²²⁰ See e. g. Iust. C. 1, 1, 8, 38, Zeno C. 1, 2, 16, 1 etc.

²²¹ Iust. C. 1, 1, 8, 28: ... as it is evident that You condemn the impiety (*impietatem*) of Nestor and Eutyches, and all other heretics, and that You firmly and inviolably, with devotion to God and reverent mind (*pia mente*) acknowledge the single, true, and Catholic Faith ... See also Theod. /Valent. C. 1, 5, 6 pr.

gods would be regarded as pious. Despite that we can assume that the nature of *pietas* towards gods in Roman republican times differed from that at the time of Justinian. The traditional Roman *pietas erga deos* was predominantly a personal virtue characterized by the outward practice especially regarding the performance of religious ceremonies. The *pietas* of the Justinian's Code was much more oriented towards the contents of beliefs and their conformity with the official doctrine.²²²

It is well known that not all the Roman emperors shared the religious views of Justinian. We can therefore assume that this aspect of piety was added only by the imperial laws of the emperors after Christianity has become the official religion of the Roman state in 380.²²³ Given the engagement of Justinian in religious matters, it is more or less clear that no imperial law was admitted into the Code that would not be in compliance with the Christian orthodoxy.

There are many enactments in the Code dealing with purely religious matters. Indirectly and directly they give us an insight into what was the substance of (the Christian) *pietas* that inspired them. According to one of such laws²²⁴ no Jew, pagan, or heretic could own Christian slaves. Any such slaves immediately became free by virtue of the law itself. Even those slaves who were not yet Christian but only desired to convert to Christianity were freed by the same law at the moment of their conversion to Christianity. Their masters, who were not entitled to claim any compensation, could not retain them by becoming Christians themselves. The emperor instructed the judges and the archbishops to take care of a rigid and zealous observation of this law inspired by considerations of piety (*pietatis intuitu*). The context of this law shows that this kind of

²²² According to a constitution of the emperor Marcian (C. 1, 1, 4 pr.) it was even prohibited to discuss the Christian religion publicly in the presence of an assembled and listening crowd.

²²³ See Grat./Val./Theod. C. Th. 16, 1, 2: It is our desire that all the various nations which are subject to our Clemency and Moderation, should continue to profess that religion which was delivered to the Romans by the divine Apostle Peter, as it has been preserved by faithful tradition, and which is now professed by the Pontiff Damasus and by Peter, Bishop of Alexandria, a man of apostolic holiness. According to the apostolic teaching and the doctrine of the Gospel, let us believe in the one deity of the Father, the Son and the Holy Spirit, in equal majesty and in a holy Trinity. We authorize the followers of this law to assume the title of Catholic Christians; but as for the others, since, in our judgment they are foolish madmen, we decree that they shall be branded with the ignominious name of heretics, and shall not presume to give to their conventicles the name of churches. They will suffer in the first place the chastisement of the divine condemnation and in the second the punishment of our authority which in accordance with the will of Heaven we shall decide to inflict.

²²⁴ Iust. C. 1, 3, 54, 8-11.

piety was not a religious ardor as such but an expression of the official orthodoxy professed by the state church.

The violation of religious piety could constitute a crime. *Pauli Sententiae* report on at least one crime of this type. It is necessary to bear in mind that the *Sententiae* were probably compiled during the time of Diocletian, i.e. before Christianity became the state religion. But we can imagine that a similar crime was also in existence thereafter. It refers to the celebration of impious or nocturnal rites (*sacra impia nocturnave*).²²⁵ These were religious ceremonies assumed to be celebrated for evil purposes, such as to enchant, bewitch, or bind anyone. According to *Pauli Sententiae* the perpetrators were crucified or thrown to wild beasts.

We can assume that at least two further crimes mentioned in Paul's Sentences represented a violation of piety. The first of them was sacrilege, i.e. a violation of the piety towards gods.²²⁶ Persons who broke into a temple at night for the purpose of robbery and plunder were thrown to wild beasts. If, during the day, they stole from a temple anything which could be easily carried off, the perpetrators of higher rank (*honestiores*) were deported and those of inferior social status (*humiliores*) were sentenced to the mines. The second crime that can be regarded as impious was the desecration of a grave.²²⁷ Although lesser offences of this kind were prosecuted by an *actio popularis* and punished by a fine of 100.000 sesterces and infamy, major violations such as a robbery or taking away the corpse were punished by death if the perpetrator was of lower rank (*humilior*) and by exile or condemnation to the mines if of higher rank (*honestior*).

c. *Paie causae*

Another new sphere of *pietas* that emerges in imperial laws is linked to particular dispositions in a will and is closely connected to the previous meaning. The relevant texts speak about "pious" dispositions. These can relate to the redemption of captives,²²⁸ or donations made for pious purposes, such as donations to "a holy church, to a house for the entertainment of strangers, an infirmary, an orphan asylum, an establishment

²²⁵ Paul. Sent. 5, 23, 15.

²²⁶ Paul. Sent. 5, 23, 19.

²²⁷ Paul. Sent. 5, 23, 19a.

²²⁸ Leo C. 1, 3, 28, 5.

where indigent persons are sheltered, an old men's home, a foundling hospital to the poor themselves or to some city".²²⁹ Because of their pious nature, such donations were not subject to general legal rules regulating lucrative acquisitions. According to Justinian's edict of 529²³⁰ they should be "free and immune from interference; for although the law enacted on this subject exerts all its force with reference to other persons, still, in consideration of piety, (*pietatis intuitu*) its vigor should be relaxed so far as the Church or any other institutions which have been set apart for pious uses (*piis consortiis*) are concerned". Justinian reasons this with the need to make a distinction between divine and human things.

A similar provision contained the statute of the emperor Leo of 468.²³¹ The emperor decreed that neither an heir nor a beneficiary of a trust (*fideicommissarius*) or a legatee was permitted to disregard the disposition of a pious testator who bequeathed a legacy or trust for the redemption of captives by alleging that a legacy or a trust was uncertain. According to the law the money had to be collected by any means necessary (*modis omnibus*) and employed for the pious purpose according to the will of the testator. In the case when the testator had only fixed the amount of the legacy or trust without appointing the person to collect the money and carry out the wish of the testator, this had to be done immediately (*sine ulla cunctatione*) by the bishop of the city where the testator was born. The bishop, who was obliged to act *pro bono* and without recovering expenses (*gratis et sine ullo dispendio*) not to reduce the amount available for the pious purpose, had to inform the governor of the province of the amount he received and after a year report on the number of captives ransomed and the sum paid.

In order to prevent a fraudulent obstruction of the pious intentions of the deceased, everyone was allowed to notify them to the governor of the province or the bishop without fearing to be treated as an informer. According to the law fidelity and industry (*fides atque industria*) of those who provided such information was "not without praise

²²⁹ Iust. C. 1, 2, 19, Iust. C. 1, 2, 22 pr., Leo C. 1, 3, 28.

²³⁰ Iust. C. 1, 2, 22 pr.

²³¹ Leo C. 1, 3, 28.

and respectability as well as piety, as they have brought truth and illumination to the ears of public officials”.²³²

The final clause is probably the most interesting because in it the person providing information about the pious disposition in the will to the governor of the province is also praised for being pious. Since the whole law is about the redemption of captives we can speculate that this person earned the epithet “pious” for helping a pious cause, i.e. the ransom of the captives. The meaning of the word in this case would probably be “human, compassionate”.

Because of their pious purpose, orphanages, hermitages, churches, poor-houses, houses for the reception of strangers, monasteries and other institutions founded for pious uses enjoyed particular privileges. They were confirmed and updated in consideration of piety (*pietatis intuitu*) by a pragmatic sanction of the emperors Leo and Anthemius.²³³ Here again, the word *pietas* relates more to charity and humanity than to the religious devotion, although this might have encouraged and backed them.

The same can be asserted for Justinian’s law validating the testament in which the testator appointed captives as his heirs.²³⁴ Normally an appointment of uncertain persons would invalidate the testament. Justinian decreed that in this case, because of the considerations of compassion and humanity (*pietatis intuitu*), such an appointment should be regarded as valid despite the fact that the purpose of the testator was to avoid the Falcidian law²³⁵ and to leave his entire estate for the ransom of captives. This case shows clearly the importance the *pietas* had in the context of legal regulations. It also induces the question of the relationship between *pietas* and *humanitas*.²³⁶

²³² Leo C. 1, 3, 28, 5.

²³³ Leo/Anthem. C. 1, 3, 34. On the privileges of the Church see C. 1, 2.

²³⁴ Iust. C. 1, 3, 48 pr.

²³⁵ The Falcidian law (*lex Falcidia*) provided that the legacies and trusts should not exceed three quarters of the testator’s estate. As a result, after having fulfilled the legacies and trusts, the heir was entitled to retain a net quarter of the estate.

²³⁶ More on this Hugo Krüger, *Die humanitas und die pietas nach den Quellen des römischen Rechts*, Zeitschrift der Savigny-Stiftung, Rom. Abt. 19 (1898), pp. 6 ss.

d. Humanity and compassion

There are quite a few mentions of the term *humanitas* both in Justinian's Digest and in his Code. With some exceptions²³⁷ it is used in the usual meaning of humanity, philanthropy or kindness. Unfortunately, it appears very seldom alongside *pietas* in the same text. There are only two texts in which a direct comparison is possible. The first of them is the Ulpian text Ulp. D. 11, 7, 14, 7 already mentioned above. Ulpian discusses various motives for incurring the expenditure of a burial of a deceased when the person who did it was not legally obliged to do so. Ulpian examines the following options: acting as an unauthorized agent, acting for humanity, for compassion (*misericordia*), for *pietas* and for affection. It is extremely difficult to see a clear difference between these motives. Nevertheless, on the basis of what we have seen so far, we can assume that humanity and compassion²³⁸ were personal attitudes and features which were not necessarily expected to be manifested in a concrete action of an individual and were not limited predominantly to inter-family relations. *Pietas*, on the other hand, formed part of the tradition and, at least in theory, everyone was expected to manifest it and to act in accordance with it as far as inter-family relations were concerned. There was at least a moral duty to behave in a pious way. We can assume that humanity and compassion as inner attitudes of a person could stimulate this virtue, especially in dealings with those who were not members of the same family.

Another text in which both *pietas* and *humanitas* are mentioned is the law of the emperor Constantine on revocation of gifts.²³⁹ Although its beginning is missing,²⁴⁰ its contents are clear. The emperor decreed that emancipated children that were ungrateful towards the father who emancipated them should be severely punished when there was no doubt that they had become irreverent towards their father by insulting him and had

²³⁷ In Iust. C. 1, 1, 8 12 and 15-18 dealing with the theological problem of the Holy Trinity the term *humanitas* stands for Christ's human nature.

²³⁸ Lactantius (Inst. VI, 10, 1) uses the terms *humanitas* and *misericordia* as synonyms (*Sed tamen primum iustitiae officium est cum deo, secundum, cum homine. Sed illud primum religio dicitur, hoc secundum misericordia vel humanitas nominator.*)

²³⁹ The constitution is quoted in Vat. 248. See also Valent./Valens/Grat. C. 8, 49, 1 (C. Th. 8, 14, 1): 'The laws punish, by the revocation of emancipation and the deprivation of undeserved freedom, sons, daughters, and other descendants who have been guilty of disobedience, or who have inflicted any verbal insult or atrocious injury upon the parent who emancipated them.' This constitution clearly refers to the law of Constantine.

²⁴⁰ See the reconstruction of the *Collectio iuris antejustiniani*, In usum scholarum ediderunt Paulus Krueger, Theodorus Mommsen, Guilelmus Studemund, Tomus III, Berolini 1890, p. 75.

not given up this practice even when they were admonished that their behavior was contrary to the sense of filial duty (*affectu pietatis*) towards the parents. If it was established that the children behaved towards their father in an arrogant and cruel way, contradicting the principle of humanity (*humanitatis ratio*), their emancipation had to be revoked. They had to return the gifts they had received from their father and “in accordance with the natural law” they themselves had to return under the paternal power. In such a way those who receded from a reverent obedience by not fulfilling their sacred duties (*pietas*) would be compelled to return to this obedience by observing their duties anew. The purpose of the change of status was to bring them back to the dutiful comportment (*pietas*).

In this law, the word *humanitatis ratio* is mentioned in connection with the cruel and injurious behavior of the children towards their parent. According to the wording of the law, such a behavior is contrary to the principle of humanity. The word *pietas* is used, this time too, in its usual meaning of dutiful behavior towards the parents. No obvious difference between both notions can be deduced from the text. The inhuman behavior of the children was also impious. Nevertheless, we can assume that the meaning of the term humanity is more general and regards all people, whereas *pietas* relates more to the dutiful and respectful relations among the family members. Furthermore, every inhuman behavior towards a parent was also impious, whereas an impious behavior was not necessarily also inhuman. For instance, irreverent behavior was impious but certainly not also inhuman.

Similarly, the motives of humanity (*pietatis intuitus*) inspired an imperial law according to which the debtor was entitled to redeem the pledged property on which, upon the permission of the emperor, the creditor acquired ownership.

In Roman law, upon the debtor’s default the creditor could sell the property pledged. He could even become its owner where this had been previously provided for in a special agreement (the so-called *lex commissoria*). The creditor became the owner of the pledged property even in the case when its value considerably exceeded the value of the debt. Because of the inherent prospect of abuse, the emperor Constantine²⁴¹ prohibited

²⁴¹ Const. C. 8, 34, 3.

any agreement of this kind. However, a problem emerged when upon debtor's default no one appeared to purchase the pledged property and the creditor was not allowed to retain it. In such a case, the creditor could obtain the permission of the imperial chancellery to become the owner of the pledged property. Yet, in a way, his ownership was only conditional; through motives of humanity Justinian's law²⁴² allowed the debtor to redeem such a property within two years by paying the creditor his debt with interest.

The same motive of *pietas* also suggested an imperial law according to which all the parties of a joint obligation should be compelled to pay the debt at the same time in the case when, with reference to the one and the same contract, prescription has been interrupted or acknowledgment of the debt has been made.²⁴³ In this case, though, it seems that the meaning of *pietas* comes closer to justice than to humanity.

Pietas in the sense of humanity was also addressed by Justinian in his law regulating the problems regarding foundlings.²⁴⁴ The emperor decreed that all the children who have been abandoned be considered free and freeborn. In addition, those who abandoned the children could not reclaim them and reduce them to slavery. Those who, through motives of compassion (*pietatis ratione*), supported such children were not to change their minds and make them slaves, although this had been their initial plan, so as not to appear as if they were performing the duty of humanity (*pietatis officium*) as a trade contract.

e. *Pietas* as parental affection

In imperial rescripts, the word *pietas* is usually vested with more or less the same meanings it bore in Justinian's Digest. Most frequently, it relates to the dutiful conduct between family members.

According to a rescript of the emperors Severus and Caracalla,²⁴⁵ a parent who brought an accusation against the guardians of his children acted in accordance with the duty of paternal affection (*munere pietatis*). As a consequence, his action cannot be qualified as

²⁴² Iust. C. 8, 33, 3, 3 B.

²⁴³ Iust. C. 8, 39, 4, 1.

²⁴⁴ Iust. C. 8, 51, 3.

²⁴⁵ Sev./Ant. C. 2, 18, 1.

a management of another's affairs without authorization (*negotiorum gestio*). Therefore, he also cannot claim the expenses he incurred.

The emperor Alexander Severus gave a similar answer to a mother who claimed the expenses she had by nourishing her children. He wrote:²⁴⁶

You have only discharged the obligation demanded by maternal affection (*exigente materna pietate*). If, however, you have spent any money to the advantage or probable benefit of their assets, and can prove that your act was not prompted by your generosity as a mother but with the intention of being reimbursed for what you paid, you can obtain it by means of the action for management of another's affairs without authorization.

Emperors Diocletian and Maximian responded similarly to a mother claiming the reimbursement of a ransom she paid for her captive son.²⁴⁷ It is improper (*non convenit*), they wrote, to regret this fact performed in consideration of maternal affection (*pietatis ratione*) and to claim any part of the sum that was paid. She could, however, justly demand from him the dowry which he owed her.

We encounter another interesting aspect of *pietas* related to the relationship between a parent and a child in a rescript of the emperors Diocletian and Maximian.²⁴⁸ They replied to a certain father that he can bring an accusation against his son before the Governor of the province alleging that the latter made an attempt on his life, provided that *pietas* and the natural reason (*ratio naturalis*) do not prevent him from doing that. Natural reason and *pietas* are quite an odd combination of arguments to keep the father away from the accusation.

It should be noted that the Roman tradition was against bringing disputes between family members to court.²⁴⁹ Without a permission of the praetor nobody was allowed to

²⁴⁶ Alex. C. 2, 18, 11.

²⁴⁷ Diocl./Maxim. C. 8, 50, 17, 2.

²⁴⁸ Diocl./Maxim. C. 9, 1, 14.

²⁴⁹ See an interesting parallel in the opinion of the Supreme Court of India. In its decision *B.S. Krishna Murthy v. B.S. Nagaraj*, AIR 2011 SC 794, directed that disputes between family members should generally be resolved by mediation etc. Thus directing a dispute between brothers to be decided by mediation, the Supreme Court called upon the legal fraternity to "advise their clients to try for mediation for resolving the disputes, especially where relationships, like family relationships, business relationships, are involved, otherwise, the litigation drags on for years and decades often ruining both the parties".

summon to court one's parents, patron or patroness, or the children or parents of one's patron or patroness.²⁵⁰ According to Modestin who was advancing a general rule, it was not possible, without an order of the praetor, to summon to court persons to whom respect was owed.²⁵¹ In addition, the obligations between family members under the same paternal power were merely natural obligations.²⁵² This furthermore reduced the possibility of a court proceeding among family members.

If it was regarded as improper to start a civil proceeding against a close family member, it was more unusual still to bring a criminal accusation against him. The emperors Diocletian and Maximian laid down a law according to which a man who brought an accusation of a serious or capital crime against his brother should not be heard but should instead be condemned to exile.²⁵³ On the other hand, the same emperors responded in a rescript to a certain *Iulianus* that he could accuse his sister of a minor offence she thoughtlessly committed. In some cases it was obviously possible to accuse a close relative. Nevertheless, it was not considered to be on the same line with the traditional system of values.

In the rescript mentioned above, the emperors did not prohibit the accusation of a son, probably because of the gravity of the asserted crime. But they made the petitioner aware of two aspects which they thought should be taken into consideration. The first was *pietas* and the second was *ratio naturalis*. In this case, *pietas* clearly refers to considerations of the dutiful conduct that should exist between a father and a son. This consideration was additionally supported by reference to natural reason, reminding the father of the natural ties between parents and their children. What the emperors wanted to say was that the father could bring the accusation against his son only when he was convinced that this was necessary despite the considerations of *pietas* and of natural reason. The rationale behind the reluctance to allow the accusation was, among other

Quoted after <http://legalperspectives.blogspot.com/2011/01/dispute-between-family-members-to-be.html>

²⁵⁰ Ulp. D. 2, 4, 4, 1. See also Paul. D. 2, 4, 6 and Ulp. D. 2, 4, 8 pr.

²⁵¹ Mod. D. 2, 4, 13: *Generaliter eas personas, quibus reverentia praestanda est, sine iussu praetoris in ius vocare non possumus* (Generally, we cannot summon to court, without the order of the praetor, those persons to whom respect is owed). More on this *Das römische Zivilprozessrecht* von Max Kaser, Zweite Auflage, neu bearbeitet von Karl Hackl, C. h. Beck, München 1996, p. 221 s.

²⁵² See Afr. D. 12, 6, 38.

²⁵³ Diocl./Maxim. C. 9, 1, 13.

things, the gravity of the consequences. In a way, by filing the accusation against his son, aiming at his condemnation, the father crossed the Rubicon. In the described case, the sentence would probably not be for parricide²⁵⁴ because the father was still alive but for the inflicted injury. Nevertheless, the accusation unquestionably destroyed the relations between the father and the son. Also for that reason, the father had to weigh up his decision in consideration of *pietas*.

An additional insight into how the notion of *pietas* related to relations between relatives is offered by a rescript of the emperor Alexander.²⁵⁵ It allows the mother to demand the guardians for her son by saying:

Maternal piety (*matris pietas*) will suggest to you whom you should ask to be appointed guardians for your son, and it should also induce you to see that nothing but what is proper is done in the administration of the affairs of your minor child.

In this case *pietas* is not only a dutiful conduct but also the affection giving the mother an insight into what will be the best for her son as well as motivating her to take care of things accordingly.

The duty to take care of the appointment of a guardian for her son was part of the maternal piety. A rescript of Diocletian and Maximian²⁵⁶ stated that a mother who has not demanded the appointment of a guardian for her son who already had one has not neglected her maternal duty (*officium pietatis*). The wording of the text supports the conclusion that the relationship between the mother and her son, from which the duty of the mother originated, was a wide-ranging one, containing both emotional affection and the features of a traditional relationship between the parents and the children. We can imagine that a mother who was on bad terms with her son had the same duty regarding the appointment of a guardian as the mother who lived with him in harmony. *Officium pietatis* is therefore the same duty we met in the texts dealing with the maintenance of a child.

²⁵⁴ According to *Lex Pompea de parricidiis* a parricides were burned alive, or abandoned to wild beasts - Paul. Sent. 5, 24. See also Inst. 4, 18, 6 describing a particular punishment of a *parricida*. See Richard A. Bauman, *Crime and Punishment in Ancient Rome*, pp. 17, 28, 30 ss and 70 ss.

²⁵⁵ Alex. C. 5, 31, 6.

²⁵⁶ Diocl./Maxim. C. 5, 31, 9.

As we have seen, the perception of *pietas* related to relations between relatives in imperial enactments does not differ much from that dealt with in the texts of the classical jurists. Yet there seems to be a new trend. In a way, in some imperial enactments the *pietas* was moving in the direction of a right. An example of this new development is a rescript of the emperors Severus and Antoninus (Caracalla).²⁵⁷ According to this rescript, it seems to be the duty of a father to support his son in proportion to his means. But this duty of the father is conditioned by the proper behavior of his son who must also, for his part, accomplish his duties towards his father:

If you have properly discharged the duties which you owe to your father, he will not refuse you his paternal affection (*paternam pietatem*). If he should not do this voluntarily, a competent judge, having been applied to, shall order him to support you in proportion to his means.

Both the father's duty to support the son and the duty of the latter to fulfill what he had to do towards his father illustrate the reciprocal nature of *pietas* and its legal importance. This text also shows that under proper circumstances, i.e. if the son behaved properly, the right of the son to claim the support of his father was legally enforceable.

A further insight into *pietas* regarding the relationship between a father and a son can be drawn from the rescript of the emperor Alexander²⁵⁸ dealing with the *SC Macedonianum* from the time of Vespasian. This *senatusconsultum*²⁵⁹ decreed that the lender should not be entitled to recover a loan given to a son under paternal power without the consent of the father, even after the death of the father. The emperor ruled that the authority of the *SC Macedonianum* does not impede a demand being made for money which was lent to a son under paternal power for the purpose of pursuing his studies or in order to meet the necessary expenses when he was out of the country as an ambassador, which paternal affection (*patris pietas*) would not have refused him. Accordingly, the loan the son had taken was not subject to the *SC Macedonianum* if it was clear that the father in his paternal affection would not withhold his consent from

²⁵⁷ Sev./Ant. C. 5, 25, 4.

²⁵⁸ Alex. C. 4, 28, 5 pr.

²⁵⁹ See D. 14, 6 and C. 4, 28. More on it Francesco Lucrezi, *Senatusconsultum Macedonianum*, Edizioni scientifiche italiane, Napoli 1992.

him or would himself give him the money he needed. In such a case, the creditor could reclaim the money.

The presumption of the father's consent depended apparently upon the nature of the activity for which the son needed money. Such was the case when he borrowed money to pursue his studies or to meet the necessary expenses of an embassy. We can imagine that without such a purpose the *SC Macedonianum* would apply and it would not be possible to presume the consent of the father on the basis of the paternal affection alone.

The most visible feature of *pietas* was a respectful and dutiful conduct towards family members. In 259 the emperors Valerian and Gallien released a rescript²⁶⁰ aimed at protecting such a respectful conduct and foreseeing the possibility of punishing those who would violate it to an unacceptable degree. This option, however, could take place after the attempts to settle the disputes inside the family have failed:

It seems to be more proper for the disputes which have arisen between you and your children to be settled at home.

If, however, the matter is of such a nature that you deem it necessary to have recourse to the law in order to punish them for the wrong which they have inflicted upon you, the Governor of the province, if applied to, will order what is usually prescribed by law with reference to pecuniary disputes, and will compel your children to show you the respect which is due to their mother (*reverentiam debitam*), and if he should ascertain that their disgraceful conduct has proceeded to the extent of serious injury, he will severely punish their lack of filial respect and affection (*laesa pietas*).

The rescript deals with the due respect owed towards a parent as a legal obligation: the Governor of the province would compel the children to exhibit such a due respect to their mother (*reverentiam autem debitam exhibere matri filios coget*). Despite such a formulation, it is not probable that the duty of correct and respectable behavior was perceived as a legal duty *stricto sensu*. It is not clear what measures the Governor of the province applied to compel the children to show their mother due respect. As for the punishment, the rescript does not provide for it in the case of disrespect: the children

²⁶⁰ Valer./Gallien. C. 8, 46, 4.

were punished for severe injuries and offences (*inclementiores iniuriae*) to which their disgraceful conduct had proceeded.

The impression that the *pietas* represented a sort of right can also be obtained from the rescript of the emperor Gordian.²⁶¹ It employs the expression *ius pietatis*. However, this idiom does not always mean a right but sometimes also a relationship or its substance.²⁶² The text of Gordian's rescript should therefore read:

You should not, against the wishes of your mother, bestow freedom upon a slave whom she forbade to be liberated, so as not to appear to have violated the relationship of filial affection (*ne videaris iura pietatis violare*).

It is perhaps surprising that the emperor speaks of the substance of the relationship of filial affection (*iura pietatis*) and not simply of *pietas*. Yet it seems that the point was not filial affection as such but the behavior of the son in the framework of the relationship between mother and son, especially considered in the light of mother's right to forbid the manumission of a slave. This right seems to have been regarded as a crucial part of the relationship between mother and son imposing on the latter the duty to respect it. This consideration of the explicit requirement of the mother was regarded as a separate obligation of the son. If he acted contrary to the demand of the mother, his manumission would be regarded as impious.

f. Donations

In connection with donations, the imperial enactments refer to *pietas* in two ways. On the one hand, donations made for pious, i.e. charitable purposes, were privileged. According to Justinian's law²⁶³ a donation amounting to the sum of three hundred solidi was valid without registry. Donations above that sum required registry. Without it they were valid only to the amount fixed by law. The exceptions to this rule were the imperial donations and donations made for charitable purposes. The latter were valid without registry up to the sum of five hundred solidi.

²⁶¹ Gord. C. 7, 2, 7.

²⁶² See e. g. Marc. D. 1, 1, 12: *Nonnumquam ius etiam pro necessitudine dicimus veluti "est mihi ius cognationis vel adfinitatis."* (Sometimes the term "*ius*" is used to denote a relationship, as for instance, "I am related by the consanguinity or affinity to such-and-such a person").

²⁶³ Iust. C. 8, 53, 34.

The other reason to refer to *pietas* was the revocation of gifts. It was possible to revoke a gift when the recipient lacked filial affection or because of his or her irreverent comportment towards the donor. The emperors Theodosius II and Valentinianus III published a law²⁶⁴ according to which a father, a grandfather or a great-grandfather could revoke donations made to a son or a daughter, a grandson or a granddaughter, or a great-grandson or a great-granddaughter, who had been emancipated, but only in the case when the recipient violated piety (*contra ipsam venire pietatem*) and in other cases specifically enumerated by the law. The violation of piety had to be established by perfectly clear evidence (*edoctis manifestissimis causis*).

We can imagine that *pietas* in this text was related to grateful, dutiful and respectful conduct towards the giver. It was probably not limited to gratefulness alone but also comprised the traditional features required by *pietas* in the context of the relationship between relatives. The text does not provide much support for the supposition that the donor could revoke a donation only in the case of a particularly grave act of impiety towards him. It is more likely that he could do that also in case of general improper behavior of the recipient.

In some cases, the mother could also revoke the donation she gave to her son. This was true for those mothers who have been married only once.²⁶⁵ They were entitled to revoke a donation made to their sons, if these behaved ungratefully. The son who was accused by his mother of impious behavior (*is qui a matre impietatis arguitur*) had to restore to her whatever he had received under the title of donation. Here too, the term *impietas* does not only relate to gratitude but covers a broader spectrum of the dutiful conduct of a son towards his mother. The mother could not revoke a donation which was sold, donated, exchanged, bestowed by way of dowry, or alienated for any other lawful reason, before the mother instituted proceedings.

²⁶⁴ Theod. /Valent. C. 8, 55, 9.

²⁶⁵ Constantius/Constans C. 8, 55, 7 pr. See also Theod. /Valent. C. 8, 55, 9, 4: We think that enough has already tacitly been provided with reference to other mothers of monstrous baseness and low virtue; for who can imagine that any favor should be granted them, as we are willing to accord none of these privileges to women who have merely contracted a second marriage?

The mother who contracted a second marriage could not revoke the donations for the reason of ingratitude because, according to Justinian's Novel,²⁶⁶ her second marriage could have contributed to the disrespectful behavior of the son. Nonetheless, she could revoke a donation if her son made an attempt on her life, if he raised his impious hand upon her, or tried to deprive her of all her property. In such cases it was apparent that the reason for his ingratitude was not the second marriage of the mother.

g. Inheritance

As we have already pointed out, *pietas* in the sense of a dutiful and respectful conduct was not limited to the lifetime of the persons concerned. The heirs owed it to the person of the deceased testator. In an event that the testator was murdered, the *pietas* of the heirs of over twenty five years of age required to avenge him. According to the law of Severus and Antoninus,²⁶⁷ the heirs who knowingly omitted this duty of piety (*officium pietatis*) had to surrender all the property of the estate to the imperial treasury. Prosecuting the murderer of the testator was part of the dutiful conduct required of an heir. However, bringing the accusation was not enough. The emperor Alexander replied in a rescript²⁶⁸ that it was consistent with the filial duty of the heirs (*convenit pietati*) not only to bring an accusation against those who were suspected to have murdered the testator but also to contest the appeal of any one of them. The heirs were obliged to do so despite the fact that some of the accused were already sentenced and punished. Thus, to fulfill the duty of piety it was not enough to initiate the procedure but to do the utmost in seeking the condemnation and the punishment of the murderer.

Considerations of piety could also serve as arguments for the interpretation or even correction of the last will. In a case where a mother who appointed her two sons her heirs died during the birth of her third son and because of that could not have appointed him her heir, the emperors Severus and Antoninus replied the injustice of the unexpected event should be rectified by the conjecture on what the mother would have done in her maternal affection (*coniectura maternae pietatis*). According to the rescript, the third son should be given equal share of the estate with his two brothers.

²⁶⁶ See Nov. 22, 35.

²⁶⁷ Sev./Ant. C. 6, 35, 1 pr.

²⁶⁸ Alex. C. 6, 35, 6, 1.

The conjecture of maternal affection in this case refers to what a normal mother would do if she could make her testament. It was obvious that the mother would not omit her third son without good reason. To the emperors it seemed compelling to interpret the will that way. Without that correction, the third son could institute proceedings to declare the will undutiful (*querela inofficiosi testamenti*). According to the rescript this would be necessary if the mother appointed as her heirs strangers, i.e. persons who were not members of the family. In such a case it would not be possible to accommodate the third son simply by interpreting the will conjecturing what the mother would have done in her maternal affection.

We have already mentioned the complaint because of a testament contrary to duty (*querela inofficiosi testamenti*). It was established to amend the violations of the parental duty of the testator who failed to appoint his children as his heirs. In a very instructive rescript, the emperors Diocletian and Maximian²⁶⁹ gave permission to use this action in the case when the daughter was disinherited because her father was upset by her refusal to separate from her husband. The emperors allowed the use of the action under the condition that she had otherwise not violated her duties of piety (*pietatis religionem*) towards her father. This means that her usual behavior towards her father was impeccable in terms of piety and was in accordance with her filial duties. The rescript mentions only the filial duty of the daughter. It is, however, obvious that the father for his part owed a similar duty to his daughter. The violation of this duty was the reason for allowing the daughter to use the action of undutiful testament. The father violated *pietas* because he disinherited the daughter without any good reason. The reason for cutting her out of his will could be a reproachable comportment of the daughter. For these grounds, the rescript insisted on impeccable behavior of the daughter that gave the father no reason for excluding her from inheritance.

The same idea can also be found in the statute of the emperor Antoninus.²⁷⁰ The emperor stipulated that the parents should not be deprived of their judgment regarding the distribution of their estates between their children, provided those who were entitled to succeed the deceased if he died intestate and who behaved in accordance with their

²⁶⁹ Diocl./Maxim. C. 3, 28, 18.

²⁷⁰ Ant. C. 3, 28, 8 pr.

filial duties have obtained by the will of their parent a fourth of the share each would inherit by intestacy. In such a case, the heirs could not initiate the complaint because of an undutiful will (*querela inofficiosi testamenti*). If, however, the behavior of a child violated the filial duty, the testator could disinherit him. The phrase *qui pietatis sibi conscius est* relates to the behavior of a child that gave the testator no reason to disinherit him.

III. The survival of the Roman *pietas* in modern law?

In Roman legal sources *pietas* for the most part relates to the reciprocal and dutiful comportment between relatives, especially between the parents and their children. It was used as a guideline in judging the suitability of a particular behavior, in evaluating the substance of claims, the interpretation of wills and their provisions, etc. *Pietas* was one of the values that increased and refined the possibilities of Roman law to treat more adequately the inter-personal relationships marked by value-related elements.

In a way, the Roman *pietas* influenced legal developments without being a legal category. Bearing both moral and legal characteristics, it was transposing moral considerations into legal sphere thereby making their presence in legal reasoning more evident and obvious. It is possible to say that the concept of *pietas* contributed and added a new quality to the Roman law, making it more useful and just.

It would thus be interesting to know whether this concept, together with so many other Roman legal concepts and notions, also found its way into modern law.

At first glance, this might seem unlikely because at least initially *pietas* was an articulation of the basic values of Roman republican society and tradition. It was, as we mentioned above, one of the most original Roman virtues and an important expression of the ancestral tradition (*mos maiorum*). As far as we can assume on the basis of Roman literary texts, its field of application was larger than in the classical legal texts and in imperial enactments where it was more or less limited to the inter-family relations and relations similar to them. The classical Roman texts don't mention the religious dimension of piety which constituted an important element of the original

notion. In quite a limited – and different – way it appears in imperial enactments, especially in those of Justinian.

And yet, despite its Roman origins the substance and characteristics of Roman *pietas* are more general and can also be found in other societies. Its main trait – a respectful comportment towards parents and other family members – can be regarded as constituting a part of the general human cultural heritage. Also, most of Roman legal texts related to piety deal with everyday problems which were not specific to the Roman antiquity but can largely be found in most societies. All the same, it is tempting to believe that, along with so many other Roman legal notions, the concept of *piety* survived the decay of the Roman empire and found its way into modern law, not because of its originality and uniqueness but because it was part of the Roman legal sources that were subject to reception.

Roman law was transmitted to modern European law through the medieval discovery and elaboration of Justinian's legislative work.²⁷¹ Bearing in mind the differences between the Roman and medieval society, it seems unlikely at first glance that those of the applications of the Roman *pietas* which were related to particular social and legal conditions of the Roman times could interest medieval lawyers elaborating the Codification of Justinian and paving the way for the reception of Roman law. And yet, taking into consideration the method of medieval legal scholars who were using the law of Justinian's codification in its complexity as a valid law and were to that purpose extending and applying Roman concepts as undisputable authority, this was not necessarily the case. Furthermore, there were strong similarities between the basic patterns and values of inter-family relations in Roman and medieval societies. The main

²⁷¹ The literature on the subject is enormous. See some basic works on the topic: Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter*, Vol. I – VII, 2. Aufl. Heidelberg 1834-1851 (reprint Darmstadt 1956), Paul Koschaker, *Europa und das römische Recht*, 2. Aufl., C. H. Beck, München und Berlin 1953, Francesco Calasso, *Medio evo del diritto*, Giuffrè, Milano 1954, Manlio Bellomo, *L'Europa del diritto commune*, 8. ed., Cigno Galileo Galilei, Roma 1998, Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800*, Washington DC: Catholic University of America Press 1995, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Erster Band, Mittelalter (1100 – 1500), Die gelehrten Rechte und die Gesetzgebung, Veröffentlichungen des Max-Planck-Instituts für europäische Rechtsgeschichte, Herausgegeben von Helmut Coing, C. H. Beck, München 1973, Hermann Lange, *Römisches Recht im Mittelalter*, Band 1, Die Glossatoren, C. H. Beck, München 1997, Hermann Lange und Maximiliane Kriechbaum, *Römisches Recht im Mittelalter*, Band 2, Die Kommentatoren, C. H. Beck, München 2007, Stein, Peter, *Roman Law in European History*, Cambridge University Press, New York 1999, *The Creation of the Ius Commune: From Casus to Regula*, Edited by John W. Cairns and Paul J. du Plessis, Edinburgh University Press, 2010.

features of Roman *pietas* enhanced by Christian precepts and values were present both in medieval and later legal developments in Europe. But this is not only true of the basic concept of Roman *pietas*, i.e. of respectful treatment of family members. Traces of the Roman-style paternal power, of limited capacity of women to own property or to act independently, etc., have survived to the time of European codifications of the 18th and 19th centuries.²⁷² In these and some other points related to family relations, Roman concepts obviously still shaped the European legal and cultural tradition as late as the end of the 18th century.

The Roman concept of *pietas* found its way into modern European codifications through legal texts as a part of a broader moral and religious tradition. The concept of *pietas* requiring a reciprocal and dutiful comportment between relatives was part of Western culture together with the idea of family²⁷³ and family relations that dominated the Western culture more or less until the 20th century. It is therefore possible to assume that, as far as the basic concept of *pietas* are concerned, Roman law could influence and enrich the development of law in Europe because it was compatible with the value system of the European societies and because of its conceptual perfection.

²⁷² See e. g. Codex Maximilianeus Bavaricus Civilis, Erster Theil, Fünftes Capitul: Von Väterlicher Gewalt (Patria Potestate), Was sie seye? wem selbe gebühre, und wie sie erlangt werde? §. 1. Die Väterliche. Gewalt ist eine Herrschaft, welche der Vatter über seine Kinder denen Rechten gemäß auszuüben hat. Sie gebührt nur dem Vatter allein, nicht aber der Mutter, oder anderen, und erstreckt sich über alle Descendenten, sowol in erst- als zweyt- und weiterer Generation, so lang die von der ersten selbst noch nicht aus sothaner Gewalt getreten und sui Juris worden seynd, es wird auch dieselbe nicht nur durch die Ehe, sondern auch in gewisser Maaß durch die Legitimation oder Adoption erlangt. See also Code Civil (1804) Article. 375 ss and Allgemeines Landrecht für die Preußischen Staaten II. Teil, II. Titel: Von den wechselseitigen Rechten und Pflichten der Aeltern und Kinder, Zweyter Abschnitt: Von den Rechten und Pflichten der Aeltern und der aus einer Ehe zur rechten Hand erzeugten Kinder, so lange die letztern unter väterlicher Gewalt stehn, Allgemeine Pflichten derselben, §. 61. Kinder sind beyden Aeltern Ehrfurcht und Gehorsam schuldig (Children owe both parents respect and obedience). §. 62. Vorzüglich aber stehen sie unter väterlicher Gewalt (But mainly they are in the power of their father). The father even decided how long the mother had to breast-feed their child (§ 68 Wie lange sie aber dem Kinde die Brust reichen solle, hängt von der Bestimmung des Vaters ab). To this point see Barbara Dölemeyer, *Frau und Familie im Privatrecht des 19. Jahrhunderts*, in: *Frauen in der Geschichte des Rechts: von der frühen Neuzeit bis zur Gegenwart*, Herausgegeben von Ute Gerhard, C.H.Beck, München 1999, pp. 633 ss.

²⁷³ On this topic see Judith Evans Grubbs, *Law and Family in Late Antiquity. The Emperor Constantine's Marriage Legislation*, Oxford University Press, Oxford New York 1999; Suzanne Dixon, *The Sentimental Ideal of the Roman Family*, in: *Marriage, Divorce and Children in Ancient Rome*, Edited by Beryl Rawson, Clarendon Press Oxford 1992, p. 99 ss; Laurent L. J. M. Waelkens, *Medieval Family and Marriage Law: From Actions of Status to Legal Doctrine*, in: *The Creation of Ius Commune, From Casus to Regula*, Edited by John W. Cairns and Paul J. du Plessis, Edinburgh Studies in Law, Volume 7, Edinburgh 2010, Reprinted 2012, pp. 103 ss.

To find some traces of the Roman concept of *pietas* in modern (European) law it is necessary to define the topics in which the Roman jurists referred to it. By and large they are as follows:

- the relationship between parents and children, comprising the duty of parents to support their children and the duty of children to support their parents, as well as restrictions on legal proceedings against close relatives;
- the mourning of dead relatives and respecting a certain time period after the death of the husband in which a widow should not remarry;
- the burial of the deceased and the reimbursement of funeral expenses;
- the reimbursement of costs in the case of a management of business of another without authorization;
- the interpretation of wills in favor of close relatives and challenging a will in case of disinheritance or passing-over of a close relative; the acceptance of an inheritance and acting as an heir;
- donations for charity.

A.The method

Trying to find and prove the influence of one legal system upon another is not easy. It is above all the problem of method. How to prove a direct influence? The same expressions with the same meaning in different legal systems can serve as indicators and in some cases to an extent also as evidence of correlation and possible mutual influence. Still, what can be regarded as proof of influence? Is the mere fact that a similar solution to the same legal issue has been developed already proof enough that it has been taken from an earlier legal system?

The best proof of the influence of Roman law would be a direct reference to some Roman text or authority in the context of a concrete decision. This can be true for legal theory, doctrine and case law but not when Roman law influenced and inspired legislation. There can be no quotation of sources in a statute. The impact of Roman law upon European Civil codes of the 18th and 19th century was not linear and direct in terms

of transposing a Roman rule directly into the text of a new Code. It was rather indirect, complex, gradual and not always clearly identifiable.²⁷⁴ Roman law influenced modern law through its medieval and later elaborations.

It was the process of the reception of Roman law that formed European civil law.²⁷⁵ Medieval lawyers regarded the codification of Justinian as valid law and applied it as such, adapting it to the new circumstances. Accordingly, its application was simultaneously its transformation and adaptation. Roman law which was regarded as “common law” (*ius commune*) was ever more affected by domestic law (*ius proprium*). From 16th century onwards, the Justinian’s Digest was applied “in a modern way” (the so called *usus modernus Pandectarum*²⁷⁶), i.e. not as a whole that had to be respected as an apodictic authority but selectively and in accordance with the domestic law. This process further obscured the demarcation between the original Roman law and modern law. In a way, the private law of continental Europe was like a tree: from Roman roots grew a new tree. Roman law was an essential part of it, but what has come out was no longer Roman law *stricto sensu* but rather its fruit.²⁷⁷ Although they were the natural consequence of the reception and of the *ius commune*, the codifications of private law brought to an end the direct use of the latter.²⁷⁸ They contained a lot of new and also a

²⁷⁴ On this topic see: Alan Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, Scottish Academic Press, 1974; the same: *From Legal Transplants to Legal Formants*, *American Journal of Comparative Law* 43, 1995, pp. 469 ss; the same, *Aspects of Reception of Law*, *American Journal of Comparative Law* 44, 1996, pp. 335 ss; Pierre Legrand, *The Impossibility of Legal Transplants*, *Maastricht Journal of European and Comparative Law*, 4, 1997, pp. 111 ss; the same: *Against a European Civil Code*, *The Modern Law Review*, Vol. 60, 1997, pp. 44 ss; Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain Legal Transplants*, *American Journal of Comparative Law*, Vol. 51, 2003, pp. 839 ss; H. Patrick Glenn, *The National Legal Tradition*, *Electronic Journal of Comparative Law*, vol. 11.3 (December 2007), <http://www.ejcl.org>, p. 1 ss; Alberto M. Musy, *The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures*, *Global Jurist Advances*. Volume 1, Issue 1, pp. 1 ss.

²⁷⁵ Very brief overview gives Thomas Glyn Watkin, *An Historical Introduction to Modern Civil Law*, Ashgate Dartmouth, Aldershot 1999, pp. 132 ss.

²⁷⁶ This period took its name from the title of a commentary of the Pandects published from 1690 on by Samuel Stryk: *Specimen usus moderni pandectarum* (An Example of a modern use of Pandects).

²⁷⁷ See *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*. Von Rudolf Jhering, Geh. Justizrathe u. ordentl. Professor der Rechte in Gießen. Erster Theil. Zweite, verbesserte Auflage. Leipzig 1866, pp. 9 ss. See also: Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2. Auflage, Göttingen 1967 (reprint 1996), especially § 12 and 13. See also Gerhard Wesenberg, Gunter Wesener, *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung*, 4. Auflage, Wien 1985.

²⁷⁸ More on this Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*. Clarendon Law Lectures, Oxford 2004. Lecture 1: The End of an Era: Transformation of Scholarship in Roman Law, pp. 1 ss.

lot of Roman law. It is often possible to deduce the influence of Roman law by comparing their solutions to the Roman ones.

Yet a similar solution is not necessarily a proof of influence. It is well known that comparable solutions can emerge independently and without reciprocal influence. On the other hand, a direct influence can produce a solution not entirely identical. A particular regulation could prove insufficient or wrong and influence a new solution in a negative way, giving argument for change or adaptation.

It is difficult to speak about civil law in Europe without reference to a particular national system. We will therefore focus on the three most prominent and original examples of European civil codes which can be regarded as representative of different legal traditions. Despite their age, all three are still in use. The codes that will be examined are the French *Code civil* of 1804, the Austrian ABGB of 1811 and the German BGB of 1896. Despite the obvious influence of Roman law, we will not include in the comparison the two older codes, i.e. the *Codex Maximilianeus Bavaricus Civilis* of 1756 and the *Allgemeines Landrecht für die Preußischen Staaten* of 1794, because they are no more in use and also had much less influence on the legal development than the aforementioned ones.

Since civil law proceeds from abstraction and its core principles are codified it seems appropriate to seek the traces of the concept of *pietas* in the abovementioned codes.

We will also try to see if there are some traces of Roman law in the modern US law. Because it is part of the common law tradition we will focus on the case law. In trying to identify the impact of the Roman *pietas* upon the US case law we will rely upon direct references to Roman law. The reason for such an approach is that there was no proper reception of Roman law in the common law countries and the influence of Roman law upon the common law was rather indirect.²⁷⁹

We will try to trace different aspects of the concept of Roman piety in modern law separately for each of the topics mentioned above. This, however, poses several terminological, methodological and conceptual problems. The main practical problem in

²⁷⁹ See William L. Burdick, *The Principles of Roman Law*, pp. 56 ss; *Roman Law and Common Law, A Comparison in Outline*, By late W. W. Buckland and Arnold D. McNair. Second edition revised by F. H. Lawson, Cambridge at the University press 1965, esp. pp. XV ss.

this endeavor is the terminology. How are we to define English and other equivalents of Roman *pietas* and of some other Roman terms mentioned in relation to it? How do we choose from among the different equivalents of a Latin term the one that in the modern case law is closest to the meaning in Roman legal texts? Yet, since *pietas* was a sort of a common name for a certain type of behavior, it seems appropriate not to seek the same terminology but rather the same or similar concepts and solutions.

There is some skepticism regarding a possible influence of Roman law upon the US case law. Given the fact that there is little to no Roman law in the curriculum of American law schools, it is much less known to American lawyers than to the lawyers of civil law countries.²⁸⁰ It is therefore almost surprising to see how often Roman law is mentioned in the case law of the US courts. This is especially true for the cases that were decided in the course of the 19th century, although there are also some recent cases referring to Roman law. The reason behind this is not only a broad education of some justices but also the legal tradition in which there was from time to time some inclination towards civil and comparative law, albeit this was more true of the earlier periods of American jurisprudence than of the more recent times. Some American judges were broadly educated and in addition possessed a remarkable level of knowledge in the field of civil and Roman law.

In the Introduction to his Commentaries on the Laws of England,²⁸¹ which upon their publication in America in 1771 “became a sort of gospel upon the law for all American judges, lawyers, and law students”,²⁸² Blackstone explained his position on what role the Roman law should play in legal education and in common law. According to him the imperial, i.e. Roman laws have not been “totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman.” He was in favor of the “study of the civil law,

²⁸⁰ Unfortunately, this assumption is more and more a fiction since the number of European countries where Roman law is still a compulsory subject in legal curricula is steadily decreasing. Consequently, legal Latin and Roman law are no more self-evident parts of legal education in civil law countries of Europe.

²⁸¹ See Introduction, Section the First: On the Study of Law, the online text in The Avalon Project, Documents in Law, History and Diplomacy, Yale Law School, Lillian Goldman Law Library, in memory of Sol Goldman, available at http://avalon.law.yale.edu/subject_menus/blackstone.asp.

²⁸² W. L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, New York 1938, p. 35

considered (apart from any binding authority) as collection of written reason". But the study of Roman law should not replace the one of English law:²⁸³

[W]e must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the praetor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament ... Without detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions.

William S. Holdsworth, in his *History of English Law*,²⁸⁴ states that it would not be true to say that English law owes nothing to Roman law. In his view, at a different period the contact with Roman law proved to be helpful to the development of English law: "We have received Roman law; but we have received it in small homoeopathic doses, at different periods, and as and when required. It has acted as a tonic to our native legal system, and not as a drug or a poison."

An even more favorable opinion on the role of Roman law was held by Sir Henry James Sumner Maine. In 1856 he wrote about

the immensity of the ignorance to which we are condemned by ignorance of Roman law. It may be doubted whether even the best educated men in England can fully realize how vastly important an element is Roman law in the general mass of human knowledge, and how largely it enters into and pervades and modifies all products of human thought which are not exclusively English.²⁸⁵

²⁸³ Blackstone, *Commentaries on the Laws of England*. Book the First. Part the First. Introduction. Of the Study, Nature, and Extent, of the Laws of England. Section the First. On the Study of the Law. Rendered, Edited and with an Introduction by Jon Roland. The HTML version of Tucker's Blackstone is published on the Internet by Constitution Society, accessible at <http://www.constitution.org/tb/tb-1101.htm>.

²⁸⁴ Sir William Searle Holdsworth, *A History of English Law*, Vol. IV, Little Brown 1924, p. 292 s. A brief overview of the influence of Roman law upon English law provides William L. Burdick, *The Principles of Roman Law and their Relation to Modern Law*, New York 1938, pp. 56 ss.

²⁸⁵ *Roman Law and Legal Education*. By H. J. S. Maine, LL. D., late Queen's Professor of Civil Law, Trinity Hall, Cambridge Essays contributed by Members of the University. 1856, p. 3.

There were adherents of civil law and thereby also of Roman law in the United States, too, especially during the “Golden Age” of American law.²⁸⁶ Throughout this period, but especially in its middle decades,²⁸⁷

a determined effort was made by a succession of zealots to introduce into the United States the institutions and methods of the civil law, if not as a substitute for, at least as a supplement to, those of the common law. The advantages of the civil law were trumpeted from Massachusetts to South Carolina with almost crusading enthusiasm.

These endeavors were largely unsuccessful. Nevertheless, there were many broadly educated judges who for their part made use of their erudition by referring to Roman legal sources. There are many famous cases proving this sort of erudition and comparative approach. One of them was the New York Chancellor Kent. In *Underhill v. Van Cortland*,²⁸⁸ decided in 1817, he includes extensive quotations from Justinian’s Digest and Institutes, as well as Vinnius’ Commentary,²⁸⁹ and concluded by saying (369): “This award would be declared binding by Vinnius, sitting under the civil law; it must be equally so under the law of this country.”

Another famous example of the comparative approach and extensive quotations of Roman legal sources is found in the memorandum “The Batture at New Orleans”, in which President Thomas Jefferson justified his order to stop further works on the so called *batture*, i.e. land created by the alluvion of Mississippi. He supported his

²⁸⁶ The term comprising the period from roughly 1820 to 1860 was used by Charles M. Haar. See his book *Golden Age of American Law*, George Braziller New York 1965.

²⁸⁷ Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, in: *The Character and Influence of the Roman Civil Law, Historical Essays*, The Hambeldon Press, London and Ronceverte 1988, p. 411.

²⁸⁸ See: *Reports of Cases Adjudged in the Court of Chancery of New-York*. By William Johnson, Counsellor at Law. Vol. II. Containing the cases from January, 1816, to September, 1817, inclusive. Second Edition, Revised and Corrected. Philadelphia: Published by E. F. Backus. 1837, p. 339 ss, especially p. 367.

²⁸⁹ Arnold Vinnius wrote a very influential Commentary on the Institutions, in which he presented Dutch Law in a broad historical and philosophical perspective. The Commentary, written in Latin, was used and published through Europe. See: Arnoldi Vinnii J. C. in quattuor libros Institutionum imperialium commentaries Academicus & Forensis. Editio Quarta, Ab Auctore recognita, novaque & largiore cum florum, tum rerum forensium aspersione exornata atque adaucta. Amsterdami, Apud Danielelem Elsevierum, 1665. Cum gratia & privilegio Sacrae Caesareae Majestatis. See also: Arnoldi Vinnii JC. In Quatuor Libros Institutionum Imperialium Commentarius Academicus, et Forensis Jo. Gottl. Heineccius JC. Recensuit, & Praefationem Notulasque adjecit. Luguduni, Typis Petri Bruyset 1755 or the German translation of a part of the Commentary: *Arnoldus Vinnius, Institutionenkommentar Schuldrecht : Text und Übersetzung*. Ins Deutsche übersetzt von Klaus Wille. Mit einer Einführung von Reinhard Zimmermann, C. F. Müller Verlag Heidelberg 2005.

argument with profuse quotes from Justinian's Digest and Institutes. Jefferson's line of reasoning was almost entirely based on Roman law. It gives a striking example of his excellent legal self-education.²⁹⁰

There were many similar cases showing both expertise and interest in comparative, civil and Roman law. There can therefore be no serious doubt about the influence Roman law exercised on English and American law. What can be disputed is the degree and maybe also the manner of its influence and not the fact as such. In this way, Roman law was to some extent part of the legal education or culture without being part of the valid law.

As far as the European Civil codes are regarded, there is no doubt that they were to a considerable extent products of the reception of Roman law.

The majority of Roman legal texts dealing with piety are related to different aspects of relationship between close relatives. In these cases *pietas* identifies the contents, i.e. the duties and rights of a proper conduct between such persons and restraining the abuse of paternal power.

B. The Civil codes

All three civil codes we will examine are over a hundred years old, two of them even over two hundred. Since their promulgation, all three have often been amended. It is obvious that their creation was influenced by Roman law or by *ius commune* much more than their later amendments. In our endeavor to find traces of the concept of Roman *pietas* therein we will therefore try to focus on their original texts which replaced the direct use

²⁹⁰ See: The Writings of Thomas Jefferson, Definitive edition containing his autobiography, notes on Virginia, parliamentary manual, official papers, messages and addresses, and other writings, official and private. Now collected and published in their entirety for the first time including all of the original manuscripts, deposited in the Department of State and published in 1853 by order of the Joint Committee of Congress, with numerous illustrations and a comprehensive analytical index. Albert Ellery Bergh Editor, Vol. XVIII. Issued under the auspices of The Thomas Jefferson Memorial Association of the United States, Washington, D. C. 1907, pp. 1-132 or The Writings of Thomas Jefferson, Being his Autobiography, Correspondence, Reports, Messages, Addresses, and Other Writings, Official and Private. Edited by H. A. Washington, Volume 8, Part III - The Batture at New Orleans, Cambridge University Press 2011, pp. 507 ss. A brief account of the text gives Henry C. Montgomery, Thomas Jefferson, Admirer and User of Roman Law, Synteleia V. Arangio-Ruiz, Jovene Napoli 1964, Vol. I, pp. 170 ss. See also P. Stein, The Attraction of the Civil Law in Post-Revolutionary America, in: The Character and Influence of the Roman Civil Law, Historical Essays, The Hambeldon Press, London and Ronceverte 1988, pp. 418 ss.

of Roman law or of *ius commune*. For the same reason we will primarily focus on the literature of that period dealing with the original versions of the three aforementioned civil codes. Their later changes were obviously much less influenced by Roman law.

a. Reverence towards parents and other aspects of inter-family relations

In Roman law, *pietas* primarily influenced the complex of inter-family relations. This complex is marked by strong emotional, social and material elements. Only a part of it has a direct legal nature and can be legally regulated. So, it is e.g. to some extent possible to legally regulate the social and material relations between relatives but not also the emotional ones. The correctness and quality of these relations cannot be transposed into a legal notion and cannot be properly brought into the legal sphere. Their largely emotional nature, which can decisively influence the decisions and shape the inter-family relations in both the social and material sphere, eludes legal assessment and legal regulation.

The ancient Roman society tried to shape and influence this sort of relations through the so-called ancestral custom (*mos maiorum*). It defined both the nature and the due quality of family relations sanctioning its disrespect by religious sanctions, stigmatization and social pressure. Abiding by or disregarding the *mos maiorum* was under certain circumstances also taken into consideration in deciding legal disputes. The crucial part of ancestral customs was the system of traditional Roman values. Among them, an important role was played by *pietas* which helped determine the right measure and the proper quality of different aspects of family relations.

Without it becoming a legal category, it had evident influence in the legal sphere. Those taking decisions in legal disputes were referring to it when weighing concrete actions related to family relations. Comparing concrete behavior with the established idea of *pietas*, they could take it into consideration with regard not only to the outward manifestations of those relations but also to their quality and substance, which were crucial if actions were to be properly adjudicated.

Thus, *pietas* served as a value-based orientation for the evaluation of particular behavior. It also made it possible to take into account and to differentiate between

various motives behind a particular action. Taking into consideration the motive of *pietas*, it was e.g. presumed that the maintenance of a close relative was inspired by the wish to help him or her without the intention to later seek the reimbursement of costs. In the same way, it was possible to appraise an action or legal act by confronting it with the appropriate behavior required by the broader concept of *pietas*. The result of such an evaluation was e.g. the prohibition to sue a parent or the imposition of limitations of the testator's right to disinherit a person in his paternal power etc.

In Roman times, as we have seen, *pietas* influenced the development of law in an indirect way. It motivated and facilitated the emergence of a related case law and later also of a casuistic statutory law in the domain of family relations. Although it was originally not limited to family relations but also to the relations towards gods, the country and the dead, in legal texts it was, with some exceptions, predominantly focused on the relations among relatives.

In the field of Roman law, the concept of *pietas* was used as a sort of a catalyst inspiring and motivating decisions in concrete cases. One of the many Roman examples of this influence was the creation of the aforementioned complaint because of an undutiful will (*querela inofficiosi testamenti*), enabling a close relative whom the testator passed over to challenge his will.

The basic aspect of *pietas*, i.e. the reverence of parents, became part of a legal norm in some European civil codes of the 18th and at 19th century. Article. 371 of the original *Code civil*²⁹¹ stipulating that a child owes honor and respect to his parents, or similar provisions of the General state laws for the Prussian states (*Allgemeines Landrecht für die Preußischen Staaten*),²⁹² or of the Austrian Civil code²⁹³ can all serve as examples of

²⁹¹ Article. 371 Code civil : L'enfant, à tout âge, doit honneur et respect à ses père et mère (A child, at any age, owes honour and respect to his father and mother).

²⁹² ALR, Zweyter Titel, Zweyter Abschnitt, §. 61. Kinder sind beyden Aeltern Ehrfurcht und Gehorsam schuldig (Children owe both parents respect and obedience). The Civil code enacted in the Duchy of Bavaria in 1756 (Codex Maximilianeus Bavaricus civilis) contained an even broader provision. According to § 3 of the fourth chapter (Viertes Capitul) the children owed their parents not only the due obedience, respect and gratitude but also services without reward for the time they were maintained by them (Dahingegen seynd die Kinder 2dò ihren Eltern nicht nur zu gebührenden Gehorsam, Ehrfurcht und Dankbarkeit, sondern auch so lang sie den Unterhalt von ihnen geniessen, zur gewöhnlich- und anständiger Dienstleistung verbunden ...).

²⁹³ Paragraph 144 of the Austrian Civil code: Die Aeltern haben das Recht, einverständlich die Handlungen ihrer Kinder zu leiten; die Kinder sind ihnen Ehrfurcht und Gehorsam schuldig. (The parents

transforming one of the aspects of *pietas* into a legal norm. This, however, brought about a substantial change of the role *pietas* played in the field of law in Roman times. Instead of helping to define, e.g., what a respectful relation between parents and children should look like, it became part of the problem since it was the legislator and not the ancestral custom or tradition that defined the content of honor, respect or obedience. For that reason, these notions (and not their application) inevitably became subject to legal interpretation.

This approach differed substantially from the Roman practice. There, the ancestral custom and its idea of *pietas* provided the lawyers with the knowledge of proper standards of a correct and dutiful comportment. This idea was an expression of a broader perception anchored in the tradition and customs. Therefore, the lawyers did not develop the concept but only applied and incorporated it in the case law. Thus the idea of *pietas* was a practical one and the lawyers could refer to it without the necessity to define, explain or to interpret it. They could use it as a more or less generally accepted standard. Since *pietas* was not part of law the lawyers (i.e. those taking legal decisions) referring to it could not change or re-interpret it. Furthermore, as part of the ancestral custom it was both stable and to some extent flexible, adapting itself to current understanding and values.

In the aforementioned civil codes, the concept was different because the reverence of parents became a legal notion and as such subject to legal interpretation. Although it is certain that respect for parents as a legal notion was still mirroring the system of values in the society, it was primarily shaped by legal interpretation and by the case law. Being part of a legal norm, the reverence of parents had to be interpreted as such. Although it is clear that the judges interpreted it in accordance with the prevailing system of values in the society, they were treating it as a legal notion rather than a moral one. This was an important transformation: what was earlier influencing the law from outside has become part of the law.

Does this mean that by incorporating some features of *pietas* into legal norms *pietas* lost its importance and role? It is possible to assume that much. Once the elements of

have the right to direct by mutual consent the acts of their children; the children owe them respect and obedience).

former Roman *pietas* have been introduced into legal norms, their role in the field of law has changed. They were no more helping to connect the legal sphere with the standards of behavior in the predominantly emotional sphere of inter-family relations. Even though they were formally legal, their substance was the same as before. They could not be entirely detached from the tradition and values in the society. Although this is true for many legal notions, it is maybe even truer for the influence of the concept of *pietas* upon law. It was not without influence but due to its particular nature it could never really become a legal notion. It is interesting to note that the direct references to the aforementioned elements of *pietas* have more or less disappeared from the civil codes. They were probably too vague and too far removed from the logic of the law. The main concept of a dutiful and respectful treatment among family members remained something that could not be wholly subordinated to legal logic.

It is possible to assert that the concept of Roman *pietas* influenced modern development of law in two ways – as a social value remaining outside legal regulation and as particular aspects of it becoming legal norms. The first element can be regarded as part of a general cultural tradition, which is permanently influencing the law, and the second as legal norms containing or referring to general legal values.

b. The French *Code civil*

Among the three civil codes in which we are going to trace various aspects of *pietas*, the French *Code civil* was probably the one most directly influenced by Roman law. Until its promulgation Roman law was, at least in some parts of France, valid law. Two of its redactors (Portalis and Maleville) originated from the area in which Roman law was still dominant (*pays de droit écrit*) and two (Bigot de Préameneu and Tronchet) from the area where the French customary law was in force (*pays de coutumes*).²⁹⁴ The Code took over numerous rules of Roman law as well as many rules of the Custom of Paris (*Coutume de Paris*).

²⁹⁴ A brief overview of the making of Code civil see in: Jacques Bouineau, Jérôme Roux, 200 ans de Code civil, Paris 2004, pp. 45 ss.

Roman law played an important role in the creation of the *Code civil*. The *travaux préparatoires* of the *Code civil*²⁹⁵ contain numerous discussions about whether to abide by a solution originating in Roman law or to seek a new one. Despite single opinions about the French being tired of Roman law regarded as alien to French customs²⁹⁶ or praising its perfection,²⁹⁷ those involved in the project were using Roman solutions as an important source of law worth being seriously deliberated. Thus, to a considerable extent *Code civil* can be regarded as a sort of modernized and systematized Roman law. According to Portalis, who responded to those criticizing the amount of Roman law in the new code, its main purpose was not to innovate but to produce clear rules. The structure of the *Code civil* was also largely influenced by Justinian's Institutes.

Analyzing the articles of *Code civil*, Polynice Alfred Henri Van Wetter came to the conclusion that out of 2.283 articles valid in Belgium²⁹⁸ 925 were in compliance with Roman law, 681 were neither fully conforming nor contrary to Roman law and 677 were contrary or unknown to Roman law.²⁹⁹ Without a thorough examination of his conclusions regarding specific articles, it is difficult to say whether his analysis is correct or not. But there can be no doubt that the influence of Roman law, was important, if not crucial, for the creation of the French Civil code.³⁰⁰

²⁹⁵ See Recueil complet des travaux préparatoires du Code civil. Par P. A. Fenet, Avocat à la Cour royale de Paris, Tome 1 – 14, Paris 1836.

²⁹⁶ See Recueil complet des travaux préparatoires du Code civil ..., Tome quatrième. Paris 1836, p. 27 : ... les Français ... fatigués des lois romaines étrangères à leurs mœurs

²⁹⁷ See Recueil complet des travaux préparatoires du Code civil ..., Tome onzième. Paris 1836, p. 152 : N'hésitons point à le dire c'est aux Romains que nous aurons le plus d'obligations, pour le perfectionnement de notre législation.

²⁹⁸ By the Treaty of Campo Formio (1797) the territory of Belgium was annexed to France. Thus, from its promulgation the French Code civil was valid also in Belgium. After the defeat of Napoleon and after Belgium became independent in 1830 it continued to use it. So, there is no doubt that the research of van Wetter applies also to the original text of the French Civil code.

²⁹⁹ Droit civil en vigueur en Belgique, annoté d'après le droit romain par P. van Wetter, professeur à l'Université de Gand, Gand 1872, p. VI.

³⁰⁰ See Code civil des Français , avec des notes indicatives des lois romaines, coutumes, ordonnances... qui ont rapport à chaque article ; ou Conférence du Code civil avec les lois anciennes ; Par Henri-Jean-Baptiste Dard (de l'Isère),... suivi d'une table générale des matières... par J. A. C..... 1805; Applications au Code civil des Institutes de Justinien et des cinquante livres du Digeste, avec la traduction en regard, par M. Biret, 2 Volumes, Paris 1824; Sérurier, C.. Précis historique sur les codes français, accompagné de notes bibliographiques françaises et étrangères sur la généralité des codes et suivi d'une dissertation sur la codification,... par C. Sérurier,.... 1845; Locré, Jean-Guillaume (1758-1840). Esprit du Code Napoléon, tiré de la discussion, ou Conférence... du projet de Code civil, des observations des tribunaux, des procès-verbaux du Conseil d'État, des observations du Tribunat, des exposés de motifs ... par J.-G. Locré,.... 5 Vol., 1805-1807; La législation civile, commerciale et criminelle de la France, ou Commentaire et complément des codes français ... par M. le baron Locré, Paris 1827. Les codes français annotés des

The regulation of the relationship between the parents and the children and even more that of the paternal power in the original text of the French Code civil shows some recognizable imprints of Roman law. In his explanatory memorandum commenting on Article 148, Portalis said:

It is nevertheless true that during the life of their father and mother, the children over the age of majority are still required to address the authors of their lives to request their consent, although the law may have declared that it was no more necessary. It was regarded as useful for the morals to revive this sort of cult rendered by the family piety (*cette espèce de culte rendu par la piété familiale*), of the character of dignity and so to speak of majesty which nature itself seems to have impressed upon those who upon the earth are, for us, the image and even the ministers of the Creator.³⁰¹

The term *piété filiale* was used in the discussion of the commission preparing the Code as well as in its commentaries.³⁰²

From the words of Portalis, we can assume that the influence of the Roman concept of *pietas* was not primarily terminological but substantive. It shaped the idea of reciprocal moral duties between family members. This much can also be deduced from the statement of the Tribune Gillet before the Tribunate (i. e. one of the four assemblies):

I am not talking about the reciprocal obligation per which the children are to nourish their parents in need. These are provisions of natural law sanctioned in advance by all honest hearts and which the gratitude united with the filial piety is rushing to fulfill.³⁰³

opinions de tous les auteurs qui ont écrit sur notre droit, les lois romains, des lois, ... par M. Lahaye,... M.M. Waldeck-Rousseau,... Giraudias et Ph.-Aug. de Morineau,... L. Faye.... Paris, Rennes 1840. See also *Roma Aeterna ? Controverse sur la filiation de la propriété napoléonienne* par Drieu Godefridi, - *Folia Electronica Classica* (Louvain-la-Neuve) –Numero 12 – juillet-décembre 2006, <http://bcs.fltr.ucl.ac.be/FE/12/Godefridi.htm#24>

³⁰¹ M. Portalis, Exposé des motifs, Procès-verbal du 19 ventôse an II, Tom II, page 511 (quoted from Recueil complet des travaux préparatoires du Code civil ..., Tome neuvième, Paris 1836, p. 148).

³⁰² See e. g. Les codes français annotés des opinions de tous les auteurs ... , p. 49 (in relation to Article 151) and p. 71 (in relation to Article 209)

³⁰³ See Recueil complet des travaux préparatoires du Code civil ..., Tome neuvième, Paris 1836, p. 182 : Communication officielle au tribunal. Le Corps législatif fit la communication officielle au Tribunal le 17

It is therefore necessary to seek the traces of the Roman concept of *pietas* in the substantial similarities of the provisions of the Code civil.

In some provisions, there is a clear resemblance to the Roman concept of *pietas*. Such is e.g. the aforementioned provision of Article 371 which stipulates: “A child, at every age, owes honor and respect to his father and mother.”³⁰⁴

Understandably, the Code does not speak about *pietas* or some other notion corresponding to its meaning. But the content can easily be compared to the one we met in the aforementioned Roman legal texts dealing with *pietas*. It is evident Article 371 articulates the basic idea of *pietas*, i.e. that of respectful behavior of the children towards their parents which find their practical application in some other articles of the *Code civil* (e. g. Art. 148).

Théophile Huc in his commentary of the *Code civil*³⁰⁵ suggests that the rule contains a principle of the Deuteronomy. To his view the redactors of the Code believed that by invoking this Deuteronomic principle they would give a proper standing to the paternal power. Intriguingly enough, in the footnote referring to his statement Huc does not quote the Deut. 5, 16, but exclusively Roman legal texts.

Huc also reports that there were demands to repeal Article 371. They were rejected by stating that Article 371 contained the principle which would be developed and determined by other articles in the Code and that on many occasions it could help and give support to the reasoning of the judges. According to Huc, retaining Article 371 was wrong because codes should not contain purely moral declarations which are not able to produce legal consequences.

ventôse an XI (8 mars 1803), et le 23. M. Gillet prononça le rapport à l'assemblée générale, au nom de la section de législation .

³⁰⁴ Article 371: L'enfant, à tout âge, doit honneur et respect à ses père et mère. The English translation is taken from : Code Napoleon; or, The French Civil Code. Literally Translated from the Original and Official Edition, Published at Paris, in 1804. By a Barrister of the Inner Temple. Translation attributed to George Spence (cf. Cushing's Anonyms: A Dictionary of Revealed Authorship and Halkett & Laing's Dictionary of Anonymous and Pseudonymous English Literature and in the Dictionary of National Biography). London: Published by William Benning, Law Bookseller, 1827. xix, 627 pages, published also on http://www.napoleon-series.org/research/government/code/book1/c_title09.html

³⁰⁵ Commentaire théorique & pratique du Code civil par Théophile Huc ; Conseiller à la Cour d'appel de Paris ; Professeur honoraire des Facultés de droit. Tome troisième ... Article. 312 à 515, Paris, Librairie Cotillon, 1892, p. 179.

Another early commentator of the *Code civil*, Jacques Marie Boileux,³⁰⁶ maintained that the principle of Article 371 was based upon the nature and the morals. To his view, its main purpose was to make clear to the children that the respect they owed their parents did not depend on the age or the paternal power. On the other hand, this religious and moral principle was not aimed at protecting those parents who behaved improperly against their children.

Other authors maintained that the main purpose of the rule was to prevent children from bringing an action against their parent in which the condemnation of the defendant involved the loss of social standing or would compromise his or her subsistence.

Van Wetter connects Article 371 with Pomp. D. 1, 1, 2 and Valer./Gallien. C. 8, 46, 4, 1. The first text gives two examples of the law of nations, i.e. of the (common) law of human race: “For instance, reverence towards God (*religio*), and the obedience we owe to parents and country.” Although Pomponius does not use the word *pietas*, the whole context could be characterized that way. The rescript of the emperors Valerianus I and Gallienus of 259, however, as already mentioned above, explicitly refers to *pietas* in the sense of filial reverence and affection.

Can we therefore maintain that Article 371 was influenced or inspired by the Roman law? It is difficult to assert that. There can certainly be no doubt that Article 371 bears resemblance to the basic concept of Roman *pietas*. But it also puts into words the biblical commandment requiring reverence towards parents.³⁰⁷ It is possible that Article 371 was inspired by both. Although formally a legal rule, it is in fact a moral precept implying certain system of values.

³⁰⁶ Commentaire sur le Code Napoléon contenant l'explication de chaque Article séparément, L'Enonciation, au bas du Commentaire, des questions qu'il a fait naître, les principales raisons de décider pour et contre, l'indication des passages des divers ouvrages où les questions sont agitées, et le renvoi aux arrêts ; par J.-M. Boileux ... , sixième Edition, corrigée et considérablement augmentée. Tome deuxième. Paris, Videcoq fils aîné, éditeur, 1852, pp. 240 ss.

³⁰⁷ See Exodus, 20: 12: Honor thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee (King James Version). Biret (Applications au Code civil des Institutes de Justinien et des cinquante livres du Digeste Volume 1, Paris 1824, p. 122), on the contrary, quotes to this article Ulp. D. 37, 15, 9.

In 1996, a new paragraph was added to Article 371. It stipulates that a child must not be separated from his brothers and sisters, except in the case where it is not possible to act otherwise or where the child's interest demands some other solution.³⁰⁸

We mentioned above a Roman case of the unhealthy slaves that the purchaser could return to the vendor (Ulp. D. 21, 1, 35). The vendor also had to accept the healthy ones if they could not be separated from the sick ones without a violation of the consideration of family ties (*pietatis ratio*). This would occur if brothers and sisters or parents and children were to be separated.

The basic idea behind the new provision of the *Code civil* is undoubtedly the same. In this particular case, however, it is very unlikely that the authors were inspired directly by the concept of *pietas*. Nevertheless, it is possible to assume that it is evidence of continuity in the form of a general cultural standard.

There are some further provisions of *Code civil* that can be brought in connection with the concept of *pietas*. Such are e.g. the provisions concerning the maintenance. They bear typical traits of the Roman legal tradition. By the act of marriage, married persons contract the obligation of nourishing, supporting and raising their children (Article 203). The children owe maintenance to their parents and other ancestors who are in need (Article 205). This obligation is reciprocal (Article 207). Maintenance has to be in proportion to the necessity of the receiver and the means of the giver (Article 208). Between the spouses there is also the obligation of mutual fidelity, help and assistance (Article 212).

These provisions are more or less identical with the Roman case law analyzed above. As we have seen with regard to the mutual duty of maintenance, Roman texts usually refer to *pietas* as its basis.³⁰⁹ The only visible novelty the French Code civil introduced in this connection is the extension of the obligation of maintenance to sons and daughters-in-law and fathers and mothers-in-law (Article 206). This duty, however, is conditioned on the existence of the affinity.

³⁰⁸ Article 371-5 (inséré par Loi n° 96-1238 du 30 décembre 1996 art. 1 Journal Officiel du 1er janvier 1997) L'enfant ne doit pas être séparé de ses frères et sœurs, sauf si cela n'est pas possible ou si son intérêt commande une autre solution. S'il y a lieu, le juge statue sur les relations personnelles entre les frères et sœurs.

³⁰⁹ See esp. Ulp. D. 25, 3, 5, and Sev./Ant. C. 5, 25, 4.

Another apparent difference between Roman law and the French *Code civil* in this respect is the provision of Article 204 stipulating that a child has no action against his father and mother for an establishment in marriage or otherwise. This means that giving a dowry is not an obligation and cannot be regarded as a fulfillment of a natural obligation. Giving a dowry is an act of generosity and suitability. It can be deemed only a moral and not a legal duty.³¹⁰

There were different positions on this issue in Roman law. According to Augustan *lex Iulia de maritandis ordinibus* the father had to provide a dowry to the children under his paternal power. A constitution of Severus and Caracalla extended this obligation to the provinces.³¹¹ Justinian changed it. According to his law, giving a dowry was regarded as an act of liberality. There was no respective legal obligation of a father.³¹² Since it was the Justinian's law that influenced later development of law, in this case, too, the *Code civil* is in harmony with Roman law.

c. The Austrian Civil code – ABGB

The Austrian Civil code (*Allgemeines Bürgerliches Gesetzbuch* – ABGB) is the second oldest codification of civil law in Europe still in use. It was enacted in 1811 and entered into force in 1812.³¹³ It was strongly influenced not only by the concept of natural law

³¹⁰ See Commentaire théorique & pratique du Code civil par Théophile Huc, Tome II, p. 217. See also Code civil des Français, avec des notes indicatives des lois romaines, coutumes, ordonnances... qui ont rapport à chaque article ; ou Conférence du Code civil avec les lois anciennes ; Par Henri-Jean-Baptiste Dard, p. 39, Fn. 1, Commentaire sur le Code civil : contenant l'explication de chaque article séparément,... (3e édition considérablement augmentée) par J. M. Boileux,... p. 182, Esprit du Code Napoléon, tiré de la discussion, ou Conférence... du projet de Code civil, des observations des tribunaux, des procès-verbaux du Conseil d'État ... par J.-G. Locré, Tome 2, pp. 313 ss. See also Biret, Applications au Code civil des Institutes de Justinien ..., Vol. 1, p. 79 quoting Roman sources.

³¹¹ See Marcian. D. 23, 2, 19. See Ausführliche Erläuterung der Pandecten nach Hellfeld, ein Commentar von D. Christian Friedrich Glück geheim Hofrathe und ordentlichem Lehrer der Rechte auf der Friedrich-Alexanders Universität in Erlangen, Fünf und zwanzigsten Theils erste Abtheilung, Erlangen in der Palm'schen Verlagsbuchhandlung. 1824, p. 55 ss.

³¹² Inst. C. 5, 11, 7, 2.

³¹³ More on the ABGB The Architecture of European Codes and Contract Law, Edited by Stefan Grundmann and Martin Schauer, Kluwer Law International, Alphen aan den Rijn 2006, pp. 84 ss. with lit. See also Werner Ogris, Elemente europäischer Rechtskultur, Böhlau Verlag, Wien Köln Weimar, 2003, pp. 311 ss and the new literature published on the occasion of the bicentenary of the ABGB, ESP. Festschrift 200 Jahre ABGB, Herausgeben von Constanze Fischer-Czermak, Gerhard Hopf, Georg Kathrein, Martin Schauer, Manz, Wien 2011. A condensed overview of the formation of the Austrian Civil code see in: Quellenausgabe des allgemeinen bürgerlichen Gesetzbuches samt vollständigem amtlichen Register von Dr. Ignaz Saxl und Dr. Felix Kornfeld, Wien 1906, pp. III ss.

but also by Roman law and domestic law.³¹⁴ These three groups of sources were interconnected in different ways.³¹⁵ Like the French *Code civil*, the ABGB adopted the “institutions system dividing its provisions into three areas: law of persons (*personae*), law of property (*res*), and actions (*actiones*).³¹⁶

In its initial version, the Austrian Civil code regulated the relationship between the parents and the children in a way similar to the French Civil code.

In the Austrian Civil code, there was also a general provision similar to Article 371 of *Code civil*. § 144 stipulated: “The parents have the right to direct by mutual consent the acts of their children; the children owe them respect and obedience.”³¹⁷ It is possible to assume that the second part of this rule was influenced by the cultural tradition which was also inspired by the Roman concept of piety. Its main message corresponds to the concept of *pietas* we have met in Roman texts. The duty of children to respect and obey their parents is not a legal category but a moral one.³¹⁸ As such it was not absolute. The children could disobey their parents requiring of them something illegal, immoral or irrational.³¹⁹

³¹⁴ See Ignacy von Koschimbahr-Łyskowski, *Zur Stellung des römischen Rechts im ABGB*, Festschrift zur Jahrhundertfeier des ABGB, 1. Juni 1911, Wien 1911, Bd. I, pp. 209 ss, Gunter Wesener, *Zur Bedeutung des Usus modernus pandectarum für das österreichische ABGB*. In: Friedrich Harrer, Heinrich Honsell, Peter Mader (Hrsg.): *Gedächtnisschrift für The Mayer-Maly. Zum 80. Geburtstag*. Springer Wien New York 2011, pp. 571 ss., Gábor Hamza, *Die Entwicklung des Privatrechts und die Römischrechtliche Tradition in den Österreichischen Erbländern /Erbländen/ und in Österreich*, AFDUDC, 13, 2009, pp. 321 ss.

³¹⁵ More on this G. Wesener, *Zur Bedeutung des Usus modernus pandectarum für das österreichische ABGB*, ... , p 573. Koschimbahr-Łyskowski, *Zur Stellung des römischen Rechts im ABGB*, pp. 214 ss. The main author of the Austrian Civil code Zeiller explains the relationship between Roman and natural law in his work on natural private law (*Das natürliche Privat-Recht von Franz Edlen von Zeiller*, Wien 1819, p. 49 s). See also the quotations of Roman sources to individual articles of the Austrian Civil code in *Quellenausgabe des allgemeinen bürgerlichen Gesetzbuches ...* Wien 1906.

³¹⁶ See § 14 of the Austrian Civil code.

³¹⁷ § 144 ABGB: Die Aeltern haben das Recht, einverständlich die Handlungen ihrer Kinder zu leiten; die Kinder sind ihnen Ehrfurcht und Gehorsam schuldig. The English translation of the original text of the Austrian Civil code see in: *General Civil code for all the German Hereditary Provinces of the Austrian Monarchy*. Translated by Joseph M. Chevalier de Winiwarter, Doctor in law, Advocate in Vienna, and legal adviser to her Britannic Majesty's Embassy at Vienna, Vienna 1866.

³¹⁸ See R. Bartsch in: *Kommentar zum allgemeinen bürgerlichen Gesetzbuch*, Herausgegeben von Dr. Heinrich Klang, Erster Band, Erster Halbband, Wien 1933, p. 864.

³¹⁹ See *Kommentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Österreichischen Monarchie*. Von Franz Edlen von Zeiller, Erster Band, Wien und Triest 1811, p. 326; *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuch von weiland Dr. Moritz von Stubenrauch*, Fünfte Auflage, Erster Band, Wien 1887, p. 237.

The first part of § 145 seems to contradict to some extent the traditional concept of paternal power (*vaeterliche Gewalt*) enacted in the ABGB. According to § 147 of the Austrian civil code, paternal power was formed by the rights pertaining to the father as the head of the family.³²⁰ For the most part it was focused on education, administration of the child's property and consenting to legal acts producing an obligation. Contrary to the Roman *paterfamilias*, his Austrian counterpart lost his power with the adulthood of a child. Paternal power was temporarily suspended if the father lost the use of his reason, was declared prodigal, sentenced to imprisonment of more than one year, emigrated without permission or was absent for more than one year without giving notice of his place of residence (§ 176).

The father lost his paternal power perpetually if he neglected the maintenance and education of his children (§ 177). Furthermore, the child whose rights were violated by his father's abuse of paternal power, but also everyone else who had knowledge of this situation,³²¹ could refer the matter to a court which could take suitable measures (§ 178). The provisions of §§ 177 and 178 of the Austrian Civil code resemble the abovementioned rescript of Trajan (Pap. D. 37, 12, 5), according to which the father who was treating his son contrary to the paternal duty (*contra pietatem*) had to emancipate him.

Similar to the Roman concept of *pietas* were also the rules of ABGB regulating the relationship between parents and children. According to § 137 of the ABGB, rights and obligations between parents and children arise with the birth of children. Initially the obligation of parents to educate and to provide for life was regulated separately for legitimate (§ 139) and illegitimate children (§ 166). The children born out of wedlock were recognized to have the same rights only with the amendment of the ABGB in 1914.³²²

It was principally the duty of the father to provide for the aliment of the children until they could provide for themselves, whereas it was chiefly the duty of the mother to take

³²⁰ See §§ 91 and 92 ABGB.

³²¹ As we have seen above the idea that anyone can inform the public authorities about the violation of *pietas* was known also in Roman law. We encountered it in connection with someone informing the authorities about a legacy dedicated to the redemption of captives (Leo. C. 1, 3, 28, 5).

³²² See Kaiserliche Verordnung vom 12. Oktober 1914, über eine Teilnovelle zum allgemeinen bürgerlichen Gesetzbuche, R. G. Bl. Jahrgang 1914, CXLIII Stück, Nr. 276, pp.115 ss.

care of their bodies and health (§ 141). The mother had to support the children if the father had no means or in the case of his death. If the same happened to the mother, the charge fell on the grandparents on both sides (§ 143).

Initially, Roman law treated an illegitimate child as a child without a father. Yet the child's relationship towards the father gradually improved. With the exception of children born of an intercourse that was either infamous, incestuous, or prohibited, the illegitimate children, especially those born out of a more stable relationship (e.g. with a concubine), were entitled to claim maintenance from their father. If the father died without legitimate children, they were also entitled to inherit part of his estate by way of testament or by intestacy. If the father who had legitimate children died intestate, his illegitimate children were not heirs but were entitled to receive from the legitimate children a certain sum determined in accordance with the judgment of a good citizen for their maintenance.³²³

According to the Austrian Civil code, the illegitimate children had the right to demand from their parents aliment, education and provision suitable to their property (§ 166).³²⁴ The father was the one chiefly obliged to provide aliment for illegitimate child, with the mother similarly obligated only if the father was not able to do so (§ 167). Despite his duty to support the illegitimate child, the father could not take it away from the mother as long as she would and could educate it (§ 168). The father could take it away from the mother if child's welfare was endangered by the way the mother was educating it (§ 169).

It is impossible to say to which extent the regulation of inter-family relations in the Austrian Civil code was inspired by the Roman concept of *pietas*. It is possible to maintain that by and large it corresponds to what we have seen in the abovementioned Roman texts.

As for *pietas*, there was not much difference between legitimate and illegitimate children in Roman law.³²⁵ It was also not unusual that the mother was allowed to retain

³²³ See Nov. 89, 12 ss., esp. Nov. 89, 12, 6.

³²⁴ The main author of the Austrian Civil code Franz von Zeiller attributes the right of the parents to educate their children to natural law. This gives them the necessary authority which does not depend upon the legitimate or illegitimate status of the children. See *Kommentar über das allgemeine bürgerliche Gesetzbuch ... Von Franz Edlen von Zeiller, Erster Band, Wien und Triest 1811*, p. 370.

³²⁵ See e. g. Paul. D. 2, 4, 6, Ulp. D. 37, 15, 1, 1, Ulp. D. 37, 15, 9, and Tryph. D. 37, 15, 10.

the children who were under the paternal power of their father, especially when he lacked the required moral qualities.³²⁶ The Roman mother had no independent right to educate the children as long as the husband lived. After his death, however, she could educate them until she got married again.³²⁷

The Austrian Civil code was also in line with the Roman concept of piety as regards the duty of the children to support their parents. The expenses incurred for the education of the children did not give the parents any claim to the property acquired by the children, but the children were bound to maintain their parents in a respectable manner if the latter fell into distress (§ 154).

Similarities between the Roman concept of *pietas* and the provisions of the ABGB can be noted in at least two instances. The first is the regulation of the mutual relationship between the spouses.³²⁸ They were equally bound to marriage-duty, fidelity and suitable treatment (§ 90). In accordance with his means, the husband had to procure a respectable maintenance to his wife and to represent her (§ 91).

Secondly, the same can also be said about the provisions of the Austrian Civil code stipulating the same rights between legitimate children and their parents and between the adopters and their adopted children (§ 183).

This sketchy overview shows that the same basic principles we have identified in the Roman case law underlie the regulation of the relationship between parents and children in the original Austrian Civil code. Given the overall influence of Roman law on the ABGB, we have good reason to believe that the Roman concept of *pietas* also had a decisive impact on it. The main patterns of the family and the relationships within the family found in ABGB were very close to Justinian's law. There are many surprising details confirming this proximity. As *pars pro toto*, we can take § 175 ABGB where the term "the power of a husband" (*Gewalt des Mannes*) over his wife was used. It was very Roman but socially probably rather *démodé*.

³²⁶ Ulp. D. 43, 30, 3, 5 (*ob nequitiam patris* – because of the bad moral quality of the father). See also Ulp. D. 43, 30, 1, 3.

³²⁷ Alex. C. 5, 49, 1.

³²⁸ See above Scaev. D. 32, 41 pr. The ideas behind §§ 89 ss ABGB are explained by Zeiller, Kommentar ..., Erster Band, Wien und Triest 1811, pp. 244 ss.

d. The German Civil code - BGB

The idea of a general Civil code for Germany was initiated by the Professor of Roman law in Heidelberg Anton Friedrich Justus Thibaut (1772-1840). In 1814 he published a booklet entitled “On the Necessity of a General Code for Germany”.³²⁹ In the same year, the most respected German lawyer of that time and one of the most prominent representatives of the Historical school of law (*Historische Rechtsschule*) Friedrich Karl von Savigny (1779-1861) replied to him with the book “On the Vocation of Our Age for Legislation and Jurisprudence”.³³⁰ Savigny advocated for historical continuity as the basis of the legal system. He maintained that “law comes into being through custom and popular acceptance ... and not through the arbitrariness of the law-giver”. The basis of legislative work should be the historical continuity and a continuous development of legal science.

Yet the main impediment to a codification of civil law was the plurality of many independent German states with their own legal systems. After these states were united into the German Empire in 1871 and especially after the amendment to the constitution in 1873 which transferred the legislative powers in the field of civil law to the Empire, the idea of a common German civil law was revived. The first draft of a German Civil code was presented in 1888.³³¹ Its main author was the Pandectist Bernhard Windscheid (1817-1892). The draft was rejected as too old-fashioned, asocial, not German enough and too complicated. A new commission chaired by Gottlieb Planck (1824-1910) developed a new draft. After some amendments, it was enacted in 1896 and entered into force in 1900.³³²

The new Civil code (*Bürgerliches Gesetzbuch* – BGB) was influenced by pandectism and by the disputes between the so-called Romanists and Germanists in the German historical school. The Romanists maintained that the “spirit of the people” (*Volksgeist*)

³²⁹ Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland von A. F. J. Thibaut, Heidelberg bey Mohr und Zimmer 1814, reprint: Goldbach, Keip, 1997.

³³⁰ Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, von D. Friedrich Carl von Savigny, Heidelberg bey Mohr und Zimmer. 1814; reprint G. Olms 1967.

³³¹ See Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, 5 Vol, Berlin und Leipzig 1888.

³³² See the introduction to minutes of the (second) commission’s meetings - Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs. Im Auftrage des Reichs-Justizamts bearbeitet von Dr. Achilles, Dr. Gebhard, Dr. Spahn, 6 Vol., Berlin 1897-1899.

was expressed in the reception of Roman law; the Germanists, on the other hand, saw its expression in the medieval German law. One of the consequences of this dispute was a tendency to reduce the influence of Roman law on the new civil code. Although the influence of Roman law is less apparent in the text of the German Civil code than in both aforementioned codes, its substance can still be regarded as its product. The German Civil code went “beyond Roman law by means of Roman law”.³³³ This was also the consequence of social changes, a more elaborated legislative technique, and a general tendency to replace the terms of Latin or Greek origin with the German equivalents.³³⁴ And it was promulgated nearly a century later than both aforementioned codes.

Contrary to the French and Austrian civil codes, the German Civil code adopted the pandectist structure dividing the code into five parts. The general part (*Allgemeiner Teil*) was followed by the law of obligations (*Recht der Schuldverhältnisse*), property law (*Sachenrecht*), family law (*Familienrecht*) and the law of succession (*Erbrecht*).

As to the regulation of inter-family relations, there are no fundamental differences between the three codes as concerns the basic principles, but there are important distinctions in the concepts.³³⁵ The BGB defines the relationship between the spouses with a general rule of § 1353/1 stipulating: “The spouses have a mutual duty of conjugal community (*Lebensgemeinschaft*).”

A spouse was not obliged to comply with the demand of the other spouse to create the conjugal community if the demand showed itself as an abuse of his right or when the spouse was entitled to file a petition for divorce (§ 1353/2).

³³³ See R. Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*, Clarendon Law Lectures, Oxford 2001, p. 48, quoting the famous saying of Ihering.

³³⁴ In this respect there is a visible contrast between the Austrian and the German civil code. It cannot be explained by the date of enactment only. On the transition from the tradition of Roman law to the new Civil code Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today. Clarendon Law Lectures*, Oxford 2004. Lecture 2: The Transition from civil Law to Civil Code in Germany: Dawn of a New Era?, pp. 53 ss.

³³⁵ See Eduard Heilfron, *Lehrbuch des bürgerlichen Rechts auf der Grundlage des Bürgerlichen Gesetzbuchs*, 3., neu bearb. Aufl. Band 4 : Familien- und Erbrecht, Berlin 1908, p. 53 ss., *Bürgerliches Gesetzbuch nebst Einführungsgesetz: Gemeinverständlich erl. unter besonderer Berücksichtigung der Rechtsverhältnisse des täglichen Lebens; Mit einem auszugswweisen Abdr. der Ausführungsgesetze für Preußen, Bayern, Sachsen, Württemberg, Baden und des Handelsgesetzbuchs*, Hrsg. von Heinrich Rosenthal, 7., neu bearb. u. verm. Aufl. Graudenz, Röthe, 1906, pp. 417 ss., *Das Bürgerliche Gesetzbuch unter Berücksichtigung der gesamten Rechtsprechung der oberen Gerichte des Deutschen Reichs, Hand-Kommentar. In Verbindung mit C. Neukirch [u. a.] hrsg. von B. Wolf, Buchhandlung des Waisenhauses, Halle a. S., 1908*, pp. 312 ss.

The rule is very technical and merely contains the legal obligation without indicating its possible basis. It is interesting to note that this norm was recently amended. In 1977, a new beginning was added stipulating that marriage is entered into for life. In 2002, a final clause was adjoined laying down that spouses are responsible for each other.³³⁶

The author of the first draft of the German Civil code Bernhard Windscheid wrote in his Textbook on the law of Pandects,³³⁷ published a year after the enactment of the new Civil code, that marriage is not only and above all a legal relationship but also a moral relationship (*sittliches Verhältniß*). As such it enters into the legal sphere. The task of the legal system is to provide the outward appearance for this form of marriage-relationship, endorsed by the moral law. To this particular relationship pertain the following duties: to live together, to maintain marital fidelity as well as a mutual love manifesting itself in the prohibition to institute a criminal procedure against a spouse or to testify against each other, for the husband to provide a guaranty for his wife's dowry upon her request, etc.

Windscheid³³⁸ also maintained that the relationship between the parents and their children originated from the same moral law (*Sittengesetz*). In this case, too, the job of the legal system is to give a proper outward expression to the moral nature of the relationship. The main features of this relationship are the mutual love as well as the respect and piety (*Pietät*) of the children towards their parents. Both features are the basis of different rules, like the right to decline to testify against each other, the right and duty of the parents to educate their children, etc.

³³⁶ BGB § 1353/1: Die Ehe wird auf Lebenszeit geschlossen. Die Ehegatten sind einander zur ehelichen Lebensgemeinschaft verpflichtet; sie tragen füreinander Verantwortung. (Marriage is entered into for life. The spouses have a mutual duty of conjugal community; they are responsible for each other.). The English translation of the norms of the German Civil code was taken from the translation provided by the Federal Ministry of Justice in cooperation with Juris GmbH – accessible at http://www.gesetze-im-internet.de/englisch_bgb/.

³³⁷ Bernhard Windscheid, Lehrbuch des Pandektenrechts, 6. Aufl., Frankfurt a.M., 1887 p. 894 ss.: Die Ehe ist nicht allein, und ist nicht zunächst, ein Rechtsverhältniß; sie ist zunächst ein sittliches Verhältniß. Als solches tritt sie mit einer fertigen Ordnung in das Rechtsgebiet ein, und die Aufgabe der Rechtsordnung kann im Ganzen und Großen keine andere sein, als die, die von dem Sittengesetz geforderte Gestaltung des ehelichen Verhältnisses, soweit sie es vermag, zur äußeren Erscheinung zu bringen.

³³⁸ Bernhard Windscheid, Lehrbuch des Pandektenrechts, 6. Aufl., Frankfurt a.M., 1887 pp. 954 ss.

E. Goldmann and L. Lilienthal in their commentary of § 1353 of the German Civil code³³⁹ explain why there is no list of duties regarding the conjugal community in the German Civil code. These duties (like the duty to live together, the duty of marital fidelity, and the one of mutual support) are, in their view, apparent from the very notion of the conjugal community (*Begriff der ehelichen Lebensgemeinschaft*). Moreover, taking into consideration the particular nature of marriage, they believe that it would not even be possible to make an exhaustive list of such duties. They have to be defined in a concrete case by means of judicial discretion, taking into consideration all the aspects of a particular relationship and the persons involved.

Initially, the German Civil code did not contain a provision on mutual respect and assistance parents and children owed each other,³⁴⁰ which was only added later.³⁴¹ But the original text of the Civil code did contain a provision on the duty to provide the maintenance to the relatives. It was limited to the lineal relatives.³⁴²

The original text of the German Civil code contained very detailed, technical provisions regulating the relationship between the spouses and between parents and their children, respectively. Among other things, the code defined the due care and attention the spouse and the father had to show in fulfilling their duties. In performing their duties arising from the marriage-relationship, the spouses had to exhibit the same care as they customarily exercise in their own affairs (so called *diligentia quam in suis*).³⁴³ Also, the father exercising his parental power has to show the same degree of due care and attention.³⁴⁴ However, given the nature of the relationship, it is quite strange that a contractual standard is applied to the parents or spouses. This approach can be

³³⁹ Das Bürgerliche Gesetzbuch, Systematisch dargestellt von E. Goldmann und L. Lilienthal, Band 3, Familienrecht, Berlin 1921, p. 60 f.

³⁴⁰ See § 1618a: Eltern und Kinder sind einander Beistand und Rücksicht schuldig (Parents and children owe each other assistance and respect).

³⁴¹ On January 1, 1980: Article 1 Nr 1, 9 § 4 of the statute of 18 July 1979.

³⁴² BGB § 1601: Verwandte in gerader Linie sind verpflichtet, einander Unterhalt zu gewähren (Lineal relatives are under an obligation to maintain each other).

³⁴³ BGB § 1359 Die Ehegatten haben bei der Erfüllung der sich aus dem ehelichen Verhältniß ergebenden Verpflichtungen einander nur für diejenige Sorgfalt einzustehen, welche sie in eigenen Angelegenheiten anzuwenden pflegen (In the performance of the duties arising from the marriage relationship, the spouses are answerable to each other only for the care they customarily exercise in their own affairs).

³⁴⁴ BGB § 1664. Der Vater hat bei der Ausübung der elterlichen Gewalt dem Kinde gegenüber nur für diejenige Sorgfalt einzustehen, welche er in eigenen Angelegenheiten anzuwenden pflegt (In exercising the parental power, the parents are answerable to the child only for the care they customarily exercise in their own affairs).

regarded as an attempt to regulate this relationship as a purely legal one, ridding it of all its emotional and moral constituents. In a sense, it denies the particular nature of inter-family relations contained in the notion of Roman *pietas* which required a much more nuanced approach based upon the particular nature of the relationship.³⁴⁵

Because of all this, it is much more difficult to establish a possible influence of the Roman concept of *pietas* upon the norms of the German Civil code regulating the inter-family relations. By and large, the main pattern of inter-family relations is similar to what we have seen in the Roman case law related to *pietas*. Yet, in the detail it often varies. Thus it is more or less impossible to identify concrete cases of this influence.

Among the reasons for this are also changed social habits. One of the points in which this is particularly obvious is paternal power. Instead of paternal power, the German Civil code introduced the term parental power (*elterliche Gewalt* – § 1626). It was divided into paternal and maternal power. The parental power was in fact a more modern edition of the paternal power. The mother could exercise her parental power either in a limited or in a subsidiary way.

The parental power³⁴⁶ of the father comprised three aspects: the right and the duty to care of the child (i.e. to educate, and to control it, as well as to decide on its domicile), to look after its property and to represent the child. When the mental or physical well-being of the child was endangered because the father abused his right to take care of the child, neglected the child or acted dishonorably or immorally, the family court had to take measures necessary to avert the danger.³⁴⁷ The same court also had to take measures if the father abused his right to administer the child's property.³⁴⁸ In extreme cases of violation of his parental power the father could be stripped thereof.

The mother could exercise her (full) parental power when the husband died or lost his parental power and the marriage was dissolved.³⁴⁹ In such a case the parental power of

³⁴⁵ The Austrian Civil code e. g. uses in this relation the term 'orderly parents' (ordentliche Eltern): ABGB § 149. (1) Die Eltern haben das Vermögen eines minderjährigen Kindes mit der Sorgfalt ordentlicher Eltern zu verwalten. This provision was introduced later and was not in the original text of the ABGB.

³⁴⁶ See §§ 1627-1683 BGB.

³⁴⁷ See § 1666/1 BGB.

³⁴⁸ See § 1667 BGB.

³⁴⁹ See § 1684/1 BGB.

the mother was more or less the same as that of the father.³⁵⁰ The family court could provide her with a guardian.³⁵¹

This regulation, albeit at first glance very novel, was not that far removed from the rights and duties of parents towards their children in Roman law. Again, however, it is very difficult to identify concrete aspects and the whole extent of the possible influence.

e. Mourning the dead relatives

As noted above, there was no legal obligation in Roman law to mourn the dead. Mourning was a part of the tradition (*mos maiorum*) and on a personal level of piety. The only legal consequence related to it was the infamy of the family father who allowed his widowed daughter to remarry before the end of the customary mourning period. As we indicated above, the reason behind this was the concern about the paternity. The customary mourning period of ten months was aimed at preventing any doubt as to who was the father of a child of the remarried widow.

Together with social standards of behavior and personal affection, *pietas* in the sense of a decent and correct conduct was a decisive incentive for mourning the dead relatives or the spouse.

In its original version, the French *Code civil* contained a provision on a widow's mourning. Article 1481 stipulated that the heirs of the deceased husband had to bear the costs of the wife's mourning for her late husband. The value of this mourning had to be determined in accordance with the property of the deceased.³⁵² It contained the price of mourning clothing for her as well as for her domestics.³⁵³

This provision does not mean that mourning was a legal obligation. Like in Roman law, it was a part of the social standards and norms the bereaved was expected to follow. There were strict social and religious rules regulating the dressing and the behavior of a mourner. Some of them dated back to the Roman times, when mourners were wearing

³⁵⁰ See § 1686 BGB.

³⁵¹ See § 1687 BGB.

³⁵² Article 1481 Code civil: Le deuil de la femme est aux frais des héritiers de mari prédécédé. La valeur de ce deuil est réglée selon la fortune du mari.

³⁵³ Commentaire théorique & pratique du Code civil par Théophile Huc ; Conseiller à la Cour d'appel de Paris ; Professeur honoraire des Facultés de droit. Tome neuvième ... Article. 1481, Paris, Librairie Cotillon, 1896, p. 393.

dark togas (*toga pulla*). Despite this, the influence of Roman law upon Article 1481 is not undisputable.³⁵⁴

Article 1481 was amended in 1965³⁵⁵ but then again it contained the provision on the costs of mourning. In 2001 it was fully abrogated.³⁵⁶

There was no similar provision in the Austrian or German civil codes. However, the Austrian Civil code (Article 1243 ABGB) contained a provision according to which the widow was entitled to demand the usual maintenance from the inheritance for six weeks after her husband's death, and in the case of pregnancy until the expiration of six weeks after her confinement.

f. Management of business of another and the reimbursement of funeral costs

It makes sense to examine the traces of Roman *pietas* in connection with the management of business of another without authorization together with the reimbursement of funeral costs. The reason for that lies in the fact that in Roman legal sources the problem was the same in both situations, i.e. the reimbursement of costs in the case when the action was set off by the consideration of *pietas*. The general rule in Roman law was that there were no claims arising from *negotiorum gestio* if the motive for the management of another's affairs without authorization was a sense of duty (*pietas*). The same rule applied in the case of burial, as long as the person who took care of and paid for the funeral did not intend to claim the reimbursement of costs and manifested her intent in advance. Although the burial of the testator was the principal duty of his heirs, burying him was not automatically regarded as the acceptance of the inheritance.

The provisions of the French Civil code regulating the management of business of another without authorization (Arts 1372-1375) were obviously inspired by Roman

³⁵⁴ See e. g. Droit civil en vigueur en Belgique, annoté d'après le droit romain par P. van Wetter, professeur à l'Université de Gand, Gand 1872, p. 210. Dard, Code civil des Français, avec des notes indicatives des lois romaines, coutumes, ordonnances..., p. 303, quoting Roman sources to this article seems to have believed that it had been inspired by Roman law.

³⁵⁵ See Loi 65-570 1965-07-13.

³⁵⁶ See Loi n°2001-1135 du 3 décembre 2001 - art. 15 JORF 4 décembre 2001.

law.³⁵⁷ However, in the original version of the Civil code there was no provision regulating the case in which the voluntary agent had no intent to demand reimbursement from the principal. Article 1375 of the French *Code civil* simply states: “The owner whose business has been well managed must fulfill the undertakings which the manager has contracted in his name, indemnify him for all the personal undertakings into which he has entered and reimburse him for all the useful or necessary expenses which he has incurred.”³⁵⁸ The obvious aim of the legislator was to give the voluntary agent a possibility to claim reimbursement. In this context a norm regulating the case when the voluntary agent had no such intention probably seemed superfluous.

The Austrian Civil code distinguishes two types of management of business of another without authorization. The first is licit and the second illicit or false. Licit is the management of business of another without authorization when the voluntary agent acts in order to prevent imminent damage³⁵⁹ and when the voluntary agent is undertaking the business of another to promote the profit of another.³⁶⁰ The management of business of another without authorization is illicit under the Austrian Civil code when the voluntary agent arrogates a business of another against the validly declared wish of the proprietor.³⁶¹ In the first case, the voluntary agent can claim reimbursement of expenses incurred. In the second case, however, he is not only answerable for the damage which has arisen from his management but also loses the expense he had inasmuch as it cannot be returned in kind. The Austrian Civil code does not deal with the problem of a voluntary agent who without authorization managed business of another having no intent to demand reimbursement from the principal.

³⁵⁷ See the quotations of Roman sources to individual Articles in: *Code civil des Français, avec des notes indicatives des lois romaines, coutumes, ordonnances ...* Par Henri-Jean-Baptiste Dard, p. 276; *Droit civil en vigueur en Belgique*, annoté d’après le droit romain par P. van Wetter, professeur à l’Université de Gand, Gand 1872, p. 203 f.

³⁵⁸ The English translation by Georges Rouhette, Professor of Law, with the assistance of Dr Anne Rouhette-Berton, Assistant Professor of English is published on the official website of the Legifrance – accessible at <http://195.83.177.9/code/liste.phtml?lang=uk&c=22>. See the commentary on this article in: *Commentaire théorique & pratique du Code civil par Théophile Huc ; Conseiller à la Cour d’appel de Paris ; Professeur honoraire des Facultés de droit. Tome huitième ...* Article. 1375, Paris, Librairie Cotillon, 1896, p. 507 ss.

³⁵⁹ See § 1036 ABGB; see also § 403 ABGB.

³⁶⁰ See § 1037 ABGB.

³⁶¹ See § 1040 ABGB.

However, this problem is regulated in the German Civil code which followed Roman law in regulating the management of the business of another without authorization.³⁶² It contains a special provision on the intention of the voluntary agent not to claim reimbursement. The same norm also regulates the reimbursement of costs of maintenance among the lineal relatives. Article 685 stipulates:³⁶³

(1) The voluntary agent has no claim if he did not intend to demand reimbursement from the principal.

(2) If parents or forebears grant their descendants maintenance, or vice versa, then in case of doubt it is to be assumed that there is no intention to demand reimbursement from the recipient.

None of the norms mentions the reason why the voluntary agent acted in such a manner. In the first case, it is possible to think of any lucrative cause. As far as the maintenance of relatives is concerned, it is more or less obvious that the most probable cause was a sense of duty towards relatives which would be called *pietas* in Roman law. This provision is so close to the Roman concept of *pietas*³⁶⁴ that it can be presumed with good reason to have been influenced by this Roman concept.³⁶⁵

The second paragraph of § 685 BGB has been broadly interpreted from the very beginning. In case of doubt there was no claim of reimbursement. The father providing maintenance to a girl who got pregnant with his son and had as a consequence been expelled from her parents' house, for instance, was not supposed to have a claim of reimbursement against her.³⁶⁶

³⁶² See R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Clarendon Press Oxford 1996, p. 435.

³⁶³ § 685 BGB: (1) Dem Geschäftsführer steht ein Anspruch nicht zu, wenn er nicht die Absicht hatte, von dem Geschäftsherrn Ersatz zu verlangen.

(2) Gewähren Eltern oder Voreltern ihren Abkömmlingen oder diese jenen Unterhalt, so ist im Zweifel anzunehmen, daß die Absicht fehlt, von dem Empfänger Ersatz zu verlangen.

³⁶⁴ See above Mod. D. 3, 5, 26, 1 and Paul. D. 3, 5, 33, and Alex. C. 2, 18(19), 11.

³⁶⁵ See commentaries of Andreas Bergmann on § 685 (Rn 1 – 2) and §§ 677 ff (Rn 65 – 2. Freiwilligkeit, amicitia, pietas) as well as those of Michael Martinek on §§ 662 ff (Rn 3 – 5) in: J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2: Recht der Schuldverhältnisse §§ 657 – 704 (Geschäftsbesorgung), Neubearbeitung 2006. Buch. IX, Sellier – de Gruyter Berlin.

³⁶⁶ See *Das Bürgerliche Gesetzbuch unter Berücksichtigung der gesamten Rechtsprechung der oberen Gerichte des Deutschen Reichs*, Halle a.S. 1908, p. 165.

The same thought of a dutiful conduct towards relatives may have also inspired Article 852 of the French *Code civil*. It stipulates that “the expenses of food, support, education, apprenticeship, the ordinary costs of outfitting, those of weddings and usual presents” the heir received from the testator are not subject to collation.³⁶⁷ Article 852 CC makes an exception to the general rule of Article 843, according to which every heir has to return to his co-heirs all the gifts he has received from the deceased. The reason for this exception is the nature of these gifts and their cause. The gifts were obviously an expression of a close relationship and of a dutiful conduct, which in Roman law was called *pietas*.

A similar reasoning can also be found in the rules of the Austrian Civil code regulating the calculation of the legitimate portion. According to § 789 ABGB, an advance can be calculated in the legitimate portion of the parents only when it has not been given in order to furnish the legal support (i.e. for the education of children – § 154 ABGB) or not from mere generosity. Furthermore, whatever the parents have bestowed upon a child without expressly requiring a reimbursement was regarded as a donation and not taken into account.³⁶⁸

Initially the French Civil code contained no particular provision on funeral expenses. Only recently it was substantially amended in this regard. The general rule is that the costs of the burial of the testator are borne by the estate. The heir who renounces a succession is normally not bound to pay the debts and costs related to the estate. The amendment of the Code civil of 2006 changed this rule in the way that the heir who has repudiated the succession must contribute to the payment of the funeral costs of a descendant or ascendant whose succession he renounced.³⁶⁹ The person who paid funeral costs for the benefit of the estate can claim the reimbursement. By operation of law, a subrogation takes place for the benefit of a beneficiary heir who from his own

³⁶⁷ Article. 852 Code civil: Les frais de nourriture, d'entretien, d'éducation, d'apprentissage, les frais ordinaires d'équipement, ceux de noces et présents d'usages, ne doivent pas être rapportés. Commenting on this article Biret (Applications au Code civil ... Vol. I, p. 360) quotes Ulp. D. 10, 2, 50. In the text Ulpian is directly referring to *pietas*.

³⁶⁸ See § 791 ABGB.

³⁶⁹ See Loi n°2006-728 du 23 juin 2006 and the amended Article 806.

funds paid the debts of a succession.³⁷⁰ Such a debt has precedence over other debts and has to be enforced immediately after the court costs.³⁷¹

Although, according to the new regulation, a child or a spouse is responsible for the funeral costs even when he or she renounces the succession,³⁷² and although such an arrangement is not very far from the Roman idea of piety, it is very unlikely that the amendment was inspired by the Roman law. It seems to have been much more motivated by common sense, by legal tradition and by practical reasons.

In its original version, the Austrian Civil code stipulated that “to the burdens incumbent on an inheritance belong also the expenses for the funeral suitable to the custom of the place, the station in life, and the property of the deceased”.³⁷³ The case law of Austrian courts interpreted the norm in the sense that the funeral costs also contained the costs of a burial plot as well as the costs of a vault with a monument,³⁷⁴ the mourning clothes corresponding to the property of the deceased,³⁷⁵ but not the maintenance of the grave.³⁷⁶ In Roman times, the position that the funeral had to correspond to the social standing and wealth of the deceased was an expression of *pietas*. A modest funeral of a wealthy person was regarded as humiliating.³⁷⁷ The abovementioned provision of the Austrian Civil code was expressing the same idea of respect and dignity. Nevertheless, it is impossible to say if and to what extent it was inspired by the Roman concept of *pietas*.

A similar provision was also contained in the initial version of the German Civil code. Its § 1968 stipulated: “The heir bears the costs of the funeral of the deceased befitting his

³⁷⁰ See Article 1251-5 Code civil.

³⁷¹ See Article 2331 point 2 Code civil.

³⁷² See e. g. Cass. Civ. 14 mai 1992 - TI Maubeuge 26 février 1993.

³⁷³ § 549 ABGB: Zu den auf einer Erbschaft haftenden Lasten gehören auch die Kosten für das dem Gebrauche des Ortes, dem Stande und dem Vermögen des Verstorbenen angemessene Begräbnis. The norm has not been amended and is still valid. There are also some special norms regarding the funeral costs. § 1327 e. g. stipulates that if death occurs from bodily injury all the expenses must be compensated. Among these expenses are also funeral costs. See Bernhard A. Koch, Helmut Koziol, Compensation for personal injury in a comparative perspective, European Centre of Tort and Insurance Law, Springer, 2003, p. 22

³⁷⁴ See OGH 10.12.1964 5 Ob 305/64.

³⁷⁵ See OGH 26.11.1998 6 Ob 297/98i.

³⁷⁶ See TE OGH 1962/06/01 2Ob164/62

³⁷⁷ Ulp. D. 11, 7, 14, 10.

social status.”³⁷⁸ According to judicial decisions of German courts, the funeral costs comprised neither the maintenance of the tomb nor the erection of a tombstone or the funeral meal. But they comprised the mourning clothes of the widow and of stepdaughters.³⁷⁹

There are further provisions in the German Civil code regulating special cases of funeral costs, e.g. in the case of a murder (§ 844 I), of the case when the mother dies during pregnancy or delivery (§ 1615 m), and in the event of death of a person entitled to maintenance (§1615 II).

Although the basic idea of the abovementioned provisions on funeral costs corresponds to what we came to know as *pietas*, it is not probable that they were influenced by the Roman law to a greater extent than German civil law in general.

g. *Pietas* related to testamentary provisions

In our brief overview of Roman texts dealing with *pietas*, we have seen that in connection to inheritance it was applied in different contexts. On the one hand, *pietas* required that the testator institute his nearest relatives as his heirs. On the other hand, it was applied as an argument and basis for the interpretation of a will in favor of close relatives. By way of interpretation conforming to *pietas*, i.e. promoting the due regard of loyalty and adherence between relatives, the succession was brought closer to these relatives.

Trying to identify the influence of the Roman concept of *pietas* upon the three civil codes under scrutiny, we have to bear in mind the basic difference between Roman and modern (civil) law of succession. In Roman law, testamentary succession was the rule, with the succession by intestacy an exception to that rule. Initially, the testator had unlimited power to disinherit his close relatives and to institute anybody as his heir. As we have seen above, considerations of *pietas* contributed essentially to the possibility of challenging a will as undutiful when the testator disinherited his close relative. The same consideration was used by the praetor in giving the possession of the estate to the

³⁷⁸ § 1968 BGB: Der Erbe trägt die Kosten der standesmäßigen Beerdigung des Erblassers. The adjective „standesgemäß“ was removed in 2002 – see Artt. 1 Abs. 2 S. 3, 9 Abs. 1 S. 3 des Gesetzes vom 26. November 2001.

³⁷⁹ See Das Bürgerliche Gesetzbuch unter Berücksichtigung der gesamten Rechtsprechung der oberen Gerichte des Deutschen Reichs, Halle a.S. 1908, p. 431.

relatives contrary to the will (*bonorum possessio contra tabulas*), or by the classical lawyers when interpreting the will in favor of close relatives.

In the three civil codes under examination, the role of the will is limited. The liberty of the testator to choose his heirs is also limited and the nearest relatives have a right to always inherit at least a part of the property. Does this regulation show the influence of the concept of *pietas*? In a way, it can be perceived as the realization of this concept. Because of such a regulation, there is much less need to change a particular will to the benefit of close relatives referring to the concept of *pietas* in the day-to-day practice. The problem is whether it is possible to identify norms of the three codes under examination that could be regarded as inspired or influenced by the Roman concept of *pietas*.

- *Code civil*

There can be no doubt that the introduction of the disposable portion of property limiting gratuitous transfers of property was introduced in the *Code civil* under the influence of Roman law, especially of the Justinian's Novel 18.³⁸⁰ In Roman law a system favoring children and other close relatives was created under the influence of the notion of *pietas*, even though the corresponding sources do not always refer to it.³⁸¹ But given that – both in Roman and French law – the disposable portion depended upon the number of children³⁸² and that the testator who had no descendants or ascendants could by means of gratuitous transfers, i.e. by *inter vivos* acts, or by will dispose of the entire property, it appears that the reason behind it was fair treatment of the testator's close relatives.³⁸³

³⁸⁰ See Droit civil en vigueur en Belgique, annoté d'après le droit romain par P. van Wetter, professeur à l'Université de Gand, Gand 1872, p. 127 ss with references of Roman sources to concrete articles of the Code. See also Commentaire théorique & pratique du Code civil par Théophile Huc ; Conseiller à la Cour d'appel de Paris ; Professeur honoraire des Facultés de droit. Tome sixième, Paris, Librairie Cotillon, 1894, pp. 180 ss. See also discussions related to this problem in Recueil complet des travaux préparatoires, du code civil. Par P. A. Fenet, Avocat à la Cour royale de Paris, Tome douzième. Paris 1836, pp. 307 ss.

³⁸¹ There is no mention of *pietas* in Nov. 18. In Justinian's Institutes it is explicitly mentioned in connection to the undutiful will (Inst. 2, 18 pr.) and in connection to trusts and bequests in favour of churches and religious institutions (Inst. . 3, 27, 7).

³⁸² See Nov. 18, 1 and Article 913 Code civil.

³⁸³ See e. g. Article. 916 Code civil: A défaut d'ascendants et de descendants, les libéralités par actes entre-vifs ou testamentaires pourront épuiser la totalité des biens (Failing descendants or ascendants, gratuitous transfers by inter vivos acts or by wills may exhaust the whole property). Later the 'surviving spouse' was added. This again would be in the sense of Roman piety.

Another example in which the influence of the concept of *pietas* can be detected is offered by the provisions regulating the abatement of gifts and legacies exceeding the disposable portion (Arts 920–930). The reduction of gifts and legacies can be requested only by those for whose benefit the law made the reserve (Article 921). These provisions were aimed at protecting the heir whose portion had to remain stable. When the value of the *inter vivos* gifts exceeded or equaled the disposable portion all the testamentary dispositions lapsed (*seront caduques* – Article 925).

The most probable and visible vestige of the Roman concept of *pietas* in the French Civil code are probably the provisions on the gifts made to the benefit of almshouses, of the poor of a commune or of public-utility institutions (Article 937). In the Roman imperial law, such donations were regarded as an expression of piety and enjoyed special treatment.³⁸⁴ In the French Civil code they have to be authorized by a governmental decree (Article 910) and have to be accepted by the administrators of the relevant communes or institutions after they have been duly authorized (Article 937).³⁸⁵ What is particular about them is the fact that they are regulated separately and that the Code is using more or less the same formulation we met in the Roman imperial law.³⁸⁶

- *The Austrian Civil code*

The law of succession in the Austrian Civil code was also modeled in accordance with Roman law.³⁸⁷ There are some conspicuous similarities, like the parallel existence of testaments and codicils (§ 53 ABGB), the principles of succession, the notion of legitimate portion (*portio legitima*), equal rights of adoptive and legitimate children, etc.

We can assume the influence of the concept of the Roman *pietas*, in particular in the regulation of the legitimate portion (§§ 762 ff), i.e. the part of inheritance which the

³⁸⁴ See Iust. C. 1, 2, 19; Iust. C. 1, 2, 22 pr. The discussion recounted in the travaux préparatoires (Recueil complet des travaux préparatoires, du code civilTome douzième. Paris 1836, p. 583) stressed that, although motivated by the zeal and piety, such donations had to be authorized.

³⁸⁵ Commentaire théorique & pratique du Code civil par Théophile Huc ; Conseiller à la Cour d'appel de Paris ; Professeur honoraire des Facultés de droit. Tome sixième , Paris, Librairie Cotillon, 1894, p. 145 ss and 257 ss.

³⁸⁶ See Iust. C. 1, 2, 19 and Iust. C. 1, 2, 22 pr.

³⁸⁷ See Gunter Wesener, Zur Bedeutung des Usus modernus pandectarum für das österreichische ABGB ... p. 579; E. Weiß, Kommentar zum allgemeinen bürgerlichen Gesetzbuch, Herausgegeben von Dr. Heinrich Klang, Zweiter Band, Erster Halbband, Wien 1935, p. 630.

testator's children or parents if he had no children were entitled to claim (§ 762 and § 764).³⁸⁸ It corresponds to piety that in connection to the legitimate portion of those entitled to legal succession, no distinction is made between the male and female sex, between the legitimate and the illegitimate birth (§ 763).

Some of the reasons for which a child could be disinherited (§ 768) were also in line with the concept of piety in Justinian's law. Such reasons were not only the apostasy from Christendom,³⁸⁹ or leaving the testator in distress without assistance, but also a life contrary to public morality (§ 768).

As in the French Civil code, there are no direct references to piety in the Austrian Civil code either. But, here, too, we can assume that the concept of *pietas* affected it through Justinian's law of succession which had a considerable influence.

- *The German Civil code*

The German inheritance law³⁹⁰ was also to a certain extent shaped by the influence of Roman law. Here, too, it is possible to see traces of the Roman concept of *pietas* in the way it is protecting the interests of close family members. Under the German law of succession the testator is free to appoint anyone as his heir (§ 1937). He can exclude a relative or his spouse from intestate succession without appointing an heir (§ 1938). As a counterbalance to this freedom of the testator, the German Civil code took over the basic idea of the Roman concept of the so-called *portio legitima*, i.e. the portion to which a close relative of the testator was entitled and of which he could not be deprived without special grounds.³⁹¹ A descendant excluded by the testator's disposition *mortis causa* could demand from the heir his compulsory portion, i.e. one-half of the share he would

³⁸⁸ Even Zeiller, the main author of the Austrian Civil code, in his commentary (Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten deutschen Erbländer der oesterreichischen Monarchie, Zweiter Band, Wien und Triest 1812, p. 763) lists under this topic sources of Roman law (together with the French Civil code, the Prussian ALR and the Gallician code). See also Friedrich von Woeß, Die Entstehung des Pflichtteilsanspruchs, in: Festschrift zur Jahrhundertfeier des allgemeinen bürgerlichen Gesetzbuches 1. Juni 1911, Zweiter Teil, Wien 1911, pp. 690 ss.

³⁸⁹ This reason was repealed already in 1868. See Article. 7, RGrB. Nr. 49/1868.

³⁹⁰ An overview by Dennis Solomon see in: Introduction to German Law, Introduction to the Laws Series, Edited by Joachim Zekoll and Matthias Reimann, Kluwer Law International, 2005, pp. 271 ss.

³⁹¹ On the regulation of the compulsory share in the Roman sources see Inst. 2, 18; D. 5, 2; C. 3, 28. Inst. C. 3, 28, 30, Nov. 18 and Nov. 115. On the compulsory share in the German law of Pandect see: Lehrbuch des Pandektenrechts von Dr. Bernhard Windscheid, Dritter Band. Achte Auflage, unter vergleichender Darstellung des deutschen bürgerlichen Rechts bearbeitet von Dr. Theodor Kipp, Frankfurt a. M., 1901, pp. 357 ss.

inherit by intestacy (Pflichtteil – § 2303).³⁹² The parents and the spouse of the testator who have been excluded from succession by disposition *mortis causa* had the same right. If the person entitled to a compulsory share was left a share smaller than the compulsory share (i.e. less than one-half of the intestate share) he or she could claim from the heir or the co-heirs the difference between what was left to him or her and what he or she was entitled to (§ 2305).

The German regulation is close to the Roman one. The main difference is in the nature of the compulsory portion. In Roman law it was part of formal law (in order to obtain the compulsory share, for instance, it was necessary to challenge the will), and according to the German Civil code it is part of substantive (material) law.³⁹³ Further differences between the two concerned the circle of those entitled to a compulsory share. In the case of absence of descendants and ascendants, in Roman law brothers and sisters could successfully challenge the will as undutiful. In German law, among the ascendants only parents were entitled to claim the compulsory share. In addition the spouse of the testator also had the same right.

The regulations in both systems were obviously inspired by the same idea of duty the testator had towards his close relatives. It is therefore possible to imagine the more or less direct influence of the concept of *pietas*.

As in Roman law, the giving of a compulsory share in German law is not regarded as the appointment of an heir in case of doubt (§ 2304). In such a case, the person who has been bestowed a compulsory share is not considered to be an heir and has no claims or responsibilities of an heir.³⁹⁴

According to the German Civil code, those entitled to a compulsory share could be deprived of it only in case of grave violations of their filial duty or transgressions of

³⁹² More on the regulation of the compulsory share in the German Civil code see: Ludwig Schiffner, Pflichtteil, Erbenausgleichung und die sonstigen gesetzlichen Vermächtnisse nach dem Bürgerlichen Gesetzbuch für das Deutsche Reich. Jena, Fischer, 1897. See also Bürgerliches Gesetzbuch nebst Einführungsgesetz erläutert von Dr. G. Planck ..., Fünfter Band. Erbrecht. Dritte, vermehrte und verbesserte Auflage. Berlin 1908, pp. 767 ss.

³⁹³ See Schiffner; Pflichtteil ..., pp. 4 ss.

³⁹⁴ § 2304 represents a rule of interpretation to correct the provision of § 2087 stating that the disposition, by which the testator has given a person his property or a fraction thereof, has to be regarded as the appointment of an heir. If, however, the person has been given only individual objects, it must not be assumed that he is intended to be an heir, even if he is described as such.

public morality. The testator could deprive a descendant of his compulsory share (§ 2333) if the descendant made an attempt on his life, of the spouse of the testator, or of another descendant of the testator; if he was guilty of any intentional physical cruelty towards the deceased or the spouse of the deceased if he descended from the spouse; if he was guilty of a crime or serious offence intentionally committed against the testator; if he willfully violated his statutory obligation of the maintenance of the testator, or if he, against the will of the testator, lead a disreputable and immoral life.³⁹⁵

It is fascinating to note how close these violations are to the breaches of *pietas* in Roman law. This strengthens the belief that the concept of the latter has influenced the regulation in the Civil code.

For more or less the same reasons as mentioned above, it was also possible to deprive of their compulsory share the father or the mother (§ 2334). The reasons to deprive a spouse of the compulsory share were those which made possible a claim for divorce (§ 2335).³⁹⁶

In a concrete case more remote descendants or parents of the testator were not entitled to compulsory shares to the extent that a descendant who would exclude them in the event of intestate succession was entitled to demand a compulsory share or accepts the property left to him (§ 2309). More remote descendants and parents can obtain their compulsory share when the descendant who would exclude them in the event of intestate succession renounced his right of succession or was unworthy to inherit.³⁹⁷

The person entitled to a compulsory share could claim its payment upon the death of the testator (§ 2317 I) from the heir or co-heirs as joint debtors. In certain cases, the

³⁹⁵ The last point was amended. Since 2010 it reads: is finally sentenced to at least one year's imprisonment without probation because of an intentional criminal offence and participation of the descendant in the estate is hence unreasonable for the testator. The same applies if the accommodation of the descendant in a psychiatric hospital or in a withdrawal clinic is finally ordered because of a similarly serious intentional offence. In accordance with Justinian's Novel 115, 3, the main reasons for the disinheritance of children were: a child acted violently against his parents; a child heaped gross and opprobrious insults upon them; a child has brought criminal accusations against them; a child has become a criminal or associated with criminals; a child has attempted to take the life of his parents; a son had sexual intercourse with his stepmother, or his father's concubine; a son has acted as informer against his parents, and, by so doing, has subjected them to great expense; a child refused to help his ill parents; a son prevented his parents from making a will. etc.

³⁹⁶ §§ 2334 and 2335 were repealed in 2010. See Artt. 1 Nr. 22, 3 des Ersten Gesetzes vom 24. September 2009

³⁹⁷ More on this Planck, o. c. pp. 787 ss.

compulsory share could be augmented (§§ 2325 ss.) or decreased by deductions of gifts in accordance with the provision of the testator (§ 2315).

Those who were unworthy of inheriting or who have waived their right to inherit had no right to a compulsory share (§ 2339 § 2345). The reasons of unworthiness were again close to violations of *pietas*. A person who was entitled to a compulsory share would be found unworthy of inheriting if he intentionally and unlawfully killed or attempted to kill the testator, or has put him in a state as a result of which he was incapable until his death of making or revoking a disposition *mortis causa*; intentionally and unlawfully prevented the testator from making or revoking a disposition *mortis causa*; has, by deceit or unlawfully by duress, induced the deceased to make or revoke a disposition *mortis causa*; was guilty of a criminal offence in respect to a disposition *mortis causa* made by the deceased.

In the case of the German Civil code, it is possible to draw the same conclusion regarding the influence of the Roman concept of *pietas* as in relation to the French and Austrian codes. It is possible to assume that it has more or less directly influenced the notion of the compulsory share. There is evidently no mention of *pietas* in the Code. The striking similarities, however, strengthen the assumption that the relevant provisions may have also been influenced by it.

It is understandable that none of the three codes uses an equivalent of the word *pietas*. In Roman law *pietas* was not a legal notion, but, as we have seen, a value or a standard requiring certain behavior. It was more than a moral duty and less than a legal obligation. The term *pietas* has never been a legal notion or a technical legal term. It is therefore obvious that the word as such could not find its way into European civil codes. Nevertheless, it is possible to find in them more or less the same standards of behavior that were inspired by *pietas* in Roman law.

Given the general influence of Roman law upon the abovementioned codes, it is probably appropriate to see in the regulations that correspond to the Roman concept of *pietas* an indication of its influence. This influence on the development of the law in Europe was probably both direct and indirect. It affected it directly through the texts of

Corpus iurs civilis and its reception. Indirectly, it influenced it through the general system of values which had partly been developed under the influence of Roman values.

IV. The US case law

In the case of the three European civil codes, the supposition of the influence of Roman law was based upon the fact that they were all to a considerable extent a result of the reception of Roman law. Therefore the similarity of concepts and solutions can be regarded as a sign of influence.

In American law, such reasoning is not appropriate. There was no proper reception of Roman law in the common law. Thus, a similar concept does not prove much (if anything at all). An influence can be assumed with some certainty only when we have a direct quotation.

Given the nature of American case law, it is in a way surprising that in some decisions of American courts it is possible to find quotations of Roman legal texts and references to Roman law. The quantity of such quotations is not large. Yet the fact that the judges were discussing certain solutions of Roman law can serve as a proof of its cultural and legal importance even in the framework of a common law system. The importance of Roman law was not the same in all areas of law. It is therefore difficult to speak about its influence in general terms. Nevertheless, it seems that its presence was most noticeable in the field of the law of succession.

In a 1906 case before the Supreme Court of Arkansas, Special Judge Rose wrote: "The same rule was applied in the Roman law. 1 Domat. Tit. 1, § 2, 14. And it is from that law that our doctrine of charities is largely derived."³⁹⁸

And in 1950, in *Johnson v. Myles*³⁹⁹ decided by the Court of Appeals of Indiana, Judge Bowen wrote:

There are no common law canons of descent in this state, and the devotion of property is entirely statutory. Our statutes are largely based upon the Roman law of succession. We must, therefore, look to the language of the statutes involved and the decisions of our courts interpreting the statutes of descent.

³⁹⁸ Fordyce & McKee v. Woman's Christian Nat. Library Ass'n, 79 Ark. 550, 96 S.W. 155 (1906)

³⁹⁹ Johnson v. Myles, 120 Ind. App. 535, 92 N.E.2d 322 (1950).

As we see, the Roman law was not entirely unknown to and unobserved by the American case law.

There were different views on the role of Roman law among American judges. Shortly before the First World War, Judge Winn of the Court of Appeals of Kentucky expressed an interesting approach to its significance and potential use in his dissenting opinion in *Lanferman v. Vanzile*:⁴⁰⁰

Edward Jenks, in his *Short History of English Law*, relates historically the influence of the Roman law in English Jurisprudence. He observes that the Great Corpus Juris of Justinian, published on the shores of the Bosphorus just before the final severance of the Eastern and Western Empires, superseded the barbaric versions of the Code of Theodosius. He adds that it had no regal force west of the Adriatic; but that, as a revelation of the wisdom of the ancient world, it came to be studied feverishly, and its teachings applied to make good the yawning gaps in the laws of Western Europe. After a time there came a jealousy and in a sense a condemnation of it; and, while it is idle to suppose that its knowledge was not made use of, especially in the solution of those problems for which the ancient customs made no provision, its influence in English law became secret and, as it were, illicit. In so far as it is based upon sound principles of natural justice, it may be in force here, not because it is the civil or Roman law, but because, being based on sound reason and affording sound principles of interpretation, it is the law everywhere.

We can imagine that individual rules of Roman law in some regards influenced American law by their substance *non ratione Imperii sed imperio Rationis*, i.e. not because of the authority of the Empire but because of the authority of the Reason which they encapsulated.⁴⁰¹ Sometimes such influence was documented through quotations, other times not.

⁴⁰⁰ *Lanferman v. Vanzile*, 150 Ky. 751, 150 S.W. 1008 (1912).

⁴⁰¹ In the time of the reception of Roman law the expression was used in France to show that they were not using Roman law as subjects of the Holy Roman Empire, but because of its quality. On the dictum see Peter Stein, *Justinian's Compilation: Classical Legacy and Legal Source*, Tulane European & Civil Law Forum, Vol. 8, 1993, p. 12.

A. *Pietas*, piety and charity

There are some decisions of American courts in which the word piety appears with reference to religious devotion.⁴⁰² Although there can be no doubt that etymologically it is derived from the Latin word *pietas*, there can also not be much doubt that it was not inspired by Roman law but by the religious tradition and the general language use.

However, it is possible to find cases in which the term *pietas* is used in direct reference to Roman law and relates to the issue of charity. I list two such cases below. In neither of them, however, does it serve a central role and in both cases it is a part of a Latin quotation.

The case *Hiller v. English*⁴⁰³ was tried in 1848. The Court of Appeals of Law of South Carolina reviewed an appeal against the first instance judgment dealing with a purchase of a slave. The plaintiff tried to recover the “price paid for a negro that had proved unsound”. He presented four grounds for the appeal. One of them was the fact that “the jury being summoned to act as jurors for the first week of the term, which week expired at 12 o'clock on Saturday night, their verdict after that hour, and on Sunday morning, was a nullity upon which no judgment can be entered up”. The defendant quoted the maxim *dies dominicus non est dies juridicus* (Sunday is not a day in law) saying that common law “has never been abrogated here, but has been confirmed by our legislation and usage; that the publishing of a verdict is a judicial act, and that that act was in this case done on Sunday”.

The Court of Appeals considered the last three grounds of appeal and found them insufficient to sustain the defendant’s motion. Yet, the first ground, i.e. the question of

⁴⁰² See e. g. *Vidal v. Girard's Ex'rs*, 43 U.S. 127, 11 L. Ed. 205 (1844), *Am. Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001), *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), *People of State of Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 (1961), *Holy Trinity Church v. United States*, 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (1892), *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004), *Rivera Rivera v. Monge Rivera*, R-85-177 (P.R. June 17, 1986), *Lugo Estrada v. Tribunal Superior*, O-72-326, (P.R. Feb. 27, 1973) etc.

⁴⁰³ *Hiller v. English*, 35 S.C.L. 486 (1848).

the validity of the verdict reached on Sunday, has been referred to the Court of Errors.⁴⁰⁴

In its decision, the Court of Errors dismissed the motion. Its opinion (point 6) includes the following text:⁴⁰⁵

In support of the verdict, it is further urged, that the receiving and publishing of it, under the circumstances that existed, fell within those exceptions in behalf of works of necessity and of mercy which attach to all sabbatical regulations. In the Constitutions of Constantine are express exceptions in behalf of certain legal proceedings, which were considered to be entitled to a peculiar favor, from their benevolent nature; and similar exceptions existed in the more ancient Roman laws, *de Feriis*. The Theodosian and Justinian codes repeated and enlarged these exceptions. The canon law prohibited secular labor or pleas on the Lord's day and other great festivals, unless "*necessitas urgeat vel pietas suadeat*." And a maxim of the common law stands as preamble and reason for the Stat. West. 1 – "*summa caritas est facere justitiam singulis in omni tempore, quando opus fuerit*."

The proficiency of the author of the decision, Judge Wardlaw, in the field of Roman law is impressive. Besides the aforementioned text, there are further references to Roman law showing his profound expertise in the field. He used the term *pietas* meaning charity in reference to canon law: "The canon law prohibited secular labor or pleas on the Lord's day and other great festivals, unless '*necessitas urgeat vel pietas suadeat*'."⁴⁰⁶

The court was of the opinion that the verdict of the first instance court was not void, and the motion was therefore dismissed.

⁴⁰⁴ In 1836 the South Carolina General Assembly passed an act establishing separate Courts of Appeals for cases in law and in equity. It also established a Court of Errors in which all the law and equity judges were sitting together to hear appeals of constitutional questions when the court was divided.

⁴⁰⁵ The highest charity is to do justice to each individual all times it is necessary. See the report on the case by Dr. Lieber, Sundays and Holidays in Court, Western Law Review, Edited by T. Walker and M. E. Curwen. Vol. III. of new Series – Vol. VIII. of whole set. From October, 1850, to October, 1851, Cincinnati 1851, pp. 452 ss. See also Recent American Decisions, Court of Errors of South Carolina - Fall Term, 1848, at Columbia. Heller v. English. The Monthly Law Reporter. Edited by Stephen H. Phillips. Volume XIII. New Series. – Vol. III. Boston 1851, pp. 542 ss.

⁴⁰⁶ When the necessity urges or the charity advises. See: Decretalium Gregorii papae IX compilationis liber II, Tit. IX, De feriis, Capitulum V. See also John George Phillimore, Influence of canon law, Oxford essays, by members of the University 1858, London John W. Parker and son, p. 256. According to Priscilla Heath Barnum, Dives and pauper, Volume 2, Oxford University Press, 2004, p. 263, the canon 'Conquestus' is extracted from a letter of Pope Alexander III (d. 1181) to an abbot who has (on the evidence of a plaintiff) retained the proceeds of land pledged to him for a loan.

Can we assume that the court's decision was reached under the influence of Roman law in general and of its concept of *pietas* i.e. charity in particular? Given the extent of quotations, it is probably difficult to call into question at least some influence of Roman law. The notion of *pietas* was also clearly brought into play. Although it did not play a central role, *pietas* or charity was crucial to the decision taken by the court. It was present in the deliberations and provoked the following discourse:⁴⁰⁷

In the case before us, it now seems charity to save the parties from the trouble and expense of another trial; but the question is, what should have been done on the circuit? It was then charity to the jurors to receive and publish their verdict when they were ready to present it. Their duty was done, why should they have been punished? If the observance of the Lord's day by them was looked to, it was surely better to permit them to be at home, to take their natural rest, and to join in public worship if they would, than to lock them up during the Sunday, uncomfortable, dissatisfied, and ill suited to each other, as they probably would have been. If only this alternative was presented, there is hardly room for doubt. Under another head, I will discuss the expedient of allowing the jury to separate at midnight, before they have agreed upon the verdict, and requiring them to return on Monday and resume the consideration of the case.-Here I conclude, that a construction of the law which would compel a Judge to adjourn the Court at midnight, and confine the jury until Monday, when, before the crowd, or even he himself, had left the court-room, the case might be terminated and relief given to all concerned in it, by his doing an act short and formal, consistent with the thoughts then most likely to fill his mind; or which at any time during the Sunday would prohibit him from suspending his own devotions for a few minutes to save at least twelve, and probably more, of his fellow-men, from suffering and temptation, would increase the profanation it might be designed to prevent, injure the cause of religion, and bring reproach upon the institutions of the country. Such a construction, our neighbors of Georgia do not give to the common law; for there, as I have been informed, a Judge on circuit, at mid-day of Sunday, receives a verdict and discharges a jury.

Another case in which the word *pietas* was used in its original Latin form dealt with the problem of *fideicommissum*. A rich inhabitant of New Orleans made a will. After having given to his sister and her children certain special legacies and to certain slaves their freedom, he bequeathed the remainder of his property to the cities of New Orleans and

⁴⁰⁷ See: *Hiller v. English*, 35 S. C. L. 486 (1848), 500.

Baltimore. He stipulated that the bequest was especially “for the establishment and support of free schools for the poor of both sexes and of all classes and castes of color”. The will was attacked in the state court by the states of Louisiana and Maryland as well as by the collateral heirs of the testator in the United States court, contending that the bequest to the cities of New Orleans and Baltimore was null because it contained *fideicommissa* and substitutions prohibited by the Civil code.⁴⁰⁸

Both the United States Supreme Court⁴⁰⁹ and the Supreme Court of Louisiana⁴¹⁰ pronounced the bequest to New Orleans and Baltimore valid. According to their decision reached in December Term of 1853 the conditions on which the bequest was made were to be regarded as not written, leaving the bequest valid. The bequest to the cities was a donation for public education, which was a worthy purpose or according to the civil Code of Louisiana a gift for pious uses.

In both judgments, there are several references to Roman law and to piety.

The statement of the facts in the case *McDonogh's Ex'rs v. Murdoch* before the US Supreme Court quotes the will of John McDonogh by saying:

And now, in language expressive of piety towards God, and charity towards mankind, the testator (after having made these deductions for his sister, Mrs. Hamet, for the children of his sister, and for the freedom of a certain number of slaves) goes on to lay down what may be called emphatically his will.

It is interesting to note that the text using the terms piety and charity is referring to two aspects of what in Rome was *pietas*.

Inquiring whether the testator is authorized to define the use and destination of his legacy, the Supreme court quoted the French author Domat as saying: “One can bequeathe or devise to a city or other corporation whatsoever, ecclesiastical or lay, and appropriate the gift to some lawful and honorable purpose, or for public works, for feeding the poor, or for other objects of piety or benevolence.” In the quotation of

⁴⁰⁸ See the summary of the case in Southern reporter, Volume 66, West Pub. Co. 1915, pp. 256 ss.

⁴⁰⁹ *Executors of John McDonogh et al. v. Mary Murdoch et al., Heirs of John McDonogh*, 56 U.S. 367 (1853).

⁴¹⁰ *State of Louisiana, State of Maryland intervening, v. Executors of John McDonogh and City of New Orleans*, 8 La. Ann. 171 (1853).

Domat, the word piety is used to denote charity. In the French original Domat used the term *œuvres de piété*⁴¹¹ (works of charity). Since Domat was commenting on Roman law and quoting Digest texts, it is possible to assert that the Court was discussing the Roman concept of *pietas*. In the text, there are several mentions of the term “pious” (property for pious uses, legacies to pious uses, property devoted to pious uses), clearly showing that the testator’s intention was understood the same way as it would be under Roman law: “But,” the Court stated:

independently of these considerations, the whole of the ancient civil law doctrine of destination to pious uses has been repealed by an act of the legislature of Louisiana, of March 25, 1828, and the Civil Code contains the rules governing the case. See Acts Assembly of Louisiana, 1828; Civil Code, art. 3521; *Handy v. Parkinson*, 10 L.R. 92; *Reynolds v. Swain*, 13 L.R. 198.’

Several times, the Supreme Court decision referred to Roman law and to Roman jurisprudence “upon which that of Louisiana is founded”. The Court discussed at length and in detail the development in Roman law of the capacity of cities to inherit, or even to take by donation or legacy. The proficiency of the judges in Roman law and the literature quoted shows that referring to Roman law was not an embellishment but one of the elements of their considerations.

This is even truer for the decision of the Supreme Court of Louisiana. Understandably, in this decision, there are many quotations of Roman legal and literary sources in Latin, there are quotations in French etc.

In his opinion, Chief Justice Eustis wrote about legacies to pious uses:

They are an element in the polity of municipal administrations in all countries which have preserved the features and jurisprudence of Roman civilization.

Legacies to pious uses are those which are destined to some work of piety, or object of charity, and have their motive independent of the consideration which the merit of the legatees might procure to them.

⁴¹¹ Les loix civiles dans leur ordre naturel: Le droit public et legum delectus ... Par M. Domat, Avocat du Roi au Siège Présidial de Clermont en Auvergne. Nouvelle édition, Tome premier ; A Paris ; Chez la Veuve Cavalier ... MDCCLXXI, Liv. IV, Tit. II, Sect. II, XIII, p. 389: ou pour d’autres œuvres de piété, ou du bien public.

He was referring to Roman law and to *Siete Partidas*⁴¹² which were to great extent a compilation of *ius commune*.

In his concurring opinion joined by the Chief Justice, Judge Rost also discussed Roman texts, quoted in Latin, as if they were part of the valid law.

The presence of Roman law in both court decisions is impressive. Even more impressive is the knowledge of it. We can assume that this was to some extent connected to the rather unusual topic of a legacy to pious uses and even more to the date when both decisions were reached. It was in 1853 when both Latin language and at least basic knowledge of Roman law were still widespread among educated lawyers and it was in Louisiana where the influence of civil law was especially strong.⁴¹³

There are some prominent examples. George Wythe (1726-1806), Judge of the Court of Chancery and professor at the College of William and Mary in Virginia, “used his vast knowledge in the courtroom, supporting arguments with scholarly quotations. . . . In one minor case . . . he was able to cite Virginia and British statutes, decisions of the British courts, sections of Justinian’s *Roman Code*, and Cicero’s *Orations*.”⁴¹⁴ Also the earliest curricula of American Law Schools encouraged a broader education. In 1817, David Hoffman proposed a law curriculum for the law faculty of the University of Maryland under the title *A Course of Legal Study*. Students were encouraged to read the Bible, Cicero, Seneca, Aristotle, Adam Smith, Montesquieu, and Grotius.

Quotations of Roman legal sources and references to Roman law were much less exceptional in the course of the 19th century than they are nowadays,⁴¹⁵ although from

⁴¹² *Siete Partidas* 6, 3, 20: By the general beneficence to the poor, without distinction-istis fecundior pietas est-the greater the merit in the donor, as the charity is the more comprehensive and catholic.

⁴¹³ Law School at Cambridge, A Lecture, Being the Ninth of a Series of Lectures, Introductory to a Course of Lectures Now Delivering in the University of Maryland by David Hoffman; Remarks on the Study of the Civil Law; An Address Delivered at the Dedication of Dane Law College in Harvard University, October 23, 1832 by Josiah Quincy, *The North American Review*, Vol. 36, No. 79 (Apr., 1833), p. 395: We notice with pleasure the three pamphlets which we have placed at the head of this article, as promising evidences of an enlightened zeal in promoting the study of general jurisprudence, and particularly of the Roman Civil Law, in this country.

⁴¹⁴ See Brian J. Moline, Early American Legal Education, *Washburn Law Journal*, Vol. 42, 2003, p. 793; electronic version accessible at <http://www.washburnlaw.edu/wlj/42-4/articles/moline-brian.pdf>.

⁴¹⁵ See e. g. The Columbian insurance company of Alexandria, plaintiffs in error, v. Ashby and Stribling and others, defendants in error (38 U.S. 331) of 1839 in which there are several references to Roman law. Judgment for plaintiffs, ship owners, against defendant, insurer of cargo on board the ship, was affirmed,

time to time one finds references to Roman law also in the modern case law of American courts.⁴¹⁶

B.Maintenance of family members

One of the important aspects of Roman *pietas* was the duty to maintain family members. There are some cases in which the duty to support a spouse is discussed with reference to Roman law. In *Hill v. Hill*,⁴¹⁷ Justice Overton tried to show the historical background of the duty to protect family in the following way:

Interspousal tort immunity is a judicial doctrine established to protect the family unit. Historically, under Biblical, Roman, and English common law, the “family” has had certain responsibilities, obligations, and special protections. Many of these are presently contained in our constitution, statutes, and judicially established doctrines. For example, we acknowledge the obligations of spouses for child support, alimony, and, in the event of marriage dissolution, the fair division of property acquired during marriage.

In general terms he is admitting that the valid American law was influenced also by Roman law. This general statement, however, is too vague to allow any concrete conclusion.

Similar reflections can be found in *Hagert v. Hagert*.⁴¹⁸ The case dealt with a separate and equitable action at the suit of the husband against the wife to compel the latter to support and maintain him “when amply able to do so, and when she has not been deserted or abandoned by the husband, when he, because of age and infirmity, is unable to gain his own livelihood”. Discussing the historical dimensions of the problem, Judge Goss of the Supreme Court of North Dakota wrote:

Courts may accept decisions coeval with Columbus, but it is only when similar

where defendant was obligated under the rule of general average contribution to compensate plaintiffs for the sacrifice of their ship on behalf of defendant's benefitted cargo.

⁴¹⁶ See e. g. *Kathleen Hill v. Cross Country Settlements, LLC* (402 Md. 281), filed in 2007, in which Judge Harrell in his opinion (C. 1) referred to the Roman law in regard to volunteering to interfere and manage the business of another. See also *United States of America v. Jack Ferranti, Defendant* (928 F. Supp. 206) decided in 1996. Judge Jack B. Weinstein referred to Roman law to put the problem in the historical context.

⁴¹⁷ *Hill v. Hill*, 415 So. 2d 20 (Fla. 1982).

⁴¹⁸ *Hagert v. Hagert*, 22 N.D. 290, 133 N.W. 1035 (1911).

conditions make the reason for the holdings applicable. As a matter of fact, when paralleling conditions, there are certain eras in Rome when Roman law would be more fittingly applied to present day divorce in these United States than any English precedent, which latter is really, when considered with procedure, often without weight under our present system. As illustrating, Rome gave to the world the first body of law on marriage. It was in Rome that the state first asserted its interest in the marriage relation. It was in Rome, in the later days, that the influence of the Christian religion first gave coloring to the marital laws. It was in Rome that equity was first administered to protect the estate of the wife as against the husband, and it was there, too, that womankind first enjoyed approximately the equality in personal rights possessed to-day under what we are pleased to term our advanced civilization. It was in Rome in her last days also that the divorce became, as many assert it now to be in this country, a national evil; but even in those days the wife enjoyed equal and sometimes superior rights of divorce to those of the husband. To further study the applicability of English precedent in these particulars let us further digress. England in adopting the civil law took with it the Roman institution of marriage, and much of what that law so prescribed, but at a time when the civilization of the age demanded the mastery of the man and the obedience of the woman, and in general the assertion of superiority of the male over the female. But here is again reflected a racial characteristic modifying the law growth. The English are as a race conservative in governmental matters, never adopting anything tending toward instability or uncertainty. This tendency is always toward system and permanency.

In this case, too, it would be difficult to argue that Roman law directly influenced the decision. Perhaps it contributed to it or to some extent strengthened the position of the judge.⁴¹⁹

Roman law and indirectly even its concept of *pietas* might have had a bit stronger influence upon the duty of parents to support their children. In 1953, the Supreme Court of New Jersey ruled that “child’s parents, who had refused to provide the child with medical aid, with result that permanent injury would have ensued but for the immediate treatment, were under a legal obligation to pay for the medical services rendered”.⁴²⁰ Discussing the conflicting views at Law and in Equity (II), the court established: “In equity, the parents’ obligation to support and educate their children is much more than

⁴¹⁹ In this sense it is possible to understand the reference to Roman law in *Conner v. Conner*, 97 A.D.2d 88 (1983).

⁴²⁰ *Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390 (1953).

a principle of natural law; it is an obligation enforced wherever equity has jurisdiction on equitable principles in the light of the facts of the individual case.”

Examining the preferable rule (III), the court maintained that the legal liability of the parent necessarily depended upon his or her ability to furnish the maintenance. Discarding the common law rule in favor of the equitable doctrine, the court also referred to Roman law⁴²¹ and to the corresponding rules of the European civil codes.

The statutory law borrowed from Roman law the notion of adoption of one person by another,⁴²² as well as the notion of parental emancipation.⁴²³

Roman law was also discussed in connection with other topics related to the concept of *pietas*, such as the recovery of expenses in the case of volunteering to interfere and manage the business of another. Contrary to Roman law, the common law “insists on the individualistic principle that a man should not be required to pay for a service for which he has not asked, and holds that to encourage rendering of such services would be to encourage the ‘officious intermeddler’.”⁴²⁴

We can see that Roman law was occasionally discussed in American courts. It influenced some of their decisions. And yet, its influence was limited, if it existed at all, to a particular case and to a particular issue. It is not possible to assert that it played a major role in the development of American case law. As far as the concept of *pietas* is concerned, a more or less direct influence can be established only in relation to both aforementioned cases dealing with property devoted to pious uses

We can assume that the concept of *pietas* also exercised its influence indirectly through a general legal culture. Although this is probable, it is a mere speculation since it is impossible to find any concrete proof of such indirect influence.

⁴²¹ It is interesting to note that the statement concerning the Roman law (In the Roman law the duty of a father to support his child was enforced only by criminal proceedings, Radin, Handbook of Roman Law 108 (1927), but in the modern civil law the obligation of the parents is direct) is not correct. Like in the European Civil codes the obligation of a father to provide maintenance for his child was directly enforceable also in Roman law – see. Sev./Ant. C. 5, 25, 4 and Ulp. D. 34, 1, 14, 1.

⁴²² Anderson v. Anderson, 320 Ill.App. 75 (1943): The adoption of one person by another is the creation of an artificial relation between people and is taken from the Roman law, being unknown to the English law. A majority of the states of the Union have enacted statutes of adoption.

⁴²³ Cafaro v. Cafaro, 118 N.J.L. 123 (1937): Borrowed from the Roman law, the term imported under that system full enfranchisement by the father. See also Brumfield v. Brumfield, 194 Va. 577 (1953).

⁴²⁴ See Mc.Neilab, Inc. v. North River Ins. Co. (645 F.Supp. 525 (D.N.J. 1986)), II. Quasi-contract and agency.

V. Instead of a conclusion

These are preliminary results of the research trying to determine and evaluate the influence of Roman concept of *pietas* on later legal developments. The historical overview is not complete because the role of *pietas* in *ius commune* still has to be researched.

It would be interesting to explore the possible influence of the Roman concept of *pietas* in other domains of law, for instance in humanitarian law (e.g. the protection of refugees and displaced persons, duty to protect), human rights law (e.g. the prohibition of torture), etc. Tracing the remnants of Roman law in the domain of public law is even more difficult than in private law, because there was less reception and it is much more complicate to find and to prove possible links. The same legal solution or a similar one does not prove much. Furthermore, it is difficult to separate the influence of standards of cultural behavior from the more or less direct impact of Roman law. Although it is possible to assert that the standards of cultural behavior when shaped in the development of European legal tradition were still largely under the influence of Roman law and *ius commune*, it is almost impossible to prove any direct link between them.

Despite all the limitations, it is possible to conclude that the concept of *pietas* influenced private law and contributed to the development of modern legal culture.