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## *'Amne Adverso' Means 'Looking Upstream' Remarks on the Book by Laurent Waelkens, 'Amne Adverso'. Roman Legal Heritage in European Legal Culture (Leuven University Press, 2015)*

### Abstract

Arnaldo Momigliano, an Italian historian and an internationally renowned professor of classics and Roman law in particular, in the late sixties of the twentieth century, expressed the view about the end of the history of law as a discipline independent from positive law. This opinion led to the formation of two different approaches towards the study of Roman law: researchers practicing pure history of the ancient world (the so-called “antiquisti”), who combine historical and philological sciences and are detached from the contemporary law; and legal historians, who regard dialogue between legal historians, including Romanists, and representatives of various legal dogmatics as necessary. The first approach undoubtedly marginalises Roman law in the context of disciplines taught at universities, while the second one allows a discursive cooperation with other disciplines of law, especially positive law and legal comparatistics, or even theory and philosophy of law. According to supporters of the second approach, modern law dates back to Roman law which provides the basis for agreement between academics.

From time to time reformers of legal studies have stressed the need for such model of legal studies which would equip graduates with knowledge that prepares them in the best way for their future profession, which undoubtedly is of paramount importance for the proper functioning of society. Lectures on Roman law, in its ancient and subsequent incarnations, make sense when the taught *materia* is associated with problems disputed in the current *curriculum studiorum*. What is more, the search for cross-references between various scientific *materiae* is a rational postulate on the level of scientific research, especially that its strength is reflected by the quality of research.

The presented review of *'Amne Adverso'. Roman Legal Heritage in European Legal Culture* (Leuven University Press, 2015), the book by Laurent Waelkens, not only discusses the content, but addresses as well such issues as the presence and shape of law in Roman antiquity and its topicality for subsequent generations of lawyers - representatives of different historical schools. Finally, the review presents a possible rational model of the presence of Roman law in modern academic reality, particularly in today legal education.

**Keywords:** Roman law, reception of Roman law, importance of tradition of Roman law, model of teaching of Roman law.

**Słowa kluczowe:** prawo rzymskie, recepcja prawa rzymskiego, aktualność tradycji romanistycznej, model nauczania prawa rzymskiego.

I. A vivid debate about the objectives of Roman law as a scientific discipline, as well as about its place as a *materia* in the university curriculum started many years ago, only to record a famous polemic between two scholars in the beginning of the 20<sup>th</sup> century, a legal philosopher Gustav Radbruch and a romanist Gerhard von Beseler, both from the Christian-Albrecht University of Kiel, which took place in 1919.<sup>1</sup> Now, the discussion concerns the content of the lectures on Roman law regarded as (un)necessary in this curriculum.<sup>2</sup> Interestingly, it is academics in Western Europe who are increasingly skeptical about the usefulness of such teaching, although their legal history has been influenced by Roman law to a much greater extent than those of Central and Eastern Europe. On the other hand, in countries of Eastern Europe it is even more explicitly emphasised that Roman law provided the foundation of the national legal cultures, and that certain legal institutions have been rested directly “on the shoulders of the Roman jurists”,<sup>3</sup> quite often with certain ignorance of the so-called middle period, i.e. the broadly understood era of the *ius commune*.<sup>4</sup>

Among romanists, there is no doubt concerning the meaning and significance of teaching Roman law at the universities (after all, it is romanists who teach this particu-

<sup>1</sup> It is well known that the adoption and entry into force of the German Civil Code (BGB) put before scholars a question about the subsequent role of Roman law in the scientific research and university legal curriculum. See G. Radbruch, *Ihr junge Juristen!* [in:] *idem, Gesamtausgabe*, Hrsg. A. Kaufmann, Bd. XIII: *Politische Schriften aus der Weimarer Zeit*, Heidelberg 1993, pp. 23–38 (who regarded Roman law as completely irrelevant and unnecessary in the university curriculum), and G. von Beseler, *Römisches Recht und Revolution*, and *Triplik* [in:] G. Radbruch, *Gesamtausgabe...*, pp. 39–58 (who advocated the presence of Roman law as indispensable subject of university training). For this polemic see H. Otte, *Gustav Radbruchs Kieler Jahre 1919–1926*, Kiel 1982, pp. 42–66. See remarks by M. Jońca, *Przedmiot irrelevantny, konwencjonalne kłamstwo et cetera...* [The Irrelevant Subject, the Conventional Lie et cetera...], “Zeszyty Prawnicze” 2009, 9/2, pp. 341–362. On other discussions on the importance of Roman law see e.g. R. Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford 2004, p. 1; H. Kupiszewski, *Prawo rzymskie a współczesność* [Roman Law and the Modernity], Warszawa 1988, pp. 73–112, in part. pp. 73–74, 80–81, 91 ss. [2<sup>nd</sup> edition eds. T. Giaro, F. Longchamps de Bérier, Kraków 2013, pp. 105–153]; see also interesting remarks on the loss of importance of Roman law for codified legal systems in: R. Lessaffer, *European Legal History*, Cambridge 2009, Chapt. 6.

<sup>2</sup> For a summary of such debate see in part. F. Ranieri, *Das Europäische Privatrecht des 19. und 20. Jahrhunderts*, Berlin 2007, pp. 197–210; G. Crifò, *Il Compito del Romanista*, “Revista Internacional de Derecho Romano” 2008, pp. 1–41 ([http://www.ridrom.uclm.es/documentos/Crifo\\_imp.pdf](http://www.ridrom.uclm.es/documentos/Crifo_imp.pdf), access: 31.12.2016). For the importance of Roman law and the comparative method see P. Pichonnaz, *L’Insegnamento del diritto romano oggi*, “Index” 2008, Vol. 36, pp. 51–59, or P. du Plessis, *Historia prawa a metodologia nauk prawnych* [Legal History and Methodology of Legal Sciences], “Czasopismo Prawno-Historyczne” 2010, Vol. 62, 2, pp. 19–28; comp. D. Heirbaut, *Comparative law and Zimmermann’s New ‘Ius Commune’: A Life Line or Death Sentence for Legal History? Some Reflections on the Use of Legal History for Comparative Law and Vice Versa* [in:] *‘Ex Iusta Causa Traditum’: Essays in Honour of Eric H. Pool*, eds. H. Van den Bergh et al., Pretoria 2005, pp. 136–153. See also remarks on the dependence of the need of teaching of Roman law on its importance for legal practice: J.W. Cairns, *Comparative Law, Unification and the Scholarly Creation of a New ‘Ius Commune’*, “Northern Ireland Legal Quarterly” 1981, Vol. 32, 2, pp. 272–283; *idem*, *Roman Law and the Scottish Legal Curriculum*, [in:] *Scots Law into the 21<sup>st</sup> Century*, ed. H. MacQueen, Edinburgh 1996, pp. 28–38; J. Thomson, *When Homer Nodded?* [in:] *Scots Law into the 21<sup>st</sup> Century*, *op. cit.*, pp. 19–27.

<sup>3</sup> I wrote about this “phenomenon”, on the example of Polish legal scholarship and court’s practice naming it as “*iusromano-gigantomania*”, in my recent study: P. Świącicka, *From Sublimation to Naturalization: Constructing Ideological Hegemony on the Shoulders of Roman Jurists* [in:] *Law and Critique in Central Europe. Questioning the Past, Resisting the Present*, eds. R. Mańko, C. Cercel, A. Sulikowski, Oxford 2016, pp. 176–205, in part. p. 193–203.

<sup>4</sup> *Ibidem*, p. 187.

lar subject), but the debate concerns the content of such teaching: what lectures should contain. It is, however, still the same question scholars asked themselves in the 20<sup>th</sup> century,<sup>5</sup> namely whether Roman law should be the object of typical historical (and even archaeological) teaching, or, perhaps, one should make effort to show more and try to recognise Roman law as an introduction to the contemporary civil law or even to law and legal theory generally – in a sense of its universal values adopted in European countries, and then called European values, such as the democratic rule of law – the state of justice (no matter how much the idea of “democracy” is currently experiencing its crisis). These two opposite positions seem to be significant. One can, in fact, while teaching, present Roman law either from the point of view of a legal historian and present only those problems that the Romans noticed and discussed; or one can also use Roman law in order to seek these solutions which, in varying degrees, has bothered lawyers of successive eras of development of European legal culture up to the present time. In other words, one can try to see in Roman law the roots of later legal dogmatics and highlight the content that has retained its importance. It is clear that the second prospect requires far greater flexibility in looking at the achievements of the Roman jurists and clues for solutions to legal problems undertaken in the modern and contemporary legal discourse.

In the discussion on the objectives of Roman law as a *materia* of the university curriculum aimed especially to “freshmen” (first-year students of law) the textbook entitled ‘*Amne Adverso*’. *Roman Legal Heritage in European Culture* (Leuven University Press), published in 2015, fits perfectly. Its Author, Laurent Waelkens, full professor of Roman Law and Legal History at KU Leuven, explicitly pointed out to its main readers: “This publication is the textbook of Roman law that is used by starting undergraduates in the English-language study programmes in Leuven” (p. 16). No doubt, however, that the representatives of other sciences, such as ancient historians, historians of law in modern times, and even contemporary civilists, may find this work worth their attention. It is not a “classic” textbook although it has undoubtedly met the qualities of a classic textbook. The book is something more: it is a lecture on Roman private law, including the private procedure, combined with considerations about the subsequent history (sometimes

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<sup>5</sup> See above, remarks in the n. 1. It is also worth reminding that also Polish academics noticed that problem, and professors of the University of Cracow started a dispute on it. I refer here to the discussion between two eminent representatives of Polish romanistics: F. Zoll (Senior), *O naukowym stanowisku prawa rzymskiego po zaprowadzeniu kodeksu cywilnego w Niemczech* [About a Scientific Place of Roman Law after an Introduction of the Civil Code in Germany], “Czasopismo Prawnicze i Ekonomiczne” 1900, Vol. 1, 1–2, pp. 1–17 (who opted for the “antiquarian” approach toward Roman law in order to search the “pure Roman law” – “unspoiled” classical Roman law on the basis of the Justinian’s *Corpus Iuris*); and a polemic with views of Zoll, published by his pupil, S. Wróblewski, *O wykładach prawa rzymskiego* [About the Lectures on Roman Law], “Czasopismo Prawnicze i Ekonomiczne” 1900, Vol. 1, 3–4, pp. 433–443 (who once declared that “*Amicus Paulus sed magis amicus est Windscheid*”, and afterwards emphasised that he believed that in the teaching, the emphasis should be put on the so-called “modern Roman law”; according to Wróblewski, some legal concepts had been directly taken from the sources of Roman law, but, all the same, long ago they stopped to belong exclusively to this particular legal order, because they permeated new legal orders; in his opinion such legal concepts belong, therefore, to a common set of rules of private law of civilised societies, are justly used in lectures on Austrian law, French law and other laws, and are not untypical of these legal orders; at the same time, despite his dedication to the studies on legal past, Wróblewski was against pure historical lectures on law; his stance was based on the assumption that the purpose of legal training was to prepare a student to work as a lawyer). See my study: P. Świącicka, ‘*Amicus Paulus sed magis amicus est Windscheid*’. About Stanisław Wróblewski’s *modus docendi* of Roman Law (forthcoming).

even the fate) of legal institutions, presented also from the comparative point of view. Moreover, sections on ancient and subsequent law regarding human rights or economic and ideological aspects of Roman law put this work beyond the usual textbooks presenting only the legal institution of Roman law according to the pandectistic schema.

In the Introduction, the author himself asks the question: why and how we should study Roman law today (pp. 19–26). He considers the following issues: (1) the comprehension of academic thought of which Roman legal thought is a component; (2) the search for the roots of common European legal thought and the meaning of European sense of justice; (3) the fact that the study of Roman law has been used since the 19<sup>th</sup> century as an antidote to the thought of the Enlightenment, and (4) the fact that the acquaintance with Roman law helps jurists to reach a better understanding of other people *via* the understanding the history of ideas. This is not of course a completely isolated approach – this type of presentation of Roman law and its subsequent history and contemporary usefulness has already been made, only to mention Reinhard Zimmermann and his famous book *Law of Obligations: Roman Foundations of the Civilian Tradition* (1<sup>st</sup> ed. Juta & Co., Cape Town, South Africa and Kluwer, Deventer and Boston 1990), or the study by Pascal Pichonnaz, *Les fondements romains du droit privé* (Schulthess Verlag, Zürich 2008), or finally the book by Jan Dirk Harke, *Römisches Recht. Von der klassischen Zeit bis zu den modernen Kodifikationen (Grundrisse des Rechts)* (CH Beck, München 2008). One should also mention the Polish textbook used e.g. at the Jagiellonian University written by Wojciech Dajczak, Tomasz Giaro, Franciszek Longchamps de Bériér, *Prawo rzymskie. U podstaw prawa prywatnego* [Roman Law. The Roots of Private Law] (1<sup>st</sup> ed. PWN, Warszawa 2009<sup>6</sup>). Nevertheless, another textbook in English on Roman law and its heritage is always welcomed (especially when it is a good synthesis it adds some new values) and the idea of the author of the reviewed work deserves an honorable place as different from the typical (still excellent) textbooks on Roman law, both in terms of the discussing *materia* and undertaken questions.

While writing a review of a textbook one should, however, take two points of view: *primo*, its value for romanists, legal historians and academic civilists, or even practicing lawyers; *secundo*, its didactic values essential to its main audience (i.e. to the students).

**II.** Evaluation of the merits of the book is definitely positive. It is not difficult to see the essential merits of this work. Even if each review – and this is a deeper review, not just a review of the contents – is somewhat subjective, it has to be emphasised that the thematic scope and presentation of certain topics is correct from the point of view of the methodology of this discipline, as well as it has been done in a very interesting way. The material shows the current state of knowledge about Roman private law and the *ius commune*. There are many reasons for this positive evaluation. First of all, the presentation of the ancient legislation and jurisprudential achievements is not an end in itself for the Author. In addition to the simple presentation of the features of ancient legal institutions or conceptual network, the Author tries to look at different problems from multiple per-

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<sup>6</sup> The manual was also partially published in the Czech translation, see: české vydání P. Dostálík, *Právo římské. Základy soukromého práva*, Iuridicum Olomoucense, Olomouc 2013.

spectives. A student, but also a more experienced reader, learns not only what features of a particular legal institution were, but he also becomes aware of the purpose of every particular institution, namely for which legal purpose it served, how it functioned, and then how it inspired the future development of law. All this is evidenced by extensive arguments based on the sources (Roman, medieval and subsequent ones). The Author is also not afraid to judge critically some of the solutions of Roman law, for example the features of the Roman pledge (p. 320).

Numerous references to issues contemplated in legal practice of the past are also valuable and explanations are always given with references to exemplary sources (even full passages of sources are quoted *in extenso*, always with translation of the Author himself or of the other scholars). In this way it is possible to get acquainted with real legal problems considered by the Roman jurists, authentic cases that were submitted to them for solutions, and not with simplistic, invented for the purpose of academic teaching, problems. This gives a good idea of the actual legal practice of Romans. Also, various references to other non-ancient legal sources are presented (e.g. *Decretum Gratiani*, *Decretales Gregorii IX*, *Glossa ordinaria*, Bartolus: *Consilia*, *Commentaria*), which is quite interesting for students and researchers from other historical areas of the legal culture. In other words, what is important for the Author is the real legal experience of subsequent generations of jurists.

The narrative is not a static or a schematic one. The Author has managed to accentuate and show – sometimes in considerable details – that the law develops over time, that the law is constantly changing and evolving. In this way, the image of particular institutions, and a fundamental concepts become more real. The evolution of every institution is presented in such a way that one could see differences between achievements of the archaic law, classical law, the Justinian law, the *ius commune*, and the contemporary law. This broad historical perspective of presentation of the development of private law (in broad historical sense) deserves recognition, because it is impossible to narrow the phenomenon of Roman law only as the ancient one, or as the contemporary private law rooted in Antiquity.

This textbook deserves high evaluation also because of the fact that the Author's aim is not only to provide a student with a certain *quantum* of knowledge, but also to show the way of thinking and working methods of the Roman jurists and the jurists of subsequent periods. In this way, in addition to acquiring the knowledge of a particular institution, a student has the opportunity to learn the content of the discourse and the variety of legal methods that were used while resolving specific legal problems, which, in turn, shows why a particular legal institution received such-and-such a shape, appropriate to the content and time of the jurisprudential practical legal discourse understood as a scientific discussion aimed to search the momentous legal *optimum*, in which the law was positivised.<sup>7</sup>

The great advantage of the textbook is what follows from its very title and the table of contents. Namely, the book shows “after-Roman” development of almost every legal

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<sup>7</sup> For the concept of “positivisation of law in dogmatic jurisprudential discourse”, see my study: P. Świącicka, ‘*Jus civile, quod sine scripto in sola prudentium interpretatione consistit*’ – A Phenomenon of Positivisation of Law in Dogmatic Discourse of Roman Jurists [in:] ‘*Constans et Perpetua Voluntas*’. *Pocta Petrovi Blahovi k 75. narodeninám*, eds. P. Mach, M. Pekarík, V. Vladár, Trnava 2014, pp. 577–590.

institution and concept developed in Roman law, in many cases up to the present day. In other words, the Author does not stop in his narrative on Roman law, but he also presents the changes that occurred afterwards, and points out when and how legal institutions obtained their shape as we know them today. The institutions that receive their contemporary shape differently than in Roman law are also presented. In this way, however, it is not just a textbook on Roman law, but also on the history of private law in general. What is more, the Author often analyses the problems of contemporary law from the perspective of jurisprudence of Roman or later times, looking for the solutions or possible reasons of legal decisions. Examples of such issues could be: the human rights (pp. 129–140), the contracting in general and the principle of freedom of contract (pp. 328, 348–349, 354–356), the protection of a buyer of things in good faith (p. 377), the formation of modern principles of transfer of ownership (pp. 299–306), the concept of damages (pp. 367–368) or the concept of fault (pp. 325–326, 346–348), the principle of *pacta sunt servanda* and the problem of effects of changes of circumstances – the *rebus sic stantibus* clause (pp. 332–333, 336–337, 349–351), a commitment for a third party (pp. 336–337) etc. References to medieval and modern source material are synthetic, but the Author almost always indicates appropriate sources, and refers the audience to further literature.

Such an interpretation of Roman legal material allows the readers to broaden their horizons. Typical graduate lawyer usually is acquainted, to varying degrees, with the history of law and relevant contemporary law in force in his own country, sometimes with the elements of European law or the laws of other European countries. But historical and comparative perspective enables such typical graduate lawyer to realise that what he knows about civil law is not an unchangeable dogma, but only one of the possible solutions – a momentous *optimum* – which not always and not everywhere has to look like the same.

Also a prospective look at the role of Roman law seems remarkable. It appears that in the opinion of the Author, the experience of Roman law still is and will continue to be useful in the development of contemporary law. He explicitly states: “Romanists often read Roman law in such manner that they could utilise it to improve the present. Roman law was used to integrate new institutions of the civil law. Even today, it is central to the comparative legal history that is necessary to coordinate the different European legal systems” (p. 27). This potentiality of the Roman thought is reflected by the analysis of several specific issues in diverse parts of the book. A student learns in which areas of law Roman solutions could be assimilated, or even may still have practical significance in further development of law. But it is not only the matter of the knowledge itself; what is more important is the awareness that Roman law and its later multiple incarnations of the *ius commune* can still have practical significance.

**III.** A detailed description of the contents is, in fact, impossible, because of a variety of topics discussed and the size of the book (p. 424). Still, some summary can be made. The book consists of the Introduction, eight Chapters and the Conclusion. Every chapter is divided into paragraphs. Each issue is closed with bibliography of main works which provide further readings.

In the Introduction (pp. 19–36) the particular and very important issues were treated with great care, namely: the aforementioned purpose of the study of Roman law, the methodology of Roman law, and the question of Roman law as a science. Concerning the latter, the Author understands the word “science” in this context as a scientific capability and skills to study the sources. Therefore, he speaks about the importance of proper reading of the sources, and advises the use of not only the “legal” method, but also achievements of classical philology, paleography and codicology, or philosophy (logic, linguistics and moral philosophy). He opts for textual criticism and historical criticism. This Introduction is particularly precious for students who would like to start their adventure with historical scholarship, therefore the proper way of reading the sources produced in different eras is for them very important. In fact, it is true that the same Latin texts were interpreted differently throughout the centuries, each time in a different temporal context, and the meaning of particular legal notions changed very often.

The Chapter 1 is particularly extensive but also very informative (pp. 37–128). The Author deals here with the sources of Roman law in Antiquity (pp. 37–81), presenting also some background of political and administrative history of Rome, and he continues with a large section on reception of Roman law (pp. 81–128), which is not limited only to the presentation of the historical facts, but he also presents the achievements of every subsequent generation of jurists over almost a millennium. The chapter finishes with some remarks on the place of Roman law in the 19<sup>th</sup> (the Pandectistics) and 20<sup>th</sup> century scholarship, when, after 1945 new methods of research were introduced by, *inter alia*, Robert Feenstra, Jean Gaudemet, Hans Thieme or Fernand de Visscher. I would add to this list the name of the eminent Italian scholar, Salvatore Riccobono.<sup>8</sup> The final statement is significant – as it incarnates the real objective of historical research almost as jurisprudential “*vera philosophia*”:<sup>9</sup> “We [i.e. the scholars, researchers – add. P.Ś.] are not trying to anchor national civil law codes anymore. We are digging for the common roots of the law in the countries of the EU. We are digging... Studying Roman law does not involve looking back, but going deep (p. 128)”, which means that the Author sees and understands the changes of law in contemporary times, in particular its Europeanisation, globalisation, even decodification.

The Chapter 2 (pp. 129–140) concerns the Roman concept of *libertas* (understood as the military *status libertatis*, civil rights) and philosophical reflection on the idea of freedom and citizenship in Roman and medieval times (discussed both by civilians and canonists), and in the 16<sup>th</sup> century when particular problems emerged along with e.g. the necessity of definition and protection of the civil rights of the Indians (School of Salamanca). The chapter finishes with the 17<sup>th</sup> century reaction to absolutism and appearance of the extrajudicial law. All these led to the important change in understanding of

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<sup>8</sup> Salvatore Riccobono (1864–1958) was that scholar of Roman law who was the first to evaluate critically the then recently rediscovered technique of interpolation and to use the study of interpolations as a means to understand changes in classical law doctrines, instead of viewing the discovery of interpolations as an end in itself. Riccobono directly influenced also the Roman law scholarship in the United States.

<sup>9</sup> To use words of one of late-classical jurists, Domitius Ulpianus, who described in such a way the objectives of the jurisprudence: D. 1.1.1.1 (Ulp. 1 *inst.*): *Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.*

personal rights: civil rights became private law and began to transcend the competence of the sovereign councils. As the Author concludes: “The doctrine of immanent rights which saved us from absolutism stayed in the jurists’ memory. After the wars of the twentieth century, the civil rights of all people were recast and transformed into new sources, such as the Universal Declaration of Human Rights or the ECHR. These sources are part of the European survival instinct” (p. 139).

The Chapter 3 (pp. 141–192) deals with the law of civil procedure – again – in the same sequence: Roman civil law procedure (*per legis actiones, per formulas*, the aedilician procedure, the imperial *cognitio extra ordinem*), and – afterwards – the Romano-canonical procedure originating from late-ancient *episcopalis audientia* and the Imperial *cognitio*. Such joint roots of the modern procedure are obvious – if the aforementioned *cognitio extra ordinem* was received in such a precise manner in the Middle Ages, it was due to the reception of Roman law by the Episcopal courts and the faculties of canon law, and, afterwards, the reception of medieval law – influenced by the canonical case law – in the Early Modern Era. Next, the Author describes the Romano-canonical procedure in the Middle Ages, as it was developed in *Decretum Gratiani* (12<sup>th</sup> c.), and afterwards in the course of studies at the medieval universities (Bologna, Paris), because it was universities that trained professional judges and followed the canonical administration of justice. This twelfth-century interest in the law of procedure (preserved in old Roman texts) was considerable and even brought into life a new specialty: that one of processualists. From the 13<sup>th</sup> century authors – specialists in the law of procedure – especially Jacobus Balduini, Sinibaldus Fliscus, Henricius de Segusio (Hostiensis) and Guillaume Durand (the author of *Speculum iudiciale*, Bologna 1279) are mentioned. Shaped in such a way, the Romano-canonical procedure (somehow – a new academic procedure of Bologna) was introduced into all of the ecclesiastical courts, which were placed hierarchically under Rome – so, in fact in all Western Europe, and also in several kingdoms of Central Europe. Therefore, such *stylus curiae* have been handed down through Europe. Apart from general questions concerning such a developed procedure, the Author examines also particular questions, such as appeals or theories of evidence or the role of local customs in cases of conflicts of norms.

In the Chapter 4 (pp. 193–256) the Author presents several aspects of the broadly-understood law of persons, such as the structure of Roman family and the power of *pater familias*, the concept of Roman marriage (personal and property relationships between a man and a woman), guardianship and curatorship in Roman times. Afterwards he explains how the institutions, such as *familia* or *matrimonium*, were shaped in medieval times, sometimes in analogy to Roman models and sometimes in a different way. The twelfth- and thirteenth-century canonists were the most important contributors to these news concepts. The next question is the limited liability of family members and its reception in medieval academic thought (e.g. *actio quasi institoria* interpreted by Bartolus in one of his *consilia*). The Author also deals with the ancient and medieval concept of slavery in Antiquity and in medieval and even modern times when the several legal questions aroused in connection with colonialism, although Western jurists of this period struggled with colonial slavery. The narration continues till the 20<sup>th</sup> century. Finally, the very important (because of their possibility to acquisition of the property rights and their participation in the trade) concept of associations and legal persons as the concept born



in Antiquity but developed fully in the course of centuries, but not before the 19<sup>th</sup> century (*persona ficta*, later *persona artificialis*, *persona moralis*, and finally the contemporary notion of legal person), was described.

The Chapter 5 (pp. 257–275) concerns the law of inheritance – which in legal history was regarded as the main branch of law, as people have always been interested in the destiny of their property after their death and the possible heirs have been interested in the same issue as well. In fact, one can learn more about society in the past (and present) by examining how it dealt with inheritances, because the rules of inheritance express the fundamental balances in a society. Therefore, the Author presents the Roman testamentary succession, intestate succession and contra-testamentary succession which produced the system of the reserve portion. After this, he deals with the reception of the Roman law of inheritance in times of the case law of the Middle Ages and the Early Modern Era, which is a challenge for every scholar who asks such a question, as the prevalent opinion is that the law of inheritance in every country – apart from the institution of a will (*testamentum*), which is a typical Roman concept – is more native rather than has common, pan-European roots. In fact, the Author presents and examines some examples from the literature of the *ius commune*, where questions concerning intestate succession were elaborated (e.g. by study on the Novel 118 among other novels by Justinian written by Cujas: *Novellarum constitutionum imperatoris Iustiniani explicatio*, Valence 1569, used in practice by the Parliament of Paris).

In the Chapter 6 (pp. 277–322) the Author presents several institutions of the law of property. He starts with the concept of real rights, seeing them as a typical concept of the 17<sup>th</sup> century (the concept by Heinrich Hahn, who classified real rights as the following: ownership which, according to him, included *emphytheusis* and superficies, possession, real and personal servitudes, pledge and inheritance), which has to be considered in the context of division between public and private law. From then on, the real rights were projected onto the Roman law, although it is true that the Romans knew and used *actiones in rem* and *actiones in personam*. But, it is also the fact that the notions – concepts *ius in rem*, *ius in re*, *ius reale* were discussed in the Middle Ages, and, afterwards, it was Grotius who put ownership at the top of the hierarchy of real rights, as ‘unlimited’. The Author explains the development of these institutions via diachronic development and specification of legal terminology by canon and civil law jurists of medieval and subsequent periods in the course of development of legal practice. It is true that the medieval concept of real rights, in particular the ownership, was influenced to a considerable extent by feudal law. Then, the moral philosophers imbued this concept with values. Finally, the civil lawyers interpreted *dominium* and *proprietas* as substantive rights. At the end of this chapter the ways of acquisition of the property in their historical development are described, and finally – other real rights: usufruct and servitudes, pledge – the latter selectively transplanted from Roman law.

The Chapter 7 (pp. 323–389) concerns the law of obligations as “the most important [part – add. P.Ś.] of the Roman law” (p. 323). The main topics – presented in their historical development – which are worth mentioning are: the notion of obligation in general and its development in the doctrine of canonists, the sources of obligations according to the Romans and according to medieval jurists, typical contracts and development of the general theory of contracts by canon and civil law jurists, strict securities, a notion of

good faith, the concept of *pacta sunt servanda* and the *clausula rebus sic stantibus*, the concept of causality, the problem of intention as the source of liability, nominal delicts and their further development into the general theory of delict. Special paragraphs are dedicated to the contract of purchase-sale and *locatio conductio*, and – one of the Roman *pacta legitima* – i.e. a donation. The Author thinks the success of the Roman law of obligations in the continental dogmatics was due to further elaboration of Roman sources by the canonists, especially to the canonical interpretation of the *bona fides* concept.

The Chapter 8 (pp. 391–404) deals with socio-economic aspects of law. It is a valuable chapter because such “theoretical” and economic aspects of Roman law are not always noticed. The content covers: food supply and its reception, Roman partnership and its developmental, pre-instruments of bankers’ activity.

To sum up: a variety of topics had been discussed with great accuracy. One could, however, observe that real rights and obligations are smaller part of the textbook, but the biggest part of the influence of Roman law, so, if this textbook is to investigate the Roman elements, it misses a substantial part. Also, some parts of the textbook reveal subjective interest of the author to specific topics (e.g. law of evidence, in great detail though not very elaborated in Roman law). And, in addition, one more component of the heritage Rome left for the world could be mentioned, i.e. the legal order as such – even though Romans did not think about their law as a closed system of concepts and norms. But they have system(s) of their own: be that a rhetorical and institutional one (of Cicero and Gaius), or of the comments by Quintus Mucius or Sabinus, or that of edict. Those systems influenced and fostered systematic reflections of the next generations of jurists, up to the age of codification.

**IV.** As this is a textbook for undergraduate students, it is also necessary to assess it as such. This assessment is, however, less positive. University graduates have – probably – the knowledge based on both Roman law (the history of jurisprudence included) and directions of development of Roman thought, but for students of the first year the book may be too difficult – at least during the first reading. A plethora of information contained within the pages of this book requires much attention of an undergraduate student.

On the other hand, the narrative is clear and full of definitions and explanations. Source material is properly quoted. References to the source editions (always with the indication of the best editions, translations, and the ways of citation of particular sources) are sufficient. The book is concluded with the helpful indices of sources and terms.

Despite its length the textbook is evidently exceptional and is worth reading by every student of law.

**V.** The question concerning the practical aspects of studying of Roman law remains valid for every generation and it seems reasonable – for every generation – to verify the answer. It is claimed today that law varies in relation to the processes of its Europeanisation,

globalization, etc.<sup>10</sup> In relation to the legal methods it is said that one may observe the clash of the applicative dogmatic method with the contemplative historical one.<sup>11</sup> Not evaluating the relevancy of this thesis with the reality, one may ask: What Roman law is today? What is it for?

It seems, therefore, necessary to go back to the question posed in the first part of this review (why teach Roman law today?) – and to add another: why write another textbook on this subject especially that the content of that book also covers further reflection (also from the comparative point of view) on the history of that law? I would answer as follows: even a lecture on law, which is no longer binding, should not disregard current discussions and developments that are taking place in the teaching of law in Europe and throughout the world. Because of dynamics of technological, economic and cultural changes, the formalistic and positivist search for solutions in one and the only one legal text often turns out to be insufficient, but, at the same time, there are limits to freedom of exploration or of *rationes decidendi*. Therefore, to adopt appropriate – ethical, effective and stable – solution, lawyers must be aware of their instruments, the proper historical interpretation included. It shows how lawyers were thinking in the past. In this sense, the reviewed book certainly deserves high evaluation and is worthy of recommendation to the students. It might be even helpful for those who reach for it by virtue of their professional interests.

To sum up: I do believe that in contemporary times it is important to indicate the influence of Roman law on subsequent legal systems as well as to analyse whether, how and in what direction modern law diverges from the Roman legal rules and principles. Of course, the pure historical or archeological studies on Roman law are not completely without importance, but the most precious is, simply and precisely, honest and reliable legal study on Roman law, its development (especially as discursively orientated jurisprudential law) and its reception which varied in different European countries. And, finally, in Roman law and in the fact that it has lost its practical significance *sensu stricto* one may see advantages for the use of Roman law in comparative context. And this is precisely what the Author of the reviewed book did by showing a various layers of European civilisation – layers understood as achievements of subsequent generations of jurists inspired by Roman law as well as by other legal traditions – from the perspective of comparative legal history.

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<sup>10</sup> T. Giaro, *Cywilizacja prawa rzymskiego i problemy współczesnej romanistyki* [Civilisation of Roman Law and the Problems of Contemporary Romanistics] [in:] *Acta Universitatis Wratislaviensis: Studia historycznoprawne. Tom poświęcony pamięci profesora Edwarda Szymoszka*, ed. A. Konieczny, Wrocław 2008, pp. 69–78, in part. pp. 69–70; *idem*, *Dogmatyka i historia prawa w dobie globalizacji. Nowe rozdzian kart* [Dogmatics and History in the Era of Globalisation. A New Deal] [in:] *Prawo w dobie globalizacji. Materiały z XI Konferencji Wydziału Prawa i Administracji Uniwersytetu Warszawskiego*, 5 marca 2010, Warszawa 2010, pp. 39–50.

<sup>11</sup> *Idem*, *Cywilizacja prawa rzymskiego i problemy współczesnej romanistyki*, p. 70, 77.

## Streszczenie

### 'Amne adverso' znaczy 'patrząc w górę' Uwagi o książce Laurenta Waelkensa 'Amne adverso'. Rzymskie dziedzictwo prawne w europejskiej kulturze prawnej (Leuven University Press, 2015)

Arnaldo Momigliano, włoski historyk i uznany specjalista w zakresie kultury klasycznej, w tym w zakresie prawa rzymskiego, pod koniec lat 60. XX w. wyraził pogląd, że nastąpił koniec historii prawa jako dyscypliny niezależnej od prawa pozytywnego, co doprowadziło do wyodrębnienia w ramach studiów nad prawem rzymskim dwóch różnych nurtów badawczych: zwolenników uprawiania czystej historii świata antycznego (zwanymi *antiquisti*), oderwanych od prawa współczesnego i łączących nauki historyczne z filologicznymi, oraz tych przedstawicieli dyscyplin historyczno-prawnych, którzy uznają za konieczny dialog pomiędzy romanistami i historykami prawa a przedstawicielami prawa pozytywnego. Pierwsze podejście niewątpliwie marginalizuje prawo rzymskie w ramach uniwersyteckich dyscyplin naukowych, drugie natomiast pozwala na podjęcie dyskursu z innymi dyscyplinami prawa, zwłaszcza prawem pozytywnym i komparatystyką prawniczą, a nawet teorią i filozofią prawa. Prawo współczesne sięga bowiem do prawa rzymskiego i w ten sposób to ostatnie staje się podstawą porozumienia.

Co jakiś czas reformatorzy studiów prawnych podkreślają potrzebę takiego ułożenia programu studiów prawniczych, aby dać absolwentowi zasób wiadomości, jaki mógłby go najlepiej przygotować do wykonywania przyszłego zawodu, który niewątpliwie ma ogromne znaczenie dla właściwego funkcjonowania społeczeństwa. W wykładzie prawa rzymskiego, w jego antycznej wersji i późniejszych wcieleniach, jest sens, jeśli wiąże się go z materią, która w obecnym *curriculum studiorum* jest aktualna. Szukanie wzajemnych odniesień między dziedzinami jest też postulatem racjonalnym w odniesieniu do prowadzonych badań naukowych, zwłaszcza że o sile przedmiotu świadczy właśnie podejmowana tematyka badawcza.

Przedstawiony artykuł recenzyjny książki Laurenta Waelkensa pt. 'Amne Adverso'. *Roman Legal Heritage in European Legal Culture* (Leuven University Press, 2015) poza omówieniem jej treści dotyczy więc takich zagadnień, jak prawo rzymskie w antyku i jego aktualność dla pokoleń przedstawicieli różnych szkół historycznych przez wieki, ale i racjonalnego modelu jego obecności w dzisiejszej uniwersyteckiej rzeczywistości naukowej i edukacji prawniczej.

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