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## THINKING LIKE A LAWYER: THE CASE FOR ROMAN LAW

**Abstract.** The aim of this piece is to present an overview of certain recent trends which have emerged in the study and teaching of Roman law. These trends are identified and placed within the larger context of the role and function of the teaching of Roman law in Law Schools during the twentieth century. In addition, it is argued in this piece that trends regarding the study of Roman legal sources which have emerged in the context of U.S. Law Schools have the potential to enrich the discipline and to permit new questions to be asked about Roman law.

**Keywords:** Roman law, legal doctrine, American legal realism, law and society, socio-legal studies.

## MYŚLEĆ JAK PRAWNIK: PRZYPADEK PRAWA RZYMSKIEGO

**Streszczenie.** Celem tego opracowania jest ogólne przedstawienie niektórych ostatnich trendów, które pojawiły się w związku z nauką i nauczaniem prawa rzymskiego. Są one dostrzegalne w szerszym kontekście roli oraz funkcjonowania nauczania prawa rzymskiego na wydziałach prawa w XX wieku. Ponadto, wskazuje się w tym opracowaniu, że tendencje dotyczące badań nad rzymskimi źródłami prawa, które ujawniły się w amerykańskich szkołach prawniczych, mają potencjał umożliwiający wzbogacenie dyscypliny oraz mogą pozwolić na postawienie nowych pytań dotyczących prawa rzymskiego.

**Słowa kluczowe:** prawo rzymskie, doktryna prawa, amerykański realizm prawniczy, prawo i społeczeństwo, badania prawnospołeczne.

In 2016, in a volume of the *American Journal of Legal History*, prominent scholars in various fields of legal history were asked to publish brief pieces setting out some of the recent trends in their respective fields. Professor Ulrike Babusiaux, from the University of Zurich, identified three recent trends in the study of Roman law, namely the internationalisation of scholarship, the production of large-scale syntheses, and the growth of a plurality of research approaches (Babusiaux 2016). While the former two trends are not without merit as points of discussion, this paper will focus on the final trend – the rise of a plurality of research approaches

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– since it has become an important discussion point in the study of (and thus also the teaching of) Roman law. In addition, as I hope to demonstrate in this short piece, the growth of these different approaches to research has the potential both to enrich the existing doctrinal studies of Roman law and to countermand some of the common criticisms levelled against the teaching of Roman law in Law Schools.

In Babusiaux’s conclusion to this piece, she summarised the nub of the issue surrounding the plurality of research approaches as follows:

The task of future research on Roman law can only be to combine the traditional dogmatic study of private law with the impulses offered by the ancient history of law and modern trends in ancient studies. These two perspectives are not opposites, but can be mutually productive and lead to new questions when joined, which in turn also lead to new insights. (Babusiaux 2016, 10)

There is much to unpack in this thought-provoking statement. Let us take each element of this quotation in turn. It is fair to state that, for much of the twentieth century and in most civilian systems, the “province” of Roman law has been limited to the study of legal “dogmatics,” often limited (at least initially) to national systems of private law which had arisen out of the medieval *ius commune* (Coing 1973). In many of these systems, having codified their private law during the nineteenth century, Roman law has come to fulfil three important didactic functions in the context of law teaching during the twentieth century (Winkel 2015). First and foremost, it provides an unparalleled guide to the terminology and structure of the civil codes of Europe and elsewhere. By teaching law students Roman law in the first year, they are equipped with the technical terminology – heavily drawn from Roman law – prevalent throughout the civil code in question. In second place, it introduces students of law to the notion that legal systems have an internal coherence which has demonstrable effects on matters such as the concurrence of actions or the cumulation of claims. By teaching the structure of Roman law, stabilised in nineteenth-century German legal scholarship, to law students in the first year (developed through the Institutes of Gaius and elaborated upon in the Institutes of Justinian), it gives the student of law an overview of a “system” of law, the notion on which most of the nineteenth-century codes were based and demonstrates the legal texts (and the principles contained in them) on which the compilers relied when creating these codifications. Thus, for example, it permits law students to appreciate the interplay between contract, delict, and property, or between contract and unjustified enrichment, to name but a few. Finally, and perhaps most importantly, it demonstrates to the student of law the importance of juristic interpretation of law as a force of legal change. Roman law is quintessentially the law of the jurists. While Praetors and Emperors may also have acted as agents of legal change at different points in the history of the Roman legal order, it was the intellectual ingenuity of the Roman jurists which

made Roman law what it was to become. It is also one of the main reasons for its continued allure to scholars in a variety of disciplines.

Both individually and collectively, these three reasons are utterly compelling and demonstrate why Roman law has been such a successful, key component of the training of generations of jurists. At the same time, however, it cannot be denied that this “dogmatic” approach to the study of Roman law is of its time and is rooted in a very specific view concerning the nature of law and how it interacts with society. Since, as set out above, the prime function of Roman law in the twentieth century has come to be to demonstrate the historic bases of civilian codification, it stands to reason that the subject also has been presented and taught in a manner which is conducive to such parallels being drawn. This, in turn, has forced Roman law into a late-nineteenth/early-twentieth century configuration which is dominated by two corollary ideas, namely “scientification” and “abstraction” (Giaro 1993). These two ideas are not new, and their impact on Roman law has been profound. Let us discuss “abstraction” first, as it is the older of the two ideas.

Throughout the Roman legal *corpus* found in the Justinianic project, two types of statements about the law may be found. The first of these types is where the legal rule is connected to an elaborate factual situation. Take the following example:

D. 9, 2, 52, 2 Alf. 2 dig.

*In clivo Capitolino duo plostra onusta mulae ducebant: prioris plostri muliones conversum plostrum sublevabant, quo facile mulae ducerent: inter superius plostrum cessim ire coepit et cum muliones, qui inter duo plostra fuerunt, e medio exissent, posterius plostrum a priore percussum retro redierat et puerum cuiusdam obriverat: dominus pueri consulebat, cum quo se agere oporteret. respondi in causa ius esse positum: nam ^eam^ si muliones, qui superius plostrum sustinuisent, sua sponte se subduxissent et ideo factum esset, ut mulae plostrum retinere non possint atque onere ipso retraherentur, cum domino mularum nullam esse actionem, cum hominibus, qui conversum plostrum sustinuisent, lege Aquilia agi posse...*

In this famous text, which contains a colourful example concerning an accident involving carts and mules on the Capitoline hill, the jurist Alfenus uses the example to explain an element of the Roman law on wrongful damage to property. Where one cart rolls back and crushes a slave against the other cart, the question raised is whether the owner of the slave, having suffered monetary damage, has any recourse in law against the owner of the slaves who were operating the cart that caused the loss. In Alfenus’ view, the answer will depend on whether the slaves operating the cart could be said to be at fault in their operation of it. We can never tell whether this example is taken from real life or whether it is an invented one used for teaching law students. This is beside the point. What the use of these examples shows, however, is that to the Roman jurists, as to modern scholars of law, the law was rooted in real life concerns. After all, most of the jurists of

the classical period engaged in legal practice – even if they did not practice as courtroom lawyers.

This first type of legal text may be compared to the second type, also taken from the realm of wrongful damage to property:

D. 9, 2, 7, 5 Ulp. 18 ad ed.

*Sed si quis servum aegrotum leviter percusserit et is obierit, recte Labeo dicit lege Aquilia eum teneri, quia aliud alii mortiferum esse solet.*

In the latter example, which articulates the so-called “thin skull” rule, there is no factual scenario to explain the legal rule in question. It is presented purely as a statement. Both texts espouse rules of law, but in the former, the factual scenario serves to contextualise the rule, while in the latter, the rule stands on its own.

In the history of the development of Roman legal thought, “abstraction” as is visible in the second text quoted above, is commonly linked to a change in Roman legal thought which occurred between the last two centuries of the Republic and the start of the Empire. As Stein writes:

By the end of the second century B.C. much of private law was covered by juristic opinions, delivered piecemeal, usually in actual cases, but occasionally in hypothetical cases. The next step was to generalize the opinions, and although the material remained Roman, the methods by which it was organized were Greek (Ref omitted), The key step in passing from the accumulation of particular cases to universals is induction (*epagōgē*). This process produces certain propositions, of which the most basic are so-called definitions (*horoi*). (Stein 2007, 5)

Thus, the change from casuistry to abstraction heralded a significant shift in the Roman juristic method. This intellectual paradigm shift was nothing short of revolutionary. As Bruce Frier has shown, it is precisely during this same period that the Romans develop a “theory of autonomous law;” an idea intimately linked to the birth and growth of the Roman legal profession and the demarcation of law as a defined body of knowledge which stood somewhat apart from everyday societal concerns (Frier 1989–1990). This does not mean, of course, that the jurists separated their intellectual discourse concerning law hermetically from reality or that they were cossetted theorists; merely that the Roman jurists appreciated, much like modern scholars of law do as well, that the relationship between law and society is not an easy nor a straightforward one, and that the migration of a “societal” impulse into the legal sphere is by no means an easy process.

It is not the aim of this article to demonstrate how “abstraction” as a key component of Roman legal thought proved an important tool for the transplanting of its ideas into subsequent periods of legal history. A much more extensive investigation would be required. One only needs to point to the working methods, scholarship, and influence of, say, the late medieval scholars of Roman law and their creation of *regulae iuris*, or of those jurists classified as followers of the *Usus Modernus Pandectarum* in the early-modern period and beyond who created elaborate “systems” of law based on transcendental principles derived from natural

law (Stein 1999). It cannot be denied, for example, that abstract, generalised rules of law, uncoupled from any specific context, are easier to “transplant,” to use Alan Watson’s concept, than those rooted in a specific context or age (Watson 1983, 1977). As Bruce Frier has observed, for example, the rise of the theory of autonomous law in Roman law had an interesting second life in juristic discussions concerning the nature of law during the nineteenth century (Frier 1989–1990, 269). Nowhere can this be seen more clearly than in the works of the Pandectists, that group of German jurists who played a major role in the codification of German private law during the late nineteenth century (Haferkamp, Luig, Reppen 2017). As Schiller writes, they:

employed the systematic structure of the law which had been worked out a century earlier, developed the whole complex of legal rules and institutions to fit the emerging modern life, largely on the framework of the historical development of institutions which had been worked out by the efforts of their teachers; a system of law which resembled that of the natural law school in that it purported to take care of any novel legal situation that might arise. (Schiller 1978, 5)

As this quotation demonstrates, by the nineteenth century the concept of “abstraction” had become intertwined with a related one, namely the creation of a “system.” The issue of a “system” was a major flashpoint between the Pandectists and the supporters of the Historical School, notably Savigny. As Letwin observed:

What he [Savigny] opposed was the disposition to liken law to a system of mathematics that can be deduced from axioms, an analogy that appealed to those who saw in codification the universal remedy for all defects in a legal system. (Letwin 2009, 185)

The drive towards the creation of a “system” consisting of “abstractions” of legal rules had several negative consequences. Chiefly, when combined with the notion of “scientification,” an idea arising out of German intellectual thought (Beiser 2015) and strongly influenced by the works of Hegel whereby the methodology of the social sciences had to be rendered more “scientific” like those in the natural sciences, Roman legal rules were, in the words of Jhering, rendered “otherworldly” with little thought being given by scholars of the subject to the operation of these rules in the real world. In addition, as Jhering noted, owing to the ideals of legal “science,” matters of Roman legal doctrine had to be complicated beyond measure:

The art of construction derives its most interesting and rewarding objectives from the simplest things. Everyone can understand simplicity, but understanding comes later. The expert knows that the simplest legal phenomena involve the greatest difficulties. (Jhering 1985, 807)

Thus, owing to a variety of complex historical reasons, by the start of the twentieth century, the prevailing paradigm for the teaching of and research into Roman law was that of a series of interconnected abstractions based around the notion of a “system” created during the eighteenth and nineteenth centuries,

and which could be elaborated upon, using complex intellectual tools such as “construction” – the discovery of new Roman legal ideas such as *culpa in contrahendo* latent in the texts. Considering the timelessness of this system, no thought was given to the operation of these rules in the real world.

It is not my intention here to chart the fate of Roman law in law teaching during the twentieth century in many civilian jurisdictions since the matter is well explored. Suffice it to say that since the conclusion of the Second World War, there have been broadly two camps, one favouring the study of Roman law for its own sake (sometimes described as legal history), the other advocating the “actualisation” of Roman law by studying it in connection with contemporary civil law. The latter approach has seen a particular flowering since the 1990s in the work of Reinhard Zimmermann and his followers who have argued in favour of a return to a pan-European *ius commune* based on Roman law.<sup>1</sup> In addition, it is fair to state that the teaching of Roman law has come under pressure in various jurisdictions, often being squeezed out of law school curricula in favour of newer and more exciting offerings. But it has not merely been the growth of new areas of law which has put pressure on the teaching of Roman law in Law Schools. More importantly, it has been the approach to the teaching of the subject – as timeless dogmatics – which has set it at odds with other branches of law where socio-legal approaches prevail, even in some of the foremost civilian jurisdictions in Europe (Van Hoecke, Ost 1998).

At the same time, as the quotation by Babusiaux at the start of this piece shows, scholarly interest in Roman law from scholars trained in other disciplines has boomed. As Clifford Ando has recently remarked:

Roman law as an academic field is flourishing today. It does so in conditions of unprecedented diversity as regards linguistic, disciplinary, and national context. Its present condition and future trajectories will to a large extent be determined by intellectual developments exogenous to Roman legal history as such, as the questions, methods, and concerns of other fields inflect the practice of jurists and historians in the Roman tradition. But the present and future of Roman legal history will also be shaped by that tradition. (Ando 2018, 664)

The question which requires addressing is what these new insights will bring to the study and the teaching of Roman law. At the heart of this movement driven by scholars mostly trained in the Humanities and from the English-speaking world, is the belief that law is “socially nested” even if the relationship between law and society is not exactly a direct or straightforward one (Calavita 2010).<sup>2</sup> It is worth noting that while Roman law has never achieved the same status in Anglophile legal education during the twentieth century as in the civilian tradition, it did

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<sup>1</sup> See: Zimmermann (1996). This approach, while supported by some, is not without its critics, such as Osler (2007). More recent research regarding the creation of a European private law has suggested that the focus will not be on legal dogmatics.

<sup>2</sup> The phrase “socially nested” is that of Calavita.

have a substantial impact in earlier periods (Hoefflich 1984). Much of this, at least from the 1980s onwards, can be traced back to Bruce Frier and his pupils who, influenced by American legal realism and sociological jurisprudence, have made a strong case for trying to situate Roman law within its various contexts (historic, economic etc.; Plessis 2019). While these scholars do not deny the importance of legal dogmatics in the development of Roman law, they argue that dogmatics – in the sense of the internal debates among the Roman jurists concerning legal change – are not the sole driver of legal change and that the thought-world of the jurists should also be linked to other considerations such as the socio-economic, or the political (Pölönen 2006). At the same time, and building on contemporary research in “law and society,” they advocate that more attention should be paid to the extent that legal change is often also motivated by larger socio-cultural factors. This necessitates a shift in focus, but not necessarily an abandonment of “dogmatics” as such. Rather, supporters of this approach suggest that it adds another layer to doctrinal studies. As Bryen has recently remarked:

the consequence of the last decade’s new work in Roman legal history is that we now have to accept that the legal order as a whole was the product of the participation of many more actors than previous generations of scholars had been prepared to account for, and that these actors’ participation in creating a legal culture was not necessarily predicated on their somehow consciously replicating official narratives, which were themselves often shifting and inchoate. (Bryen 2014, 357)

As this rich quotation demonstrates, scholars of Roman law are invited to look beyond legal doctrine. This does not mean that legal doctrine will not continue to play an important role in the teaching and understanding of Roman law. Rather, by locating Roman law in its various contexts, whether political or socio-economic, it allows scholars of Roman law to ask further questions concerning the “socially nested” nature of legal systems. And in doing so, it provides further opportunities to engage in dialogue with scholars across a range of disciplines who are interested in larger questions concerning the relationships between law and society.

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