Acta Universitatis Lodziensis

FOLIA IURIDICA 99

WYDAWNICTWO
UNIWERSYTETU
ŁÓDZKIEGO

Acta Universitatis Lodziensis

FOLIA IURIDICA 99

Teaching Legal History – History of Legal Teaching

edited by
Łukasz Jan Korporowicz

WYDAWNICTWO UNIWERSYTETU ŁÓDZKIEGO
Łódź 2022

COPE
Member since 2018
JM13714

ISSN 0208-6069
e-ISSN 2450-2782

Wydane przez Wydawnictwo Uniwersytetu Łódzkiego
Wydanie I. W.10514.21.0.Z

Ark. wyd. 14,0; ark. druk. 12,0

Wydawnictwo Uniwersytetu Łódzkiego
90-237 Łódź, ul. Jana Matejki 34A
www.wydawnictwo.uni.lodz.pl
e-mail: ksiegarnia@uni.lodz.pl
tel. (42) 635 55 77

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.01

COPE Member since 2018 JM13714

*Łukasz Jan Korporowicz**
https://orcid.org/0000-0002-5725-5018

TEACHING LEGAL HISTORY – HISTORY OF LEGAL TEACHING: INTRODUCTORY REMARKS

Abstract. The article works as a set of introductory remarks that precede the collection of articles published under the title *Teaching Legal History – History of Legal Teaching*. In this article, the aims of the volume and its content are discussed.

Keywords: legal history, legal teaching, methodology, future of higher education.

NAUCZENIE HISTORII PRAWA – HISTORIA NAUCZANIA PRAWA: UWAGI WPROWADZAJĄCE

Streszczenie. Artykuł służy przedstawieniu wstępnych uwag, poprzedzających zbiór artykułów opublikowanych pod wspólnym tytułem *Teaching Legal History – History of Legal Teaching.* Przedstawiono w nim cele towarzyszące publikacji tego tomu, jak również jego treść.

Słowa kluczowe: historia prawa, nauczanie prawa, metodologia, przyszłość szkolnictwa wyższego.

Having large cohorts of great lawyers is always the result of years of legal education. Whatever the legal or educational system we will have in mind, educating lawyers is always time-consuming and always requires a large amount of materials and human resources. For these reasons, talking about legal education and its character is always crucial. Like in many other aspects of our life, we shall not only focus on the future of the problem, but rather it is important to look into the past to learn a lesson that may help us better prepare for the future.

Another key issue is the diversity of experiences that legal education and legal educators have around the world. Although in many aspects we are sharing similar experiences, in many others they are different and they are often torn between the academic and vocational model of legal education. In addition, the discrepancies between different legal systems also contribute to these differences.

* University of Lodz, Faculty of Law and Administration, Department of Roman Law, lukasz.korporowicz@wpia.uni.lodz.pl

Received: 20.12.2021. Revised: 29.01.2022. Accepted: 29.03.2022.

Finally, there are areas of jurisprudence that are more predestined to be regarded as a "niche scholarly interest" than others. This feature is commonly associated with the legal history. And, in reality, this elitism is rarely treated in a positive way. Being in the bubble of our legal history deliberations is never a good one. Legal history should serve every lawyer and not only legal historians.

These introductory thoughts reveal the reasons for the decision to collect a set of articles that would try to focus on a combination of legal history and its teaching, as well as more broadly on teaching law in the past. Trying to cross the boundaries of the above-mentioned bubble, the goal of that set it to give as wide as possible spectrum of different stories of the legal education, methods used and currently being used by the legal academics, and finally to shed some light on the future of legal history and legal education.

This presented volume of the *Acta Universitatis Lodziensis. Folia Iuridica* contains thirteen articles and two reviews linked thematically to the main subject of the volume. One of the main aims behind the decision to edit this collection of articles was to present as wide picture of the issues related to the theme of the volume as possible. And this goal was achieved in two different ways. First, geographically. The authors of the collected articles represent eight different countries: Australia, Austria, Belgium, Japan, Poland, the United Kingdom (Wales and Scotland) and the United States. They therefore represent a diverse spectrum of teaching traditions and methods, as well as different legal cultures – civilian, common law, and mixed legal systems. Second, a wide range of discussions were also achieved on the substantive level. The presented deliberations cover ancient, eighteenth-, nineteenth- and twentieth-centuries contexts. Some texts deal with specific subjects. Others treat the theme of the volume in a more general way.

Teaching law in antiquity is the subject of two articles, the one written by Lena Fijałkowska and the other written by Philipp Klausberger. Both authors presented the issue of methods of teaching law in ancient times. The eighteenth-century origins of the comparative method is the subject of an article written by Łukasz Korporowicz. Teaching Old Polish law in the nineteenth-century partitioned Poland is then discussed by Dorota Wiśniewska. The history of Roman law teaching in Poland and in Japan in the late nineteenth century is examined extensively by Grzegorz Nancka and Tomoyoshi Hayashi. Finally, the history of legal teaching in the twentieth century is presented by Izabela Leraczyk and Frederik Dhondt. The authors present two almost unknown issues. Izabela Leraczyk's article is on the academic structures organized by the Polish Auxiliary Forces during their internment in Switzerland. Frederik Dhondt, in turn, presents a detailed scientific biography of the Belgian legal historian John Gilissen.

An overview of the history of legal teaching in Australia is the subject of an article written by David Barker. The methodology of teaching legal history and Roman law as well as the challenges that both disciplines are encountering in modern academia is the subject of the articles written by Michał Gałędek,

Richard W. Ireland, and Paul du Plessis. In all of these pieces, the authors also ask a question regarding the future of legal education and, more closely, the future of legal history. This topic is also broadly discussed by the authors of the reviews (Kathryn Harvey and Łukasz Korporowicz) that are added at the end of the volume.

The volume below is certainly not the first one in which this kind of discussion has been presented. It is hoped, however, that it will bring some additional thoughts and comments into this important field of discussion.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.02

*David Barker**

https://orcid.org/0000-0002-0782-3486

AUSTRALIAN LEGAL EDUCATION – A SHORT HISTORY[1]

Abstract. This article examines the history and development of legal education in Australia by tracing the establishment of university law schools and other forms of legal education in the states and territories from the time of European settlement in 1788 until the present day. It considers the critical role played by legal education in shaping the culture of law and thus determining how well the legal system operates in practice.

It argues that Australian legal education can satisfactorily meet the twin objectives of training individuals as legal practitioners, whilst providing a liberal education that facilitates the acquisition of knowledge and transferable legal skills.

Keywords: law teaching, Australia, liberal education, transferable legal skills.

AUSTRALIJSKA EDUKACJA PRAWNICZA – KRÓTKA HISTORIA

Streszczenie. W artykule przedstawiono historię oraz rozwój australijskiej edukacji prawniczej poprzez omówienie sposobu ustanawiania uniwersyteckich szkół prawniczych oraz innych form nauczania prawa w australijskich stanach i terytoriach, zaczynając od osadnictwa europejskiego w 1788 roku, a kończąc na czasach współczesnych. Zwraca się w nim uwagę na kluczową rolę, jaką edukacja prawnicza odegrała w kształtowaniu się kultury prawniczej, tym samym przesądzając o tym, w jaki sposób działa system prawny w praktyce.

W artykule wskazuje się, że australijska edukacja prawnicza może w satysfakcjonujący sposób zmierzyć się z podwójnym celem, jakim jest kształcenie praktyków prawa, zapewniając jednocześnie edukację, która ułatwia zdobywanie wiedzy i przekazywanie umiejętności prawniczych.

Słowa kluczowe: nauczanie prawa, Australia, edukacja prawnicza, przekazywanie umiejętności prawniczych.

* Emeritus Professor, AustLII – Faculty of Law, University of Technology Sydney, David.Barker@uts.edu.au

[1] This article is a summary of the main conclusions of David Barker's book *A History of Australian Legal Education* (Barker 2007).

Received: 8.11.2021. Revised: 11.01.2022. Accepted: 15.03.2022.

1. INTRODUCTION

Australian law schools are very different today to those from a century ago or even longer. The modern Australian law school represents a vibrant part of both the university and the legal community. Despite the ever-present warnings given to law students that there are too many of them in Australia and that they will face bleak employment opportunities on graduation (a prophecy which has so far proved unfounded), law schools in Australia are still able to recruit some of the brightest year 12 (eighteen year old) students and graduates from other disciplines who see a future in the legal profession and beyond.

In this short account of both the history of Australian legal education and the current state of its development, the author has based much of his sources on his book *A History of Australian Legal Education* (Barker 2017), although of course he has also drawn on his current and past experience as a law academic for the past 50 years or so, the last 32 years being spent as a legal educator and solicitor in Australia.

2. EARLY DEVELOPMENT: 1788 TO 1940

The early development of legal education in New South Wales and subsequently, in the remainder of Australia, was heavily dependent on the requirements for entry into the legal profession in England and Wales. This has to be seen in relation to the colony of New South Wales having been originally settled by Europeans in 1788. The colony was initially governed by military law followed by the gradual introduction of civilian law (Neal 1991). However by the beginning of the 19th century there was already a need for some form of judicial administration and consequently, the admission and recognition of lawyers to participate in this judicial process. By the middle of the century there was also a need for legal training within the Australian colonies. This gave rise to the development of the qualifications to be attained by lawyers to enable them to practise within the courts. As a consequence there was the concurrent development of early law schools in universities, which were gradually founded in each of the colonial and State capital cities.

In 1810 the only lawyers in New South Wales were three former convicts who were subsequently supplemented by English solicitors and gradually the legal profession was built up by attorneys and barristers arriving from the United Kingdom.

Qualifications for admission were originally derived from a British statute of 1729 (2 Geo II. c. 23). These required "applicants for admission to have been admitted as solicitors in England, Scotland or Ireland to have qualified by serving

a clerkship of five years with a New South Wales practitioner, subject perhaps, to an examination as to fitness" (Martin 1986, 114).

However until legislation in 1848, anyone wishing to be admitted as a barrister in New South Wales had to have been previously admitted as a barrister or advocate in Great Britain or Ireland.

A New South Wales Barristers Admission Board was established on 18 June 1848 by the *Barristers Admissions Act 1848* (Imp) which was subsequently supplemented by a Solicitors Admission Board. Two years after the establishment of the Barristers Admission Board, the University of Sydney was incorporated in 1850. However in 1855 the University adopted by-laws which established a Faculty of Law originally consisting of a Chair in English Jurisprudence. Although the University was involved in examining students in law, it was not until 1890 that legal education was finally formalised at the University with the establishment of the University of Sydney Faculty of Law with the appointment of Pitt Cobbett to its first Chair of Law and as its Foundation Dean in 1891. He was replaced as both Dean and Law Professor by John Peden who continued in this role until 1942 (Mackinolty 1991, 57).

In other States of Australia there was the gradual introduction of law teaching, so that in the State of Victoria, the University of Melbourne was established in 1851 with law being added to the teaching programme in 1857, which at the same time resulted in the formal establishment of the University of Melbourne Law Faculty. This consisted of a Dean, all lecturers (who were then all working part-time) and all lawyers who were members of the University Council, whether members of the judiciary, barristers or solicitors (Waugh 2007).

In the State of Tasmania, the University of Tasmania was established in 1890, with the Faculty of Law being established soon after in 1893. Although the Law School started with a sole lecturer, Jethro Brown, appointed as a Professor in 1896, he was replaced in 1900 by a long serving Dean, Professor Dugald Gordon McDougall who served in the post until his retirement in 1932 (Davis 1993).

In the state of South Australia soon after the foundation of the University of Adelaide in 1874, action was taken in 1877 to establish a law school but this foundered until 1882 when the University recognised the need to establish and fund a law program by the University making its first appointment of a professorial chair solely devoted to teaching law (Duncan, Leonards 1973).

This meant that by the enactment of the Federation of Australia in 1901 there were only four law schools. As for the subsequent two remaining states, despite the University of Western Australia being established in 1911 Western Australia did not found a law school until 1927, again under the aegis of a long-serving law academic Professor Frank Beasley. Professor Beasley was to have a profound influence on the early development of the law school, serving first as Head of the Law School and then continuing as a professor until his retirement in 1963 (Russell 1980).

Queensland was the remaining colony, and then state, that suffered because of the lack of a law school. It was not until 1936 that the University of Queensland established a functioning School of Law ("Heritage"). Prior to this as in many other states students could be admitted to practise law if they held law degrees awarded by other universities outside Queensland. However most took advantage of sitting exams of the Barristers' and Solicitors' Boards which came under the aegis of the Supreme Court of Queensland's Admission Board.

3. REFLECTIONS ON THE EARLY DEVELOPMENT OF LEGAL EDUCATION IN AUSTRALIA

An early examination of Australian legal education at the close of the 19th century a year before the proclamation of Federation (1901), reveals the development of some early trends, even though only a century and a half had elapsed since European settlement on the continent. A major development relates to those early universities that had established law schools. These tertiary institutions were unsure about whether the major objective of the law degree was to qualify the graduate to gain entry into the legal profession, or whether it should also be designed to give law graduates an all-round education.

It is interesting to note the fact that so few law schools had been established in Australia prior to World War II reflects that legal education was not regarded at this time as a major factor in the development of the legal profession. At this time Australian university law schools tended to have one full-time professor, with the rest of the teaching undertaken by part-time by legal practitioners. Professor David Weisbrot, law commentator, states: "Interestingly, up until the post-war period (after World War II) there was no significant and distinct class of legal academics." This meant that the Australian law school degrees "reflected narrow vocational concerns" (Weisbrot 1990, 122).

The other main development relate to the nature of teaching. This incorporated not only the selection of law teachers – including whether they should be involved in practice, employed part-time or full-time, possess higher academic legal qualifications – but also the standard of the teaching accommodation, its proximity to the law courts, the provision of teaching materials and the availability of large and high quality law libraries. It is easy, with benefit of hindsight to reflect that although both legislatures and University Councils usually included a large number of qualified lawyers, they tended not to advocate for provision of these essential components of a successful law school. This lack of self-interest on behalf of the legal profession led to an unfortunate effect on the funding of legal education in the 20th and 21st centuries.

4. INITIAL YEARS OF EXPANSION: SECOND WAVE AUSTRALIAN LAW SCHOOLS

Linking the traditional law schools and those who were established post-war (World War II) is the Australian National University College of Law, previously the ANU Faculty of Law. Some commentators have regarded this law school as the last of the traditional law schools whilst others have regarded it as the beginning of the Second Wave Law Schools. In reality it could be regarded as the bridge between the two legal worlds. It was established in 1960 with a strong emphasis on research, with a Legal Workshop Course being introduced in 1971 to provide a six-month qualifying course for those who wished to be admitted as legal practitioners. It has continued to expand since its foundation and has built an enviable reputation in constitutional, international and environmental law, operating eight research centres including the Centre for International and Public Law and the Australian Centre Environmental Law.

During the three decades after the establishment in 1960 of the Australian National University (ANU) Faculty of Law there was an impetus to expand other Australian law Schools. Perhaps this was because the expanding economy at the time increased the demand for additional lawyers. There was also a view "That any course at a university should be open to all who were qualified for it and wished to undertake it" (Balmford 1989, 155), which was supported by various government reports on tertiary education at this time. This perception also reflected a change of attitude in the school leavers of the 1960s who were the initial post-war generation (the "baby-boomers"). Increasingly, the majority stayed at school until Year 12 (then 6th form) and were the first members of their families to go to university. This was partly due to the creation of fee-free tertiary education after the election of the Whitlam Government on 5 December 1972 which led to the expansion of Australian law schools.

There was a noticeable change during this period in law teaching in Australia. This was not only reflected in the increased number of tertiary law teachers (due to the increase of law students and an expansion of law schools) but also in the calibre of law teachers. From 1960 onwards there was a greater focus on learning skills incorporating a more conceptual approach to the study of law. These changes in the nature and quality of law teaching required a shift in the qualities and approach of those appointed as law teachers. The majority were now required to serve full-time with little or no time to devote to legal practice. This shift in the experience of law teachers led to differences in the approach to teaching law in the law schools established in this period, which became known as Second Wave law schools. These were the first moves away from what were regarded as the forms of prevailing legal education with their emphasis on mainly acquiring knowledge as compared to intellectual training

incorporating critical analysis. This meant that there was increasing focus on life-long learning. Professor Derham, the Foundation Dean of Monash University Law School emphasised this change as "bringing our black letter law into tune with the needs of the time in arduous and exacting work calling for high scholarship and developed legal skills" (Tomasic 1978, 9).

Whilst it would be a mistake to regard each of the Second Wave law schools as established with the same objectives overall, they reflected a change in legal education, both in content and method. Certainly the new law schools of this period: Monash University, University of New South Wales, Macquarie University, University of Technology Sydney and Queensland University of Technology, introduced alternative approaches to the law curriculum with an emphasis on transferable law skills, stimulating the participation of law students, where possible incorporating the Socratic form of teaching and questioning the conventional norms of legal education with continuous class assessment. A more significant development with which the Second Wave law schools should be associated has been described by Professor Michael Coper, the former Dean of the Australian National University College of Law, as 'The emergence of the idea of legal education as the study of law as an intellectual discipline in its own right' (Coper 2005, 392).

5. AN ANVALANCHE OF LAW SCHOOLS: THIRD WAVE AUSTRALIAN LAW SCHOOLS – 1989 TO 2015

The period of Australian legal education commencing in 1989 (Coper 2005, 388, 391), and heralding what became known as the "Third Wave" law schools or "An Avalanche of Law Schools" (Barker 2017), was the precursor to an unprecedented and unexpected expansion of law schools in Australia. This increase resulted in an additional 16 law schools being established between 1989 and 1997, with a further 10 in the first 15 years of the 21st century.

One explanation for this expansion is that it was an outcome of the Dawkins reforms, which were introduced by John Dawkins, the Federal Education Minister at that time, who abolished the binary divide between the former universities and colleges of advanced education, which allowed more flexible programs for potential students. These reforms aimed to increase undergraduate student numbers as universities were given economies of scale.

When considering the advent of so many law schools in Australia post 1989, the challenge is to understand the underpinning of their establishment and to consider whether they are a true reflection of the changes which had come about in legal education and legal scholarship since 1989. In the Australian Law Reform Commission Report (ALRC) No 89 the early part of this period has been described as follows with regard to the ongoing development of legal education:

> Over the past decade or so, legal education in Australia has undergone a period of unprecedented growth and change. To some extent, this parallels the dynamic change in the profession – characterised by rapid growth; moves towards national admission and practice; globalisation; the end of traditional statutory monopolies; the application of competition policy and competitive pressures; the rise of corporate 'mega firms' the emergence of multi-disciplinary partnership; increasing calls for public accountability; more demanding clients; and the influence of new information and communication technologies – but many of the changes in legal education have been driven by other factors. (Australian Law Reform Commission 2000, 117)

Later in this report there is a statement relating to "other factors" which might assist in explaining one of the reasons for this rapid expansion of law schools in Australia

> Law faculties are attractive propositions for universities, bringing prestige, professional links and excellent students, at a modest cost compared with comparable professional programs such as medicine, dentistry, veterinary science, architecture or engineering (Australian Law Reform Commission 2000, 118).

If there was one aspect of the influence which characterises the influence of the "Third Wave" law schools it would have to be the greater emphasis on innovation teaching and assessment strategies than had occurred in the earlier law schools. Much of this can be attributed to the introduction in 1988 of the Australasian Law Teaching Clinic by the Australasian Universities Law Schools Association (AULSA), now the Australasian Law Academics Association (ALAA). These Law Teaching Clinics continued to be provided on an ongoing basis until 2003, when it was decided that because of the number of teaching courses being conducted the universities there was no further need for a specialised teaching workshop of the kind organised by the Association. It was in 1992 that there was agreement on a national curriculum for any Australian law degree. It was then that a Law Admissions Consultative Committee (LACC) chaired by Justice Priestley recommended 11 broad areas of knowledge which applicants for admission as a legal practitioner would need to have studied. This group of subjects, which became known as the "Priestley Eleven," comprise the following subjects: Criminal Law and Procedure, Torts, Contract, Property, Equity, Company Law, Administrative Law, Federal and State Constitutional Law, Civil Procedure, Evidence and Professional Conduct, including basic Trust Accounting (Law Admissions Consultative Committee 2002, 27–32).

6. CHANGING PATTERNS OF LEGAL EDUCATION: TEACHING AND LEARNING BEYOND THE LAW SCHOOLS

It is often overlooked that an extensive part of Australian legal education is delivered outside the law schools. This has been partly due to a conscious decision to exclude law schools from involvement and partly because most law schools

consider that providing Practical Legal Training (PLT) and Continuing Legal Education (CLE) is not part of their remit as legal educators. However it should be noted that some law schools do provide PLT and/or CLE. The first such centre for PLT was the Leo Cussen Institute (subsequently renamed the Leo Cussen Centre for Law) which was established in 1972 in the centre of Melbourne, Victoria. This was followed by the founding of the College of Law in St. Leonards, Sydney, New South Wales in 1977. The College of Law is now the largest provider of PLT in Australia with a presence in most States and Territories whilst the Leo Cussen Centre for Law remains the principal provider in the State of Victoria. CLE was regarded as the least essential of the three stages of legal education and it was not until 1987 that New South Wales was the first State to make it mandatory for all solicitors to undertake a minimum amount of CLE. That New South Wales was the first jurisdiction to implement such a CLE Scheme was probably because it was also the first State or Territory law society to abandon the system of articled clerks, so alerting it to the need for some form of continuing education on the completion of PLT and admission as a legal practitioner. Since then it is a requirement in most States and Territories, whilst similar requirements are now imposed on barrister members of various bar associations throughout Australia. Courses of instruction for CLE are provided by a cross-section of legal educators including the Leo Cussen Centre for Law, the College of Law and many of the local law societies and bar associations.

7. AUSTRALIAN LEGAL EDUCATION TODAY: THE EVERLASTING SAGA

In culminating this short account tracing the evolution of Australian legal education from the time of European settlement in 1788 until the present day, it has to be recognised that there is no easy resolution of the paradox created by the dichotomy between the studying of law as an intellectual pursuit as compared to training for professional practice.

These challenges have been reflected in the following comment by Mary Keyes and Richard Johnstone, law academics, who have argued that the challenge is for:

> Australian laws schools to rethink their relationship with the legal profession, to ensure that law schools assert their autonomy in matters of curriculum, teaching and learning and research, so that legal education aims for more than preparing students for work in legal practice. (Keyes, Johnstone 2004, 537)

Professor Michael Coper, formerly Dean of the ANU College of Law has sought to reconcile these opposing views when he states:

> The emergence of the ideal of legal education as the study of law as an intellectual discipline in its own right has led to continuing tensions with the ideal of legal education as training for professional practice. (Coper 2005, 392)

Yet he believes that "the two conceptions are profoundly consistent," because:

> [The] best and most effective lawyers, in any form of practice, are those with a deep understanding of the law and the legal system: a deep understanding not just of the rules but of their context, their dynamics, their role in society, and their limits; an understanding, in particular, of where the law has come from, as well as an intuition about where it might go. (Coper 2005, 392)

A study of the history of Australian legal education reveals that it has shown a remarkable resilience in both retaining and enhancing its status as a major university discipline. It has achieved this whilst also being able to provide training for students to become legal practitioners, whilst at the same time ensuring that they receive a liberal education incorporating the development of intellectual and transferable skills.

BIBLIOGRAPHY

Australian Law Reform Commission. 2000. *Managing Justice: A Review of the Federal Civil Justice System*. Report No. 89. Sydney: Commonwealth of Australia.

Balmford, Peter. 1989. "The Foundation of Monash Law School." *Monash University Law Review* 15: 139–175.

Barker, David. 2017. *A History of Australian Legal Education*. Sydney: Federation Press.

Coper, Michael. 2005. "Law Reform and Legal Education: Uniting Separate Worlds." In *The Promise of Law Reform*. Edited by Brian Opeskin, David Weisbrot. 388–403. Sydney: Federation Press.

Davis, Richard. 1993. *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893–1993*. Tasmania: University of Tasmania.

Duncan, Walter. Roger Leonards. 1973. *The University of Adelaide, 1874–1974.* Adelaide: Rigby Limited.

Keyes, Mary. Richard Johnstone. 2004. "Changing Legal Education: Rhetoric, Reality and Prospects for the Future." *Sydney University Law Review* 26(4): 537–564.

Law Admissions Consultative Committee. 2002. *Towards a National Legal Profession: Revised Uniform Admission Rules*. s.l.

Mackinolty, Judy. 1991. "Learned Practitioners 1910–1941." In *A Century Down town: Sydney University Law School's First Hundred Years.* Edited by John Mackinolty, Judy Mackinolty. 57–82. Sydney: Sydney University Law School.

Martin, Linda. 1986. "From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales." *University of New South Wales Law Journal* 9(2): 111–143.

Neal, David. 1991. *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*. Sydney: Cambridge University Press.

Russell, Enid. 1980. *A History of the Law in Western Australia and its Development from 1829 to 1979*. Perth: University of Western Australia Press.

School of Law, University of Queensland. n.d. "Heritage." Accessed 20 April, 2021. https://law.uq.edu.au/about/history

Tomasic, Roman. 1978. *Understanding Lawyers: Perspectives on the Legal Profession in Australia*. Sydney: Law Foundation of New South Wales.

Waugh, John. 2007. *First Principles: the Melbourne Law School 1857–2007.* Melbourne: Miegunyah Press.

Weisbrot, David. 1990. *Australian Lawyers*. Sydney: Longman Cheshire.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.03

*Frederik Dhondt**

https://orcid.org/0000-0001-9999-5658

JOHN GILISSEN AND THE TEACHING OF LEGAL HISTORY IN BRUSSELS[1]

Abstract. John Gilissen (1912–1988) was a high-profile legal academic at the Université libre de Bruxelles (°1834) and the Vrije Universiteit Brussel (°1969). Personal – albeit fragmentary – archival records deposited with these universities permit to reconstruct his teaching (both *ex cathedra*-courses for big groups and intensive tutorials), impressive global scientific network and insatiable scientific curiosity. Gilissen is the author of standard works on many aspects of domestic legal history (both public and private), and acquired renown as the secretary-general of the *Société Jean Bodin pour l'histoire comparative des institutions.* His influential position as a public prosecutor, law professor and legal historian generates a unique insider's perspective on the confessional, linguistic and constitutional transformation of the country from World War One to the First Reform of the State. The current law curriculum at the Vrije Universiteit Brussel still bears marks of Gilissen's comparative approach to the history of civil law and his interest in the contemporary relevance of institutional history.

Keywords: Legal history, Belgian history, 20th century history.

JOHN GILISSEN I NAUCZANIE HISTORII PRAWA W BRUKSELI

Streszczenie. John Gilissen (1912–1988) był wybitnym prawnikiem wykładającym na Université libre de Bruxelles (założonym w 1834 r.) i Vrije Universiteit Brussel (założonym w 1969 r.). Posiadane przez te uniwersytety osobiste dokumenty archiwalne – choć nieliczne – pozwalają odtworzyć sposób nauczania Gilissena (zarówno w trakcie wykładów kursowych dla dużych grup studenckich, jak i uzupełniających ćwiczeń), robiącą wrażenie, globalną sieć kontaktów naukowych oraz nienasyconą ciekawość badawczą. Gilissen jest autorem fundamentalnych prac dotyczących licznych aspektów rodzimej historii prawa (tak w odniesieniu do prawa publicznego,

* Vrije Universiteit Brussel; Ghent University, Faculty of Law and Criminology, frederik.dhondt@vub.be

[1] The scope of this article is limited to the available archival sources, which are representative of Gilissen's teaching, but in no way exhaustive. I thank Dirk Heirbaut, Michel Magits and Els Witte for their comments on an earlier draft, as well as Stefano Cattelan, Wouter De Rycke, Michael Van den Poel and Arno Swyngedouw for proofreading. Special thanks go to Frank Scheelings (VUB, Centrum voor Academische en Vrijzinnige Archieven [CAVA]) and Michèle Graye (ULB, Service des Archives) for their kind help. For reasons of privacy, students' names have been abbreviated.

Received: 8.11.2021. Revised: 11.01.2022. Accepted: 15.03.2022.

jak i prywatnego), a także zyskał renomę jako sekretarz generalny *Société Jean Bodin pour l'histoire comparative des institutions*. Jego wpływowa pozycja publicznego oskarżyciela, profesora prawa i historyka prawa powoduje dostrzeżenie wyjątkowej pespektywy przemian wyznaniowych, językowych oraz ustrojowych rodzimego kraju Gilissena od czasów pierwszej wojny światowej do pierwszej reformy państwa. Obecny program studiów prawniczych na Vrije Universiteit Brussel nadal nosi ślady wpływów Gilissena i jego prawnoporównawczego podejścia do historii prawa prywatnego oraz jego zainteresowań współczesnym znaczeniem historii instytucjonalnej.

Słowa kluczowe: historia prawa, historia Belgii, historia XX wieku.

In the following contribution, I present a reconstruction of John Gilissen's (1912–1988) academic contribution to legal history, with a focus on teaching, based on fragmentary files kept at the archives of the Université libre de Bruxelles (ULB) and Vrije Universiteit Brussel (VUB).[2] After a brief biographical introduction (1), an overview of his academic career and experience in the seminal period of the Second World War (2), and the blossoming of his research from 1950 on (3), the focus will be on the remains of his teaching at the ULB and VUB (4), administrative responsibilities (5) and his central role in many academic networks (6). Finally, I will briefly signal the enduring legacy of this predecessor on the teaching of legal history in Brussels today.

1. LIFE

Professor Jean-Joseph ("John") Gilissen (1912–1988) was born just before the outbreak of the Great War. He studied in Brussels and Antwerp (high school) and enrolled at the predominantly French-speaking Université libre de Bruxelles as a law student in 1930. He simultaneously pursued studies in law and history, to obtain the degree of doctor of law in 1935 and master (*licencié*) in history in 1934. As a historian, his master thesis treated the law of contract according to the law applicable in the county of Flanders and the duchy of Brabant in the thirteenth century. As a historian, Gilissen was influenced by his masters, the early modernist Paul Bonenfant (1899–1965, see Despy 1989)[3] and the specialist of Ancient Egypt Count Jacques Pirenne (1891–1972, see Gilissen 1979, 9).[4]

[2] VUB, Centrum voor Academische en Vrijzinnige Archieven, PJG (B 75/02/3), containing university-related administrative documents from 1960 to 1971.

[3] Bonenfant studied under the direction of Michel Huisman (1874–1953). He started teaching at the ULB in 1930.

[4] Jacques Pirenne was active in the *Comité de politique nationale*, which demanded territorial extension for Belgium after World War One. He opposed the transformation of the State University of Ghent (where his father, the mediaevist Henri, taught) to a solely Dutch-speaking institution, and became secretary of King Leopold III, whose authoritarian views were at the basis of the "Royal question," which divided Belgium until 1950 (Colignon 2021).

Gilissen mastered both Dutch and French, a relatively rare quality among the academic staff of the ULB (Ingber 1983, XII).[5] He published and taught in both languages. When he grew up and studied, the linguistic question rocked Belgian politics. Dutch had only been recognised on par with French as a legal language in 1898 following the so-called *Gelijkheidswet*, literally: "equality law" (X 1959). University teaching in Dutch commenced at the law faculties of Brussels and Ghent in the 1890s, since the use of Dutch had been allowed in criminal procedure in 1873 (Prayon-Van Zuylen 1892). Further reforms were demanded after the Great War.[6] Right after the conclusion of the armistice on 11 November 1918, King Albert I announced in Parliament that equality *in rechte en in feite* ("equality in law and fact") would be established. Universal male suffrage was introduced *contra constitutionem* for the elections of 1919, and the King promised that the State University of Ghent would switch to exclusively teaching in Dutch. This was part of the moderate Flemish nationalists' aim to establish a linguistic border, and apply the territoriality principle.

The following seven decades of Gilissen's life would see the transformation of the unitary Belgian state to a federal state, and the end of bilingual universities. Whereas the ULB counted a Dutch-speaking section in the 1930s, the university "disintegrated" and split in 1969 (Tyssens 1995, 28; Baeteman, De Vroede et al. 1987). This should be situated against the background of the global student revolts of 1968.[7] In Belgium, student protests were translated in the separation of the Catholic University of Leuven, with the French-speaking section moving to an entirely new city, Louvain-la-Neuve. In Brussels, the standalone VUB (*Vrije Universiteit Brussel*) was created, with its own law faculty, as the logical continuation of the Dutch-speaking courses organised in the ULB before. The VUB moved to a new campus, a quarter of an hour on foot from the ULB's main site at the Solbosch, built for the universal exhibition of 1910. Both institutions

[5] In 1940, the German occupant established that 62% of the 29 members of the academic staff in the Law Faculty was bilingual (mastering both Dutch and French), 34% spoke only French and 4% was "almost bilingual." This situation significantly differed from that in the university as a whole, where only 48% of the 271 staff members were considered bilingual, and 37% spoke only French, with peaks of 44% in the Faculty of Engineering and 42% in the School of Economics. Annex to the letter of Petri and Reese, ULB/Archives Gilissen, no. 1. After 1970, the Vrije Universiteit Brussel's professorial corps included many professors who originally taught at the ULB, mostly in the faculties of Sciences and Arts and Philosophy (Cornelis, Witte, Veretennicoff 1977).

[6] The German occupant had closed the State University in Ghent and opened a solely Dutch speaking university. So-called "Activists," who collaborated with the German *Reich*, had even proclaimed the independence of Flanders towards the end of the war. This separatist position was not the most predominant in the Flemish movement (Wils 2017).

[7] Brussels Studenten Front to John Gilissen, Brussels, 29 October 1968, VUB, Cava, Gilissen Archives. Gilissen was asked to declare his solidarity with the Dutch-speaking students, who protested against university election without parity between French- and Dutch-speaking members of the academic community, nor a guaranteed representation.

would share this former military exercising site.[8] Gilissen was one of the rare professors to continue teaching in both ULB and VUB. Only a couple of joint initiatives survived the split of the university, such as the *Studiecentrum voor de Verlichting*, but not for very long.[9]

He received honorary doctorates from the universities of Lille (1965), Strasbourg (1970) and Paris (1974), was a member of both the Belgian (Flemish-speaking, 1956) and Dutch (1976) Royal Academies and was distinguished with the Grand-Cross of the Order of Orange-Nassau. Gilissen founded the *Société internationale de droit pénal militaire et de droit de la guerre*, the *Association internationale d'histoire du droit et des institutions* and the *Centre d'histoire et d'ethnologie juridiques*. The latter centre, based at the ULB, published a seven-volume *Introduction bibliographique à l'histoire du droit et à l'ethnologie juridique*.[10]

We cannot omit one crucial episode in Gilissen's extra-academic career. On 8 September 1942, pursuant to the closure of the ULB, Gilissen had been dismissed as *chargé de cours*, at the order of Nazi-commissioner Petri.[11] He remained as an assistant public prosecutor.[12] At the end of the second World War, the young assistant public prosecutor joined the ranks of the military courts and tribunals to prosecute wartime collaboration with the German occupant.[13] These

[8] In this first "independent" academic year, the VUB's campus in Etterbeek was not constructed yet. The university only moved here completely in 1974 (Witte 1995, 16). Law students were attracted with the image of the ULB's main building on the Avenue Franklin Roosevelt (VUB, CAVA, coursebooks, Collegerooster 1969–1970, Brussels, VUB, 1969, 2).

[9] "The Dutch-Speaking Free University would hence demonstrate that she does not want to deviate from the original design of her founders, promoting the emancipation of man and the self-realisation of a freer community by conscious, free and matured human beings" (Source: "Project betreffende de oprichting van een instituut voor de Studie van de XVIIIde eeuw," VUB, CAVA, Gilissen Archives, s.d.: probably May 1969, 1; De Hert, Dhondt 2017).

[10] See also Gilissen, Pollet (1965).

[11] The ULB's academic authorities had decided to close the university on 25 November 1941, to protest against German interference in nominations in the academic corps (Tyssens 1995, 62; Despy-Meyer, Dierkens et al. 1991; Stengers 1982). Letter from Petri to Gilissen, Brussels, 8 September 1942; Interdiction of physical presence in the university's premises by secretary Morissens, Brussels, 9 September 1942. ULB/Archives Gilissen, no. 1. Gilissen did remain as deputy prosecutor in the office of the Brussels Royal Prosecutor, Section B, as indicated in the Circular Instruction of the Royal Prosecutor, Brussels, 11 September 1942, *ibid.* Before the war, as a lecturer (*chargé de cours*), Gilissen had supported the student protests at the ULB against the Belgian policy of non-intervention in the Spanish Civil War (Witte 2009, 42).

[12] "Gilissen, John." In *Digithemis Prosopographical Database of Belgian Judges*, http://prosopo.sipr.ucl.ac.be:8080/prosopographie3/. He had started in this position in 1938, after a brief stint at the bar.

[13] Letter by the administrative councillors Petri and Reese to the German military commander in Belgium on the current situation of the ULB, 5 June 1940. ULB/Archives Gilissen, no. 1: "the University of Brussels (*Brüsseler Hochschule*) has an explicit Liberal-Socialist character and is linked to freemasonry from its foundation on. The professorial corps was judged 'very much jewish',

procedures took place in the military councils and courts.[14] Gilissen acted at the appeals level, in the Brussels Military Court, which attracted the attention of both Dutch- and French-speaking media.[15] Incidentally, his name appeared in press reports on the cases of famous collaborators, such as the former president of the Socialist Party Hendrik De Man (1885–1953), who was sentenced by default to twenty years of imprisonment by the War Council on 12 September 1946. *Le Soir* reports that Gilissen, as assistant chief military prosecutor, requested a revision of the verdict by the Military Court, because De Man's "malicious intent" (*intention méchante*) would have been insufficiently taken into account. He had drawn up a note on the Belgian Workers Party for the occupant's authorities, from which Gilissen (as prosecutor) derived a *défaillance encore plus grande que celle de Degrelle*, the latter being a far-right French-speaking politician, who had already been an outspoken fascist before the war (De Man 1927; Conway 1993; Stutje 2018). Gilissen requested a life sentence for De Man, albeit with the alleviating circumstance that De Man had come to modify his attitude afterwards. The Military Court confirmed the earlier sentence of twenty years.[16] Another illustrious trial where Gilissen acted as prosecutor was that of the *Grand-Bruxelles*, where Belgians who executed the Nazi occupant's desire to merge the municipalities of Brussels, were put on trial.[17] The legal historian had now become a part of the country's authorities.[18]

---

and expressed itself in anti-German sense recently." A copy of a wartime article in the collaboration press by Pierre Hubermont (1903–1939) translated the German wish to reorient the ULB, away from "determinist dogmatism […] historical materialism and […] marxism" or "antifascism," "blinded by verbal phantasies as freedom and democracy." See also the editorial of Raymond De Becker (1912–1969), editor-in-chief of the newspaper *Le Soir*, taken over by the German occupant, 14 December 1941: "the ULB stayed a center of masonic influences, bad temper, inertia and sabotage" (*Ibid*). At the time of the German invasion, the actual political influence of freemasonry was very limited, due to the massification of democracy and the multiple other ideological disagreements between Liberals and Socialists (Tyssens 1993, 271). See also Witte (2009, 39–44); Beyen (2002, 165).

[14] Gilissen published a "groundbreaking" statistical study on the prosecution of wartime collaboration (Gilissen 1951) and on administrative epuration (for the mention, Wouters 2019, 17 and 21). He was preparing a monograph on the topic, but was unable to finish that study. His papers collected for the purpose are kept in the archives of the military criminal court. These figures have been corrected by Huyse and Dhondt (2020, 179–280). Gilissen proposed to destroy part of the extensive records on collaboration, as he deemed petty cases to be of little significance (Wouters 2019, 16).

[15] E.g. *Het Laatste Nieuws*, 12 December 1950. Gilissen equally provided data for the legendary documentaries and interviews of Maurice De Wilde, a journalist of the Belgian public broadcaster, who received an honorary doctorate at the Vrije Universiteit Brussel.

[16] *Le Soir*, 30 March 1947.

[17] "Le «Gross-Brussel» en appel," *La Dernière Heure*, 21 February 1947.

[18] E.g. Gilissen's presence signalled among other men of influence as former prime minister Henri Carton de Wiart (1869–1951), minister of state and ULB-professor Henri Rolin (1891–1973) and First President of the Council of State Jean Suetens (born 1893) at a lecture on wartime collaboration and the Flemish movement at the Brussels Bar. *Het Volk*, 21 January 1950.

His involvement in prosecution will certainly have conferred an impressive aura on Gilissen in the eyes of his students, adding to the traditionally hierarchical relationship between professors and students, prior to the democratisation of university education. "Patriotism and integrity" explained his nomination as adviser to the Minister of Defence and Head of the Research Department of the Ministry in 1945, "charged with the delicate mission to check the biographical notes of Belgian officers" (Ingber 1983, XIII). In 1965, Gilissen was promoted to the rank of *Auditeur-Generaal* (head of the prosecution department) at the Military Court.[19] His parallel career at the Palace of Justice engendered a stream of publications on military law and criminal law (X 1988).

2. ACADEMIC AND JUDICIAL CAREER TO 1950

While he was pursuing his internship at the Brussels Bar (1935), John Gilissen was appointed as assistant at the ULB (1936) (Feenstra 1989; Godding 1988, 17). Since the law faculty did not require a doctoral dissertation (all graduates obtained the title of Doctor of Laws until 1972), he was assigned the course *Historische Inleiding tot het Burgerlijk recht* ("Historical Introduction to Civil Law") in 1938.[20] He combined this function with a course on *Kunstgeschiedenis* ("History of Art") and *Geschiedenis van de Bestuursinstellingen van België* ("History of Belgian Administrative Institutions") at the evening classes of the Higher Institute for Administration (Brussels, Antwerp).[21]

After the war, Gilissen was entrusted with both the French and Dutch version of the courses *Historical Introduction to Civil Law*, *Legal History* (1948), and, from 1958 on, *Contemporary History*. On 1 January 1948, he attained the rank of "Professor" (*hoogleraar)* (Ingber 1983, XII).[22] Gilissen's archives contain many relevant documents to trace the history of the Dutch-speaking section of

[19] *Ibid*, X.

[20] Until 1929, this course had been part of the mandatory one-year "candidature" (one year-Bachelor) in Law, for which students could only enrol after two years of "candidature" in the Faculty of Arts and Philosophy. The Law of 21 May 1929 on Higher Education extended the "doctorate" (Master) to three years, scrapped the "candidature" in Law, and relegated "Encyclopaedia of Law," "Institutes of Roman Law" and "Historical Introduction to Civil Law" to the two-year "candidature in Arts and Philosophy preparatory to Law and Notary Sciences" (Waelkens, Stevens 2014, 230).

[21] E.g. Letter of Robert Picavet (Director of the Higher Institute for Administrative Sciences) to John Gilissen, Antwerp, 28 July 1954, ULB/Archives Gilissen, no. 26. Picavet explained that Gilissen's courses would not be taught in 1954/1955, as the institute, which only taught in the evening, would only organise the courses of its second and fourth year. In 1975, the VUB would later become a pioneer in the Belgian university landscape by creating special evening lectures for 'working students' for most courses of the regular program (Magits, Salmaekers 1995, 285–288).

[22] He was promoted to senior professor (*professeur ordinaire-gewoon hoogleraar*) ten years later.

the ULB's law faculty, which eventually became the independent faculty of Law and Criminology of the VUB. Already in the Winter of 1944, Gilissen and his colleague Joseph Van Tichelen (professor of constitutional law)[23] took part in the special committee appointed by the Board of Administrators to study "the Flemish question" (Tyssens 1995, 62).[24] Following articles 2 and 43 of the linguistic law of 15 June 1935, which made a Dutch-speaking Law degree mandatory to practice law at the bar, as a notary or to become a magistrate in the Flemish provinces (Antwerp, West Flanders, East Flanders, Limburg), the district of Leuven and the district of Brussels outside of the city centre, the ULB had decided to create Dutch versions of the law courses taught in French (Van Goethem 1990; Vandenbogaerde 2018, 187–285).[25] From 1938 on, the first cycle of the law programme became gradually available in both French and Dutch.[26]

This had become necessary as a consequence of the linguistic laws of 1932, which had imposed Dutch as the main teaching language in secondary schools in the Dutch-speaking part of Belgium.[27] Furthermore, pursuant to the law of 28 June 1932, appointments in the civil service (including for medical doctors, scientists and engineers) required a Dutch-speaking degree.[28] Pupils at high schools in Flanders could only be taught by teachers with a Dutch-speaking academic degree.[29] Where would non-Catholic teachers in languages, sciences or mathematics graduate, if the ULB could not provide programs in Dutch?[30]

As a consequence, the ULB risked losing its students from Flanders, and would not be able to send out its graduates to compete for positions in Flanders. Gilissen thought that the university needed to "double" all degrees as soon as possible, starting with the strategic faculties which provided teachers for high schools. The necessity of a law degree in Dutch had already been established

[23] After the war, Van Tichelen would make a career in economic diplomacy, as director-general of the Ministry of Economic Affairs. He would negotiate the Treaties of Rome in 1957 with Jean-Charles Snoy et d'Oppuers and Paul-Henri Spaak, and can thus be considered as one of the "Founding Fathers" of the European Union (Van Tichelen 1981).

[24] Committee appointed by decision of the Board of Administrators of the ULB, 14 October 1944.

[25] Law on Language in the Judiciary, *Moniteur Belge* 22 June 1935.

[26] In July 1941, the ULB's administrative authorities accepted the principle of a full "dédoublement" of the whole university, encouraged by the occupant (Tyssens 1995, 62).

[27] Law of 14 July 1932 on the Use of Language in Lower and Secondary education, *Moniteur Belge* 3 August 1932 (Tyssens 1995, 62).

[28] Law of 29 June 1932 on the Use of Language in Administrative Affairs, *Moniteur Belge* 29 June 1932.

[29] Art. 40 of the law of 21 May 1929 foresaw that exams had to be taken in Dutch for at least two subjects taught in high school. Teachers had to write their master thesis in Dutch, and had to prove mastery of Dutch during a mock course.

[30] We should however relativise the impression of an absolute separation between Dutch-speaking universities and French-speaking Belgium. E.g. on 13 October 1954, *Le Soir* still printed the official examination results of the University of Ghent, even those of the second session.

before the war. The committee's reports included statements according to which socialist and liberal ministers of justice complained on the lack of non-Catholic Dutch-speaking law graduates, which obliged them to appoint Catholics as judges and prosecutors.[31] The philosophical pluralism in Flanders, and thus the overall balance of Belgian society, was at stake. If a non-Catholic elite were to survive in Flanders, the free university in Brussels had to take on its responsibility as a university in the nation's capital, providing both French-speaking and Dutch-speaking graduates to fill the courts of law, the civil service, business management, banking and – of course – university research and teaching positions in Dutch.

The committee's detailed preparations included a statistical analysis of the ULB's recruitment. In the final year, out of 150 law students in the final cycle (the "Doctorate" in law), around 31 were originally from Flanders, mainly from Antwerp.[32] The ULB's general recruitment in Flanders hovered around 10% of the total number of students. This explained the small number of students in the Dutch-speaking section: ten in 1938–1939, twenty-five in 1941–1942 and eighteen in 1944–1945, after the liberation of Belgium. However, the potential of a Dutch-speaking alternative to the Catholic university of Leuven and the State University in Ghent was estimated to be considerably bigger than the enrolment numbers before the war.

Gilissen tried to convince his peers to hire more professors in the Faculty of Arts and Philosophy, especially in the History section, since the latter provided the bulk of courses taught in the first cycle of law studies.[33] If Dutch-speaking

[31] Comment in Gilissen's note , s.d., p. 7. ULB/Gilissen archives, no. 25.

[32] Eight students out of 154 in 1927–1928, fourteen out of 162 in 1934–1935. After the creation of a Dutch-speaking section, four out of thirteen (1937–1938) and two out of thirteen (1938–1939) students came from Antwerp. In the French-speaking section, three out of 115 in 1938–1939 and three out of 100 in 1938–1939. The overall recruitment of the ULB's law faculty was very local, as students from Brussels made up more than two thirds of enrolments. Students from the Walloon provinces filled a quarter to a third of the classroom. These numbers cannot be compared to today's figures, as the democratisation and feminisation of the student population has opened the access to a university degree to virtually the whole population. In the 1930s, the overall number of students showed that Brussels (Freethinking, 2 034 students in 1937–1938) was of a size comparable to Ghent (State, 1894), the universities of Liège (State, 2 731) and Leuven (Catholic, 4 073). It should however be underlined that access to university was restricted in Flanders before the war. The Dutch-speaking part of the country clearly lagged behind (Tyssens 1995, 41).

[33] Gilissen proposed to hire three fulltime professors for medieval, early modern and contemporary history, or, alternatively, to attract part-time colleagues. In the first cycle, the law courses of Natural law, Historical Introduction to Civil Law (Gilissen), Roman Law and Encyclopedia of Law had been taught in Dutch since 1938. Besides historical and literary courses, the exams in the first year included logics, psychology and anatomy (first period). Later documents on efforts to "double" all training programmes at the ULB listed the number of degrees in history delivered to Dutch-speaking students in Leuven and Brussels between 1956 and 1961: 69 "licenciés" (masters) and 77 "agrégés" (high school teachers) and 5 doctors for the former, one single "licencié" for Brussels in 1961 (ULB/Archives Gilissen, no. 29).

alumni from Flemish secondary schools were to enrol at the ULB, they ought to be able to follow the full curriculum in Dutch. This included the provision of tutors for Dutch-speakers, the compulsory study of Dutch terminology for students in the French-speaking section and the "defense of our own candidates at state exams" (which could allow a candidate to obtain a qualification to teach in both languages).

Gilissen and Van Tichelen vibrantly pleaded for equal treatment of Dutch-speaking students and academic staff. They refuted the idea that the ULB should only harbour "reasonable" (read: bilingual or predominantly French-speaking) Flemings.[34] The statistics accompanying the commission's works showed that the ULB's enrolments had not declined after the State University of Ghent had switched to exclusively Dutch teaching (1930). This could be interpreted as a sign that the ULB's natural audience was averse to an education in Dutch. Especially students from Antwerp seemed to prefer Brussels over Ghent.[35] Quite the contrary, Gilissen and Van Tichelen argued, the university ought to show its benevolence to the Flemish provinces, rather than entrench the wartime perception of Flanders as the harbour of widespread collaboration with the German occupant. This statement is to be taken seriously, in view of Gilissen's eminent role as assistant military prosecutor at the Military Court. They considered the university to be incomplete or only operating at a restricted level of its true potential, and suggested the inclusion of Dutch-speaking personalities from outside academia in the Board of Administrators.

Before World War One, only elements of criminal law and criminal procedure and practical exercises in these matters had been taught in Dutch (Tyssens 1995, 61).[36] The early linguistic legislation in Belgium had first introduced the use of Dutch in criminal procedure in Flanders. After the Great War, exercises in commercial law in the final year were equally taught in Dutch. Doubling the second cycle (from 1935–1936 on) had only resulted in a meagre two students in 1938–1939, and six in 1938–1939 (first year), eight and five (second year) and a single student in the final year (in both years). The French-speaking programme in law had only a handful of Flemish students left. The linguistic legislation had thus clearly produced the legislator's intended effect. Gilissen and Van Tichelen pleaded that the 506 students pursuing their final year of high school in the

[34] ULB/Archives Gilissen, no. 24, Letter by Gilissen and Van Tichelen.

[35] The statistical note mentions 162 students from Antwerp in Ghent and 206 in Brussels for the academic year 1937–1938.

[36] The Law of 10 April 1890 had introduced a course of Criminal Law in Dutch. In 1924, both Criminal Law and Criminal Procedure were taught in Dutch. The introduction of practical exercises in the law programme was a German-inspired innovation, in which the ULB was a pioneer (Magits 1990).

Flemish state schools (traditionally affiliated to non-Catholic families) ought to be seen as the future students of the ULB.[37]

Van Tichelen drew up a note with various reflections that illustrate the complex relationship between the Dutch-speaking and French-speaking elements in the ULB's academic community.[38] He thought that the cultural renewal in Flanders in the course of the past century should not lead to a break-up of Belgian unity. Flanders had managed to inverse its position in fifty years, due to the rise of the Flemish movement and the extension of suffrage. "Quislings" were common all over Europe. The totalitarian excesses of the Flemish movement during the war, according to Van Tichelen, should not obscure that "the Flemish movement had belonged to the left" before World War One. He framed the emancipation of Dutch culture in Belgium as a final correction on the state of "isolation and regression" caused by the split of the Low Countries in the revolt against Spain in the late sixteenth century. Only after the Great War would the Flemish movement have come under Catholic control. French was seen as a tool to liberate the mind in Flanders in 1830, but the reverse should be true more than a century later: the study of Flemish culture, and the practice of teaching and research in Dutch would enrich the mind of a university whose devise was *le libre examen* i.e. free investigation (Stengers 2004). He suggested the academic authorities ought to speak out publicly and plead for a regeneration of the country after the war.

This major constitutional redesign, which Van Tichelen hoped for, was not realised in the immediate years after the war. Yet, Gilissen and Van Tichelen clearly saw the danger of the intertwining of the confessional/non-confessional divide with the linguistic opposition in the country. The ULB's potential to attract Dutch-speaking students was a symbol for the ties that could preserve the country's pluralism. Belgium would fend off the introduction of federalism. A lengthy process of "reform of the state" only started in 1970. The "Royal Question" on the attitude of King Leopold III (1901–1983) during the Second World War, would divide the country, along the left-right and linguistic conflict, until the King's abdication in 1950.

---

[37] The relatively modest numbers should be contextualised within the legal and social framework of higher secondary education. Schooling was only compulsory (for boys and girls) until the age of fourteen. Consequently, those pursuing their studies until the age of eighteen were doing so with the aim of enrolling at a university or at another institution for higher education. In 1939, the *athenea* (state institutions for secondary education) had slightly less than 18 000 students enrolled (Tyssens 1993, 281). Various pieces in his personal archives indicate Gilissen's willingness to promote Dutch-speaking studies at the ULB, e.g. letter of L. Madelein, assistant to the Rector to John Gilissen, Brussels, 26 March 1965, ULB/Archives Gilissen, no. 30: Gilissen was listed as speaker on a "propaganda day" (*voorlichtingsdag*) for students from the Royal Athenea of Berchem (Antwerp) and Termonde (East Flanders). The softening of the ideological divide resulted in a break-even point in the 1990s, when half of the VUB's students were recruited from the free (Catholic-inspired) education network, which is still by far dominant in Flanders (Witte 1995, 21).

[38] Note Van Tichelen, s.d., ULB/Archives Gilissen, no. 24.

In the immediate aftermath of the Committee's report, the ULB confirmed its decision to "double" the full law program in 1946.[39] The first alumni of the fully Dutch-speaking law programme graduated in 1951 (Tyssens 1995, 63). However, the operation would not be extended to the other faculties.[40] Linguistic issues would only resurface in the 1960s, together with new social movements and growing democratisation in secondary education, intimately linked with the post-war growth of the welfare state and the "baby boom."[41]

3. RESEARCH

Gilissen's research was very broad. He authored over eight thousand pages. His publications proliferated after the end of his assignment to the repression of collaboration (1950). However, it should be underlined that Gilissen combined this prolific writing with an exceptionally dense activity as a central hub in many scientific networks.[42] He took up the prestigious function of secretary-general of the *Société Jean Bodin pour l'histoire comparative des institutions*. Gilissen's scientific renown stems in part from the extensive, clear and insightful syntheses he managed to produce (e.g. Société Jean Bodin pour l'histoire comparative des institutions 1969: 134 pages). The society's collective thematic volumes' sweep was astonishingly large, as scholars from all major legal systems contributed (Gilissen 1970). Gilissen aimed to discover the *grands courants* of human and institutional behaviour. When criticized by the famous French political scientist and constitutional lawyer Maurice Duverger (1917–2014), Gilissen replied that comparative legal history was different from sociology, since it did not pretend to discover universal truths (Gilissen 1973; Gilissen 1975).

Gilissen was equally a Belgian member of the board of editors of *The Legal History Review* (*Tijdschrift voor Rechtsgeschiedenis*; Winkel 2019) for over three decades. This leading journal of legal history, founded by Dutch lawyers in 1919, became a truly Dutch-Belgian review after the Second World War. Gilissen served on the board for more than thirty years, together with – among others – Robert Feenstra (1920–2013), Felix Wubbe (1923–2014), Egied Strubbe (1897–1970), François Louis Ganshof (1895–1980) and Raoul Van Caenegem (1927–2018). The journal dedicated a special section to him in 1982, with articles by Felix Wubbe,

[39] Thirteen years after the Catholic University of Leuven (Waelkens, Stevens 2014, 234–241).

[40] Optional courses in Dutch could be taken at the Faculty of Arts and Philosophy by students from Social Sciences, Dutch terminology was made available to the Faculty of Engineering. *Ibid.*

[41] Which caused an *explosion scolaire* (Tyssens 1995, 31–33). In 1961, Belgium counted 51 000 students enrolled in higher education, compared to only 22 000 in 1954. This would continue to rise to 71 000 in 1971 (Tyssens 1995, 40).

[42] "Il lui arrivera, certaines années, d'être président de trois associations, et, simultanément, d'exercer le secrétariat général de trois autres sociétés savantes…" (Ingber 1983, X).

Raoul Van Caenegem, Pieter Gerbenzon (1920–2009) and Philippe Godding. He was equally a board member of the Franco-Belgian-Dutch *Société d'histoire du droit et des institutions des pays flamands, picards et wallons*, founded in 1929 and of the Royal Commission for the Publication of Old Laws and Ordinances at the Belgian Ministry of Justice, established in 1846, an institution he presided over from 1969 to his decease.[43]

In his own publications, themes vary from family law (the legal status of women in the Low Countries), the historiography of law (Gilissen 1980a), judiciary institutions (Gilissen 1980b) to constitutional law (Gilissen 1981, 1984, 1986), sources of law ("the phases of codification and homologation of customs in the XVII Provinces of the Low Countries," Gilissen 1950) and the teaching of law (Gilissen 1985). His work on representative institutions before and after 1790 has been the work of reference for decades (Gilissen 1952, 1958a). Part of John Gilissen's source material for his famous articles on customary law (and, as illustrated below, probably for student exercises), still resides in the VUB's library, which contains several *Coutumiers* (Ferriere 1714; Richebourg 1724; Kersteman 1772).

4. TEACHING

Gilissen's *Introduction historique au droit*, published by Bruylant in 1979, is a classic.[44] The originality of the work lies in its approach of the course, which is designed to teaching concepts to students. Three themes are treated: a comparative introduction to legal systems (see below), an overview of the sources of law (which implies institutional history before 1795) and elements of private law. Teaching on the sources of law meant that Gilissen elaborated on the empire of custom and, after 1795, that of (French) law (Gilissen 1979, 14). Gilissen astutely quoted the monument of Belgian civil law doctrine, ULB-professor Henri De Page (1894–1969) (Heirbaut 2019). In his *Traité élémentaire de droit civil belge*, the oracle of positive law had stated that legal history alone could clarify the origins of rules, and was, in that sense, superior to philosophy and theory of law (Gilissen 1979, 11). This endorsement ought to have impressed Gilissen's students, as references to De Page were practically mandatory for all student writing and pleading. Of course, Gilissen did not stick to a mere genealogy of legal rules, but questioned concepts and multiple types of normativity.

[43] See the commission's website: https://justitie.belgium.be/nl/informatie/bibliotheek/koninklijke_commissie_uitgave_belgische_oude_wetten_en_verordeningen

[44] A Dutch version (succeeding a polycopied course) was published in 1991, adapted by successor Michel Magits (Gilissen 1991). Part of the preparatory documentation for the manual is to be found in ULB/Archives Gilissen, nrs. 75–76. See also Gaudemet (1980).

4.1. Gilissen's course at the VUB

At the newly established VUB (1969–1970), Gilissen taught two mandatory courses in the first year. The manual was written for Gilissen's crown course *Historische Inleiding tot het Recht* ("Historical Introduction to Law," 60 hours), which ran over a whole year. Students had to follow his course on comparative institutional history (60 hours), as well as Roman Law (Jacques-Henri Michel, 60 hours).[45] An optional course *Geschiedenis van het recht* ("History of Law," 45 hours) and a seminar in legal history on "doctorate" (master) level (30 hours) were equally under his responsibility.

As a young institution, the VUB's Faculty of Law and Criminology could flexibly innovate and alter the teaching scheme. Faculty council reports indicate a certain responsiveness to student requests in the creation of courses and assistant positions. In the course guide for 1977–1978, Gilissen's course *Geschiedenis van het Recht* ("History of Law," 45 hours) in the second year mentions that hours have to be "agreed with the students."[46] In this year, the teaching staff for legal history and legal theory counted four professors (Frédéric Dumon,[47] S. Frey, John Gilissen, Jacques-Henri Michel), six assistants (among whom Gilissen's successors Frits Gorlé (Gorlé 1980) and Michel Magits), three language instructors and one monitor (the future professor of constitutional law and judge in the Council of State André Beirlaen).[48]

---

[45] Request by René Dekkers to be discharged of the course "Institutes of Roman Law" (120 hours) in Dutch (second year of the Candidature preparatory to the Doctorate in Law) to the benefit of his "ancien et brilliant élève" Jacques Michel, 29 June 1966, ULB/Archives Gilissen, no. 30. The decision of the committee to nominate Michel as "professeur extraordinaire" cites the unanimous praise of students for his teachings, and eight publications in the past three years, as well as his international scientific activity. The pedagogical priority of the university is illustrated in an earlier report on the attribution of the course "Pandects" in Dutch (45 hours), which had become vacant due to the resignation of Wilfried Roels in 1964. Michel, the only candidate, was not recruited, since his mastery of Dutch was considered insufficient. Consequently, in spite of Michel's nomination by the Board of Administrators, the committee (composed of Gilissen, Jean Van Ryn and… René Dekkers) managed to convince René Dekkers, "in spite of the numerous burdens he was already charged with," to continue teaching this course, although assisted by Michel, who equally taught a course on Latin philology in the Faculty of Arts and Philosophy. This case perfectly illustrates the many complexities of a law program caught between two faculties, in a double linguistic environment (Magits 2014). Jean Van Ryn, professor of commercial law and influential attorney at the Bar of Brussels, was among the seminal figures at the origin of the French-speaking party *Front démocratique des Francophones*.

[46] VUB, CAVA, coursebooks, Collegerooster 1977–1978, 28.

[47] Frédéric Dumon (1912–2000), Head of the prosecution department at the Court of Cassation, 1978–1982 and professor at the Vrije Universiteit Brussel. "Dumon, Frédéric." In *Digithemis. Prosopographical Database of Belgian Judges*, http://prosopo.sipr.ucl.ac.be:8080/prosopographie3/.

[48] Teaching assistants assigned to the courses in legal history (and publishing on legal history) did not necessarily pursue a further academic career in this field, e.g. Maxime Stroobant, who was

Gilissen's teaching, which always eyed for the contemporary relevance of the past, also created a logical and automatical bridge to popularisation in the series *Actuele geschiedenis* ("Current History"). In a note dated 5 May 1969, John Gilissen explains that he had conceived the course "Contemporary History" (1958) as one in "Current History," focusing on the historical background of present-day questions of public law. The letter enumerates the following cases: the presidential elections in the USA (at the occasion of Nixon's election in 1968), the "negro question" in the USA[49], the British Labour Party, the evolution of public law in the USSR, the constitutional revision in Belgium and the problem of abstentions, the genesis and evolution of political parties in the German Federal Republic since 1949, fascism and Christian Democracy in Italy, Chinese Communism, colonisation and decolonisation in Africa. The letter gives us a glimpse of how Gilissen organised his tremendous teaching load: the first five cases were destined for the history students, the latter four for the law students. There was no immediate link in content: the law students took 60 hours of class, whereas students in history and political science only followed 45 hours. Gilissen foresaw for the next year (the first "independent" academic year for the VUB), "the third revision of the Belgian constitution," "De Gaulle and après-Gaullism," "South-Africa and Rhodesia," "South-America" and the "question of famine in North-America."

He published small booklets on "The third revision of the Belgian Constitution 1954–1971" (Gilissen, Croisseau 1974), "The USSR" (Gilissen, Gorlé 1978), "South-Africa" (Gilissen, Magits 1978) or "The Irish Question" (Gilissen, Nauwelaerts 1974), "China" (Gilissen 1977) and "The French Fifth Republic." All of these themes had been the subject of practical exercises at the VUB in his course on comparative institutional history.[50] The main course started with the constitutional history of Britain and the United States (Part I), before turning to France, Belgium and the Low Countries 1789–1831, the Netherlands and the USSR (Part II). Germany, Italy, Spain nor the Scandinavian countries were treated.

4.2. In the Master's workshop: Course preparations

John Gilissen's handwritten course preparations in his archives at the ULB give insight into the practical ordering of the major mandatory course *Introduction historique au droit civil* and the genesis of the manual, as the eventual pagination in the following paragraph indicates. The start of the academic year

assigned as assistant to Gilissen's course in 1969–1970, but became a professor of labour law and member of the Belgian Senate (1988–1995).

[49] Note by John Gilissen, 5 May 1969. In the text: "Het negervraagstuk in de V.S.A."

[50] See also ULB/Archives Gilissen: John Gilissen, *Hedendaagse Geschiedenis. Historische Inleiding tot de Instellingen van de Voornaamste Moderne Staten* (Brussels: VUB, 1977), vol. I, I–III. The chapters on France since 1958, the USSR, and three chapters of 'current history' are published separately.

1959–1960 was on 14 October, the last course on 17 May, with a small interruption for the Christmas break. Twelve sessions were dedicated to external legal history (pp. 12–489). "Primitive legal systems"[51] (pp. 31–52, with examples in the 1979 manual on Zaire (Congo) and "Antiquity" (pp. 53–84: Egyptian, Cuneiform and Hebraic law) were the subject of a single course. Two courses were devoted to the sources of Roman, Germanic and canon law, including (annotated *in margine*) the *Haut Moyen Âge* or Early Middle Ages (pp. 120–182, 219–313). Customary medieval law (*Bas Moyen Âge* or Late Middle Ages) occupied one session and a half (the latter being complemented by half a session devoted to legislation). Roman law and canon law occupied the first session of December, the second one being earmarked for Roman law and customary law in the early modern period (pp. 258–267, 358–377). The second session devoted to the early modern period treated codification and doctrine (pp. 314–357). External legal history continued well into the new year, as the revolutionary and 19th century legislation (379–447) occupied the first two sessions of January, and the final one doctrine, custom and the judiciary branch (pp. 454–479). Hindu, Muslim and Chinese law, or Soviet and Communist Law, which were included in 1979, did not figure in the program yet (pp. 91–120, 198–217).

This schedule implied that Gilissen could only devote nine sessions to the internal history of private law, divided into family law (3: marriage, divorce, tutelage, emancipation, pp. 505–564), real property (2, pp. 565–588), succession (589–622) and the law of obligations (2, pp. 637–674).[52] The handwritten course preparations include clear and well-structured schemes and extracts of own contributions to reviews.[53] Copies of recent relevant book reviews or articles are a sign of the author's continuous attention to the development of legal historical scholarship.[54] Gilissen's files furthermore contain elaborate offprints from legislative publications and contemporary jurisprudence, in order to remain up to date in teaching. Legal history had to serve as an historical introduction

[51] ULB/Archives Gilissen, no. 78 for documentation regarding "archaic, hindu, muslim, antique, canon" law. Gilissen kept communications by foreign colleagues thematically related to his teachings, e.g. typed book review of Ander Csizmadia, "Le développement des relations juridiques de l'État hongrois et des églises et leur pratique à l'époque de Horthy 1919–1944," extract of Václav Vaněček's "La penetrazione del diritto romano e canonico nel territorio dell'odierna Cecoslovacchia a partire dalla seconda metà del IX secolo sino alla prima metà del secolo XIV" from the *Convegno Internazionale di studi Accursiani* (Milano: Giuffré, 1968).

[52] ULB/Archives Gilissen, no. 77.

[53] E.g. ULB/Archives Gilissen, no. 77: extract from the *Tydskrif vir Hedendaagse Romeins Hollandse Reg* (1955, Pretoria) on Roman law and customary law in the Southern Low Countries.

[54] E.g. ULB/Archives Gilissen, no. 77: review of Hans-Achim Roll, *Zur Geschichte der Lex Salica Forschung* (Scientia Verlag: Aalen, 1972).

to positive law. It is thus hardly surprising that his archives contain a consistent section devoted to the Belgian Judiciary Code of 1967.[55]

The course preparation for the Dutch-speaking variant *Geschiedkundige Inleiding tot het Burgerlijk Recht* informs us of the number of students for this mandatory course in the preparatory candidature ("Bachelor") leading to admission in the "Doctorate" (Master) of Law: twenty-six students for 1957–1958 and seventeen students for 1959–1960.

4.3. Students at work: Exercises in legal history

The archives at the ULB contain copies of student essays written for the course *Legal History* in the second year of the "preparatory Candidate Degree to the Licentiate in Law and Notarial Sciences" from the 1950s. Only the "Doctorate" was exclusively reserved for law courses. In the first cycle, law students were instructed with matters taught at the Faculty of Arts and Philosophy (see also Waelkens, Stevens 2014, 230). The programs of Economics and Political Science equally contained many historical courses.[56]

Gilissen ordered his students to work on the legislation of the Prince-Bishopric of Liège, an immediate member of the Holy Roman Empire, comprising the major part of the Belgian provinces of Liège, Limburg and parts of Luxemburg, Namur and Hainault. The neighbouring abbatial principality of Stavelot-Malmédy was equally scrutinized.[57] The "democratic" representative regime in Liège guaranteed a right of advice and in many cases co-decision for the Estates. However, the exact degree to which the Prince-Bishop was bound to respect the Estates, varied across the ages.[58] Gilissen requested his students to work on specific constitutional documents[59] and legislative acts, which had all been published in the 17th, 18th and 19th centuries.[60] This allowed him to map

[55] ULB/Archives Gilissen, nrs. 75 and 76. The most recent work on the matter is Maarten Vankeersbilck, *Justitie in de steigers : gerechtelijke hervormingen in België : de moeizame weg naar het gerechtelijk wetboek*, Gent, UGent, 2019 (unpublished doctoral thesis in law).

[56] E.g. model of the curriculum for the degree of Candidate and Licentiate in Economics, March 1954: four historical courses in the first year, two in the second, third and final year. Students in economics equally had to take three legal courses in the first year, two in the second, third and final year. ULB/Archives Gilissen, no. 26, minutes of the Faculty Meeting of the School for Political and Social Science, 8 March 1954.

[57] "Les ordonnances territoriales de Stavelot-Malmédy," ULB/Archives Gilissen, no. 52.

[58] E.g. F.D. "Dans quelle mesure le prince-évêque de Liège se passait-il de l'intervention des Etats dans l'exercice du pouvoir législatif (entre 1621 et 1684)," ULB/Archives Gilissen, no. 52.

[59] E.g. the "Peace of Fexhe," considered as the "palladium" of "liégeois" civic liberty. J.P., "La paix de fexhe (1316)," ULB/Archives Gilissen, no. 52 (on this topic see Masson and Demoulin 2018).

[60] The theme of Liège's democratic roots is a commonplace in Belgian legal history. It figured prominently in the first stand-alone treatise on Belgian public law (Thimus 1844: 27–33).

all areas of material[61] and procedural law.[62] A similar approach was taken for early modern legislation in France, Germany and the Dutch Republic.[63]

In 1955–1956, the Dutch-speaking law students worked on the legal status of women. Four female and eighteen male students studied regional variations of customary law[64], positions in doctrine[65], published case law[66] and applicable legislation in various periods.[67] A single synoptic note grouping student names, topics, marks and comments allows to reconstitute the pedagogical nature of Gilissen's approach. Five students failed the course, three of them having been "often" and "almost always" absent, one student "silent, even when he has something to report" and a final one who "never understands what he had to do."[68] By contrast, praise for excellent students is rendered clearly as well: the "excellent" B. (18/20), "intelligent" D.C. (16/20) and "very good" V. (16/20) who had "thoroughly researched, although he had failed to understand everything."[69] According to Gilissen's assessment, some oral presentation was mandatory.[70]

Interestingly, Gilissen blended polemic issues of his own times and institutional history.[71] The folder dedicated to exercises for second year law students contains press clippings evoking the major political controversies of his lifetime. For example, a piece written late in 1958 by right-wing Catholic senator Pierre Nothomb (1887–1966) questioning the appropriateness of proportional representation, drew Gilissen's attention. Belgium had adapted proportional representation in 1899, with major adjustments in 1919. The majority system

[61] E.g. F.L., "Les Ordonnances du Pays de Liège: XVI^{e} au XVIII^{e} siècles. Ordonnance touchant l'impression et le débit des livres – 29 janvier 1766," ULB/Archives Gilissen, no. 52; L. L., "Le 'Cri du Perron' du 9 juin 1533 et les Ordonnances du 5 mars 1562 et du 10 septembre 1566 contre les hérétiques," (*Ibid*).

[62] E.g. D.D.P., "Ordonnance du Pays de Liège portant règlement pour la réformation des abus existant dans l'administration de la justice (Georges d'Autriche, 6 juillet 1551)," ULB/Archives Gilissen, no. 52.

[63] ULB/Archives Gilissen, no. 53.

[64] Malines, Artois, North-Brabant, Antwerp, South-Brabant, Bruges, Hainault, Looz-Maastricht, Namur-Luxemburg, Ypres-Courtrai, Tournai-Cambrai-St Amand, Liège, Franc of Bruges, Ghent and Cassel.

[65] Fourteenth-fifteenth, seventeenth-eighteenth centuries.

[66] Seventeenth-eighteenth centuries.

[67] Fifteenth-eighteenth centuries.

[68] ULB/Archives Gilissen, no. 77.

[69] The student was assigned the subject of the legal status of women in Roman law. Gilissen downgraded his original mark (17/20). ULB/Archives Gilissen, no. 77.

[70] E.g. D.S. (15/20): "regular, sometimes lacunae in his research, speaks well in public."

[71] At the VUB, Gilissen equally acted as supervisor for many master theses in contemporary history with political and institutional subjects, which can count as a proof to support Ingber's statement that he is to be thanked for the "origin and growth in difficult circumstances" of the VUB's History section (Ingber 1983, XII; François, Vanhaute, Vrielinck, 1995).

(1830–1899) threatened to obliterate the chances of minorities (Catholics in Wallonia, Socialists in Flanders) to be represented, and posed a threat to the Liberal party, due to the extension of suffrage in 1894. After the First World War and the introduction of universal male suffrage (one man, one vote), the system was perfected to guarantee smaller parties that their "residuary" votes in small constituencies would be added up at the intermediate, provincial level, in order to ensure accurate representation of minority opinions in parliament. This system of *apparentement* ensured pluralism, as no votes in smaller constituencies would be "lost."

Nothomb's article criticised the governmental agreement concluded by the Christian democrat Prime Minister Gaston Eyskens (1958–1961). His party, the CVP/PSC, had just won an overall majority in Flanders (56,6% of votes), controlled the Senate, but fell just short of a majority nationwide (46,5% of votes, 104 seats out of 212 in the Chamber of Representatives). Eyskens was accused by the notoriously Conservative Nothomb of "conceding" to the Liberals' demands: by lowering the threshold for participation in the repartition of parliamentary seats at the provincial level, Eyskens gave in to the "moral advantages" of "sticking as closely as possible to justice." For the Chamber of Representatives, the CVP/PSC had obtained 49% of the seats with 46% of votes, its coalition partner had 9,4% of the seats with 11% of the popular vote, and was thus slightly under-represented.[72]

Yet, Nothomb thought Eykens was reinforcing a "very bad governmental system" by conceding to the Liberals. Nothomb's remark referred to the crisis of the French Fourth Republic (1944–1958), where governmental majorities tried to defend themselves against the pressure of Gaullist and Communist electoral successes.[73] He accused the Liberal party of aiming at the instauration of a nation-wide system of *apparentement*, which would *de facto* take the national vote count as a decisive criterium for the attribution of seats. As a Conservative Catholic, Nothomb wanted to restrict the impact of "systems built on mathematics," which he saw as a "destruction of personalities, local forces and independences." Any "strong government" would be rendered impossible if smaller parties were granted their full electoral weight in parliament. Furthermore, small constituencies (where the principle of proportionality is almost cancelled out due to the high factual threshold) would constitute the guaranty for a close link between electors and politicians.[74]

---

[72] In Limburg, a traditionally Catholic-dominated province, the CVP obtained 71,82% of the vote, against 24,48% for a joint list ("cartel") of Socialists and Liberals. Eight seats went to the CVP, three to its opponents. Without *apparentement*, the Socialist-Liberal cartel would have lost at least one seat, which would have further increased the slight overrepresentation of the victorious CVP--PSC. *Le Soir*, 3 June 1958.

[73] Gilissen's archive contains a map of the Fourth Republic's last *Assemblée Nationale*, cut from *Le Figaro*, 21 November 1958.

[74] Nothomb, "Le 'S.U. Intégral'," s.d., ULB/Archives Gilissen, no. 48.

Nothomb's remarkable opinion pleaded for "true and integral universal suffrage." After the introduction of female suffrage for parliamentary elections (1948), the next logical and necessary step ought to be suffrage for "men, women and children." Nothomb suggested all "members of a society of free men" had been entrusted by "natural law" with the right to participate in elections. The actual exercise of this right was logically limited by the threshold of majority, but why couldn't children be represented by their head of family (ergo, the father)? True "familial suffrage" would be rejected by Socialists and Liberals, added Nothomb, just as they had "ridiculously and uselessly" opposed female suffrage.

Just as with the Old Regime ordinances, Gilissen presented a thematically coherent corpus of primary to his students for exercises on electoral law and its practice. In one case, sixteen Dutch-speaking students were attributed the constituencies of Brussels (pre 1878, post-1878), Antwerp, Mechelen-Turnhout, Louvain and Nivelles, Ghent-Eekloo, Termonde-St Nicolas, Alost-Audenarde, Bruges and Ypres-Ostend-Furnes-Dixmude, Courtrai-Roulers-Tielt, Tournai-Ath-Soignies, Mons-Charleroi-Thuin, "Limburg," Liège/Huy-Waremme, Namur, and Luxemburg/Verviers. Gilissen associated constituencies from various provinces. Four out of sixteen students failed the course (their paper being annotated as "weak"), five excelled (with a "Miss Van Mieghem" receiving the highest mark). Six out of sixteen students were female.[75]

Gilissen's notes contained calculations on the relationship between popular vote and seats in the Chamber of Representatives, or on electoral abstention.[76] Unsurprisingly in view of the linguistic and confessional situation,[77] he noted with interest that in Roulers, Tielt (both in West-Flanders) and Maaseyck (Limburg), no Liberal candidates had been presented at the 1857 parliamentary election, which was held under a system of suffrage based on a tax threshold. Without *apparentement* and in a majority system, the Catholics obtained all available seats, unopposed. Conversely, no Catholic candidates had been presented in Dixmude (West Flanders), Mons (Hainault), Waremme (Liège), Arlon (Luxemburg) and Philippeville (Namur). Gilissen tried to adapt the popular vote numbers by adding

[75] In another case, twenty-four electoral results were attributed to a class of nine female and fifteen male students.

[76] E.g. "Uitslagen 1857," ULB/Archives Gilissen, no. 48. In 1893 (at the first reform of the Belgian Constitution), voter turnout was rendered mandatory.

[77] The elections of 1958 forced Gaston Eyskens to seek a coalition with the Liberals. Under the preceding Socialist-Liberal Government Van Acker III (1954–1958), a political storm over education pitted Catholics and Non-Catholics against one another. Lacking an absolute majority in the Chamber of Representatives, the CVP/PSC was ready to negotiate with both Socialists and Liberals to accommodate the issue. This gave rise to the "Schoolpact," which foresaw increased budgets and beneficially influenced the participation of lower social classes and women to higher education. This logic of compromise would provide the societal and political context for the split of the ULB, as the representation of both sides of the confessional divide within each linguistic community was deemed necessary (Witte, De Groof, Tyssens 1999).

the electors who had failed to turn up. The contrast with the proportional system as adopted in 1899 and, most importantly, the *apparentement* introduced in 1919, was clear.

Investigating the technicalities of the nineteenth-century's electoral system rendered students more aware of the specificity of the contemporary system, and of the implications of future modifications. The life of constitutional and legislative texts was heavily documented. Gilissen's notes and course documentation emphasise the only partial renewal of the Chambers between 1830 and 1914, save for the full dissolution of Parliament (1833, 1848, 1857, 1864, 1870, 1884, 1892, 1894, 1900, 1912), as well as the elitist nature of the Senate, for which 507 people were eligible in 1880.[78] The system of voting with a fiscal threshold was documented with statistics on population and electors, including statistics on the various professional categories included and excluded by fiscal criteria.[79] This was relevant, as the competing Liberal and Catholic ministries tried to eliminate part of their rival's sociological support groups from voting, with the most famous controversies focusing on priests and bar-tenants.[80]

Another theme, treated in the tumultuous sixties, was the imminent reform of the Belgian state. In his Dutch-speaking seminars for master students in political and diplomatic science,[81] Gilissen decided to study the preceding proposals for constitutional reforms, which contained several elements that would return in the constitutional debates of the 1970s, 80s and 90s.[82] These attempts only rarely receive attention nowadays, as the full deployment of the process of state reform from 1970 on has introduced a complex form of federalism. Gilissen's students examined the proposal by Herman Vos (1889–1952) of 23 April 1931. This left-leaning Flemish Nationalist proposed to introduce a "Federal Statute"

[78] Every two years, half of the members of the Chamber of Representatives were elected (art. 51) and every four years, half of the senators (art. 55, Belgian Constitution of 1831). Dissolutions of both Chambers, or of the Chamber of Representatives or the Senate alone, gave rise to a full renewal of all seats. The number of eligible citizens for the Senate was determined by a high fiscal threshold of a thousand florins (art. 56, 5°, Belgian Constitution of 1831). On 5,5 million inhabitants, the number cited above represented 0,009218% of the population. Until 1993, the Belgian Senate enjoyed full competence in a perfect bicameral system.

[79] ULB/Archives Gilissen, no. 48.

[80] Statistics revealed that only 6 lawyers and proctors and 14 judges and councillors could vote in the predominantly rural constituency of Turnhout in 1880, on a total of 1 712 electors and a population of more than 100 000 people. In the capital (Brussels), 279 lawyers and notaries were on the electoral roll, as well as 116 judges and councillors, on a total of 18 154 electors and a population of over 600 000. Farmers and landowners were the most numerous category, even in the province of Brabant (where both counted about 3 500 electors). ULB/Archives Gilissen, no. 48.

[81] ULB/Archives Gilissen, no. 73 ("Grondige studie van een vraagstuk uit de hedendaagse politieke geschiedenis van België").

[82] ULB/Archives Gilissen, no. 73.

for Belgium (Van Causenbroeck s.d.).[83] His proposal, elaborated with the help of the Dutch historian Pieter Geyl (1887–1966) and the Dutch constitutional lawyer Frederik Gerretson (1884–1958), was not thought fit for consideration and was never treated in Parliament.[84] At the occasion of the (procedural) vote on consideration of the proposal, solely the communist Jacquemotte supported the treatment, insisting on the fundamental nature of the right of self-determination and secession (*Parliamentary Transactions – Chamber of Representatives*, 19 July 1932, Paper L.R., 8–9). Chamber president Frans van Cauwelaert, a Catholic and Flemish nationalist, thought the proposal merely intended to "destroy the Belgian state" (*Parliamentary Transactions – Chamber of Representatives*, 19 July 1932, Paper L.R., 8).

Vos aimed to transform the unitary Belgian state into a "United Kingdom of Flanders and Wallonia." The formula was not a coincidence, as the previous "United Kingdom of the Netherlands" (1815–1830) had united Belgium and the Netherlands. Vos proposed to let the capital alternate between Brussels (which he considered as the capital of Flanders) and a city in Wallonia, following the example of The Hague and Brussels in the nineteenth century. Both member states would have a bicameral parliament, following the American model. At the federal level, the "Federal Assembly" would be constituted by an equal number of representatives from both parts of the country. This parity was equally present in the Federal Government, which controlled the Executive Branch. Only foreign policy, customs and transport, common finance and the colonies would remain a joint competence. Vos thought an army was not necessary. The state ought to be permanently neutral and disarmed, with a constitutional interdiction of alliances, exclusively reliant on the League of Nations and the Locarno Pact (Paper L.R., 6). Needless to say, this very restricted form of bipolar federalism loosened the link between Flanders and Wallonia, and was a poorly disguised conception of a confederation to be dissolved as soon as the occasion would present itself.

Several proposals for the introduction of federalism by Walloon politicians equally received attention, including one by three Socialist members of the Chamber of Representatives in 1938, proposing a federalism with three constituent entities: Flanders, Wallonia and Brussels (Paper L.R., 12–14).[85] These three entities

[83] ULB/Archives Gilissen, no. 73, paper by L.R. (Political and Diplomatic Sciences, 1964–1965).

[84] The proposal was sponsored by Staf Declercq and Gerard Romsée, who would become leading figures of the VNV, a party at the forefront of collaboration with the Nazi occupant (De Wever 1994). As customary within the Flemish movement, Vos was accused of "treason" by the most radical Flemish nationalists, who accused him of delaying the absorption of Flanders into a United Kingdom of the Netherlands, by prolonging the "Belgian deceit" (Paper L.R., 7).

[85] The emphasis on the difficulties within the Socialist movement concerning the linguistic issue has recently been highlighted (Van Velthoven 2019).

would obtain an equal number of Federal Senators. Brussels would return 30 MPs for the Federal Chamber, Flanders and Wallonia each 90. A "Constitutional Supreme Court," inspired on the US Supreme Court would exercise judicial review on federal and state legislation, as well as enforce the competence structure (Paper L.R., 12–14). The text aimed to constitutionalise social measures taken in the aftermath of the First World War and the major strikes of 1936.[86] This proposal was not thought fit for consideration either, although Flemish nationalists, Communists and Walloon Socialists provided 62 votes in favour of its discussion. At the end of the Second World War, the dissolution of the Flemish nationalist and totalitarian party VNV put an end to these proposals, but did not prevent the Walloon Socialists from introducing new attempts (Witte, Van Velthoven 1999).[87] Another case treated was the proposal of the CVP/PSC-government Van Houtte (1952–1954) to modify the constitution in order to incorporate "Belgian accession to the European supranational institutions" (Paper L.R., 29).[88]

The thorough treatment of these proposals in the preceding paper was greatly appreciated by Gilissen and resulted in a 16/20. The archives give us the occasion to see both positive and negative comments on student works. A paper submitted on the political workgroup constituted by the Lefèvre-Spaak government (1961–1965) to prepare a constitutional revision was criticised as "weak": the student had copied the report by Minister of Justice Piet Vermeylen, displayed a total "lack of critical sense." The literature review was incomplete, "although not much material is available," and, most importantly, "no solid historical criticism or comparison of sources" were present, which justified a meagre 8/20. A similar work on the roundtable conference devoted to constitutional reform in 1964–1965 received a 15/20. Gilissen justified this shortly, but did not forget to include a copy of a student's letter arguing that she had been able to obtain the official records of the relevant meetings from the Minister of Justice himself.[89]

Gilissen's teaching on more contemporary institutional and political issues was logical in the context of the law faculty at that time. The administrative documents in the archives render clearly that many courses were open to (or even mandatory

[86] The eight hours working day, maximum working time of 48 hours per week, equal pay for equal work, abolition of child labour (art. 8 and 31 of the proposal; Paper L.R., 13).

[87] Most notably, in October 1945, the 'Walloon National Congress' in Liège asked for autonomy. This was translated into a proposal for the transformation of Belgium into a confederation, introduced by various French-speaking Socialist, Liberal and Communist MPs in 1947 (Paper L.R., 17).

[88] Belgium's accession to the European Community for Coal and Steal and the European Defence Community was seen as unconstitutional by leading legal scholars Walter Ganshof van der Meersch (ULB) and Charles De Visscher (Louvain), who called for a revision of the constitution. The legislative elections of 11 April 1954 created a new political situation, whereby the CVP/PSC refused to cooperate with the new Socialist-Liberal government Van Acker-III (Paper L.R., 31).

[89] Letter of L.M. to John Gilissen, Brussels, 4 July 1967.

for) students in political science or economics.[90] The correspondence contained in the preparatory documents for courses tend to suggest that a considerable part of the course documentation was not yet available at the university, and had to be collected by the Professor himself.[91] As Substitute and Chief Military Prosecutor at the Military Court, Gilissen used his authority to request documents for teaching purposes at the Ministry of Justice.[92]

5. ADMINISTRATIVE RESPONSIBILITIES

John Gilissen's involvement in teaching was intimately linked to his own research. Of course, the hierarchical nature of his position involved his participation in the direction of the common policy of the university and its faculties, beyond the linguistic question. Gilissen acted as president of the ULB's Faculty of Arts and Philosophy (1962–1964)[93] but was of course a member of many deliberative organs. His archives contain an interesting note on the perspectives of scientific research. The Belgian National Fund for Scientific Research, set up in 1927, emphasised the need to generalise the mandatory writing of a thesis, in order to test student abilities for research, and evoke vocations.[94] To enliven academic research, the note proposed to create six month research-sabbaticals for maximum five professors per

[90] E.g. Draft of a study program for Studies in Economics, to allow for the creation of a Licentiate Thesis, 8 March 1954, School of Political Science and Economics (ULB), 8 March 1954: the first two years in economics had six mandatory history courses and two law courses. The final two year-cycle counted four legal courses and four historical courses.

[91] E.g. J. Temmerman, head of the Senate's Study and Documentation Services, to John Gilissen, Brussels, 29 January 1957, communicating information on the Senate's membership 1831–1912 and electoral results 1908–1954. The letter indicates that full data can only be provided "according to the advancement of our archival operations." A handwritten table of the membership of Chamber and Senate states that "these figures have been provided by the Ministry of the Interior, Administration of Electoral Affairs (M. Van Houtte). This administration does not have the full results of the numerical strength of the political parties in the Senate. M. Van Houtte considers it to be extremely difficult for his services to establish the political affiliation of Senators prior to 1932 […] Van Houtte directs us to the Registry of the Senate. A check of M. Temmerman's figures is thus impossible […] Nor M. Van Houtte, nor M. Backaert of the Chamber of Representatives' Registry, can explain the lacking two seats for 1866 to 1870, where only 122 seats can be found, although the Law of 7 May 1866 foresaw a total of 124 seats." ULB/Archives Gilissen, no. 48.

[92] E.g. John Gilissen as Deputy Auditor-General to the Library Service of the Ministry of Justice, Brussels (Palace of Justice), N° S.A. 99/2, 3 November 1958. ULB/Archives Gilissen, no. 48. In this letter, Gilissen requested the Parliamentary Transactions of Chamber and Senate for the years 1848–1850.

[93] ULB/Archives Gilissen, no. 28–29.

[94] "Réformes possibles ou souhaitables," National Fund for Scientific Research. ULB/Archives Gilissen, file 26, 11 pages.

year, diminishing the burdens of teaching and administration.[95] The rejection rates cited in the note are relatively modest compared to present-day standards.[96]

In spite of the differences in scale (as a consequence of the democratisation of higher education) and the changes in governance structure (due to internationalisation and the scission of the Fund in a Flemish and French-speaking Foundation), the fundamental problems of scientific research are still familiar today: the available means only allow for a limited number of positions to be awarded, and scientific mandates that do not lead to a tenured position as professor (including other responsibilities besides research) can create a situation whereby a brilliant researcher runs out of funding.[97] This is of course explained in the terms of the generic professional and private life patterns prevailing in the 1950s: a brilliant researcher arriving at the end of his postdoctoral trajectory will be "over thirty, married, possibly a family father" (and will thus have to support a housewife and/or children). Without "the means to wait patiently and with dignity for a stable situation, conformably to his ideal, this person will easily become an angry man, suffering of social declassification. His bitterness will be even more poignant because he had the greatest and legitimate hope."[98]

The high hopes of the Fund for Scientific Research contrasted with the reality experienced in faculty meetings. At the meeting of the School for Political and Social Science of 8 March 1954, the eminent historian Jean Stengers pointed to the lack of professors to supervise thesis research by master students.[99] His colleague, the economic historian Guillaume Jacquemyns (1897–1969) thought students would not be induced to apply for a doctoral dissertation, nor would the master thesis… "allow us to chase the more mediocre students."[100] Another council member, Lameere, complained that students tended to spend too much time in writing a thesis, which "fatally" damaged their "general culture."[101]

---

[95] "Réformes possibles," 9.

[96] "Réformes possibles," 3: 27 applicants rejected out of 45 (60%), whereas present-day rejection rates hover between 90% and 75%.

[97] As a consequence, researchers looked at the State Archives or secondary schools for tenured positions, to wait for the vacancy of a professorial position. The illustrious medievist and contemporary historian Jan Dhondt (1915–1972, Ghent) is a well-known example: he was appointed at university after the war, when opportunities abounded due to retirements. For the ULB, secondary schools were known as the *vestibule de l'université*, used to finish doctoral dissertations (Witte 2009, 50).

[98] "Réformes possibles," 4.

[99] ULB/Archives Gilissen, no. 26, draft minutes of the Council meeting of the School of Political Science and Economics (ULB), 8 March 1954.

[100] *Ibid*. Jacquemyns was "well integrated in the PSB [*Parti Socialiste Belge*]'s establishment through the Brussels Solvay Institute [at the ULB]." He and Jean Stengers were part of the new generation of professors appointed after the war (Witte 2009, 50–51).

[101] ULB/Archives Gilissen, no. 26, draft minutes of the Council meeting of the School of Political Science and Economics (ULB), 8 March 1954

6. A MAN OF MANY NETWORKS

Besides the activities of the *Société Jean Bodin*, Gilissen's international lecturing activities allowed him to extend his teaching to external audiences. He gave guest lectures at the University of Leiden,[102] travelled to Rio de Janeiro for a conference on "Lacunae in law," and intervened at dozens of foreign institutions.[103] Of course, the master's pupils had to follow his trail. A dossier filed for renewal by assistant Ivan Roggen mentioned participation in the *Société d'histoire du droit*'s conference in Algiers, besides the *Société Jean Bodin* and the *Société d'histoire du droit et des institutions des pays flamands, picards et wallons*.[104] Conversely, Gilissen equally invited his foreign colleagues for guest lectures, e.g. the invitation for Peter Stein's (1926–2016) lecture on "The notion of General Principles of Law, from a historical perspective."[105] As explained in Peter Stein's personal note to Gilissen:

> I have prepared a lecture which I think is suitable for those beginning the study of law (while still having some interest for those who know some legal history) […] I have prepared it in French but of course if you would prefer not to risk the possibility of my French being unintelligible to the audience, I could give it in English.[106]

Stein's letter gives a privileged view of the international nexus of renowned legal historians in the 1960s, in a world without high-speed rail connections and with less frequent flights. He asked Gilissen whether it would be possible to move the lecture forward, as the eminent Dutch colleague Robert Feenstra had announced him to travel by train through Brussels on his way to Nancy, where a celebration for the late François Gény (1861–1959) was foreseen. As Feenstra projected to spend the night at Metz before reaching his final destination, Stein inquired whether he could be free to join his Dutch colleague there, sketching the perspective of taking only a later train the next day at 08:31 in the morning to Nancy.[107]

Gilissen's archives show he had annotated a previous letter of Stein, dated two weeks earlier, in order to ask for lodging for his guest at the University Foundation, a traditional meeting point of academic sociability in the heart of

---

[102] Letter of I. Schöffer to John Gilissen, Amsterdam, 28 November 1954. ULB/Archives Gilissen, no. 26.

[103] ULB/Archives Gilissen, no. 48.

[104] "Note relative à monsieur Roggen," s.d., 2. ULB/Archives Gilissen, no. 27.

[105] Invitation for a lecture by Peter Stein (Dean of the Law Faculty at the University of Aberdeen), auditorium 16 at the Faculty of Arts and Philosophy (which Gilissen presided), 25 October 1962. ULB/Archives Gilissen, 28. Another example of an international "star" of legal academia invited to Brussels is Michel Villey (1913–1988)'s lecture on "Jean Bodin and harmonious justice" on 17 March 1970. VUB, Cava, Gilissen Archives.

[106] Peter Stein to John Gilissen, Aberdeen, 19 October 1962, r°. ULB/Archives Gilissen, no. 28.

[107] *Ibid*, v°.

Brussels.[108] An ensuing letter containing practical instructions showed how academic travel was arranged in a world without mobile phones or internet: Gilissen requested his guest to phone him after arrival at the University Foundation after a lengthy travel by ferryboat and by train, either at the ULB (between 10 and 10:15 AM), or at the Palace of Justice (from 10:30 AM on), with the kind request to speak in French.[109]

One could wonder how Gilissen managed to combine a position as military prosecutor with a heavy teaching and administrative load, added to simultaneous activity in several national, bilateral and international scientific networks. A letter to the *Centre d'études René Marcq* of 31 January 1955 lifts a tip of the veil. Gilissen apologises for not having been able to attend a meeting, since he had been retained at the Military Prosecution Department. Gilissen notes that the legal history section of the *Centre René Marcq*, named after a model alumnus of the ULB, had fallen in "lethargy" in 1954, after only two years of activity. Two members had been called to other priorities, as Frans De Pauw (1929–2006, future dean of the VUB's Faculty of Law and Criminology; Scheelings s.d.)[110] had obtained a scholarship for the United States, and Philippe Godding (1926–2013, from 1966 on professor of legal history in Louvain; X 2013)[111] had been appointed as substitute public prosecutor in Brussels. Together with assistant Ivan Roggen (1921–1997, governor of the Province of Brabant from 1976 to 1989 for the liberal party PRL),[112] Gilissen had compiled some conclusions of past research, and presented them at the conference of the

[108] Peter Stein to John Gilissen, Aberdeen, 4 October 1962, r° (annotated by Gilissen: "Tel à F.U. OK"). The eventual subject of the lecture was erased by Stein and replaced by "Legal Elegance and legal principles in historical perspective". The letter also indicated that Stein planned to visit Feenstra in Leiden late in October, but that he realised that 1 November would be unsuitable to lecture in Belgium, as this was an official holiday.

[109] John Gilissen to Peter Stein, Brussels, 11 October 1962, ULB/Archives Gilissen, no. 28. Conversely, some of Gilissens's colleagues at the ULB were academics of international renown as well, linking their networks back to Brussels, e.g. letter of Chaïm Perelman to John Gilissen, Pennsylvania (Pennsylvania State University), 1 December 1962.

[110] De Pauw graduated first in Germanic philology (1951), and five years later in law (1956). From 1951 to 1961 on, he taught at the teaching institute for secondary school teachers in Nivelles, before his appointment als lecturer at the ULB. In 1952, he worked on the customary law of Asse, highly probably under the direction of Gilissen.

[111] Philippe Godding was the son of Robert Godding (1883–1953), a Liberal Senator for Antwerp, who studied law at the ULB and was minister for Colonies from August 1945 to March 1947. Godding fled to France in 1940 during the German invasion. *Le Soir*, 14 June 1968.

[112] As Gilissen explained in a letter supporting the renewal of Roggen's appointment as assistant, he had been appointed as substitute of the Chief Military Prosecutor (5 December 1955), and entrusted with a teaching mission at the Royal Military School (John Gilissen to dean Madeleine Gevers, Brussels, 8 March 1956). ULB/Archives Gilissen, no. 27. According to his obituary published in *Le Soir* ("Dernier hommage ce jeudi à Forest. Le gouverneur Roggen était royaliste, unitariste et bilingue," 18 June 1997), Roggen was the "youngest general magistrate of Belgium." In 1983, Roggen, who had withdrawn from academia, still participated in the redaction of the *Liber Amicorum*.

Société Jean Bodin, "albeit in a geographically enlarged form" as *Le droit privé dans les villes médiévales belges* (Gilissen 1954). Gilissen proposed that the René Marcq center would work on the same theme as the *Société Jean Bodin* for 1955: "the status of strangers in old law" (Société Jean Bodin pour l'histoire comparative des institutions 1958). Furthermore, Gilissen appears to have counted on assistants acting as replacement lecturers.[113]

7. LEGACY

Besides the many citations of Gilissen's work by historians and legal historians alike, the teaching program at the VUB still carries the distinct set-up that followed from the structure described above.

7.1. History of public law

Gilissen's successor at the VUB, Michel Magits, took over the mandatory 60 hour-course on Institutional history (*Geschiedkundige inleiding tot de instellingen van de voornaamste moderne staten* – "Historical Introduction to the Institutions of the Principal Modern States"), as well as a mandatory course – *Historische inleiding tot het Belgische recht* ("Historical Introduction to Belgian Law," 60 hours). As a compensation for this heavy teaching load, no master courses associated with legal history were taught.

In parallel, founding Dean Frans De Pauw taught the mandatory course of "Historical Introduction to Legal Philosophy including Natural Law" (30 hours) in the second year. This course disappeared at De Pauw's retirement. The general course on Legal Philosophy in the first year (Jean-Marc Piret), however, does take an historical approach.

7.2. History of private law

Roman Law (45 hours of ex cathedra teaching, 11 hours of tutorials, Jacques-Henri Michel) still figured in the mandatory courses of the second year in 1987–1988, to appear in the first year in 1992–1993 for 75 hours of ex cathedra teaching and 15 hours of exercises (Robert Raes). Roman law was merged with the course

[113] E.g. Letter of the ULB's academic authorities to Paul Philippot, Brussels, 22 December 1955, confirming his appointment as assistant "*hors cadre*" for the replacement of John Gilissen for the course "Survey of art history and archaeology (Middle Ages and Early Modern Period)." ULB/Archives Gilissen, no. 27. This course was taught simultaneously by Gilissen at the ULB's Arts faculty, and at the "Higher Institute for Art History and Archaeology" in Brussels. One can understand that the "apex" of a double career as "both judge and professor" (Ingber 1983, XII) required some adjustments.

"History of Law" (see below). This recreated the hybrid form of course Gilissen had imagined. Gilissen had also communicated at public lectures and conferences on Roman law, but preferred to stick to its external history and the reception in Western Europe. Gilissen lectured in South Africa on the matter.[114]

7.3. Comparative legal history

Gilissen's courses at the ULB and VUB contained a strong component devoted to comparative law. His "Introduction" gives credit to his colleagues Frits Gorlé (for Soviet law), Jacques Vanderlinden (African law), Aristide Theoridès (Egyptian law) and Léon Anciaux (Islamic law) (Gilissen 1979, 9).[115] The present-day reader is of course struck by the Cold War context in which the manual generated. Gilissen, as well as his Brussels colleague René Dekkers (X 1982)[116] were interested in the functioning of a society without a concept of the state or law. The manual clearly stated that in spite of ideological pretences, the law of the USSR could not escape its filiation with Romanist systems (Gilissen 1979, 20). Gilissen devoted attention to the separate development of Chinese and Maoist conceptions. In spite of the recent Cultural Revolution (1968), the manual thought that the PRC had started to develop just a new Confucian ethics (*li*) from 1958 on. African customary law, finally, was characterised as "archaic, but not primitive," in the sense that African, non-written, collective and solidarity-based legal systems had been the fruit of a long evolution and multiple subjections by non-African political systems (Gilissen 1979, 21).

After his retirement, *Geschiedenis van het Recht* ("History of Law [including the evolution of the main legal systems]") was taught by Frits Gorlé (30 hours, 15 hours of exercises). The first section "Sketch of a universal history of the main legal systems" in the "Historical Introduction to Law" has been trimmed down to the benefit of a broader internal history of private law, with a focus on real property, contracts and trade. Since 2018–2019, the course's name has been modified to "Historical Introduction to Private Law."

Legal history and political history still occupy a prominent position at the Vrije Universiteit Brussel and the Université libre de Bruxelles. At the VUB – besides the course *Politieke Geschiedenis van België* ("Political History of

[114] ULB/Archives Gilissen, nrs. 35–37, with a calendar of Stellenbosch (18 August: 11 hours, 50 students and 4 professors), Potchefstroom (9 September: 20 hours, 40 students) and Johannesburg (17 September: 40 students).

[115] Gilissen did keep track of developments in the Islamic world, as his papers on Tunisian family law, or on the Algerian Civil Code demonstrate. Another example is the extract "Le droit islamique et sa socialisation dans les pays en voie de dévelopemment" by Gabriele Crespi Reghizzi from the *Rapports généraux au IX*e *congrès international de droit comparé* (Teheran, 1974). ULB/Archives Gilissen, no. 78. See also Gilissen 1972.

[116] René Dekkers was an eminent civil lawyer, but he also taught comparative law, Roman law and social law (Dekkers 1951).

Belgium," 6 ECTS) – *Historische en Vergelijkende Inleiding tot het Publiekrecht* ("Historical and Comparative Introduction to Public Law, 6 ECTS conforms to *Inleiding tot de Voornaamste Moderne Staten*) and *Historische Inleiding tot het Privaatrecht* ("Historical Introduction to Private Law," 6 ECTS) can be traced back to the *summa divisio* set out in Gilissen's 1979 manual.

At the ULB, the courses *Histoire du droit et des institutions* (10 ECTS) and *Histoire de la Belgique contemporaine* (6 ECTS) are mandatory in the first year. The former course is the direct successor to John Gilissen's course (Beauthier 2007). Roman law has been integrated into a broad course *Droit civil et fondements de droit romain* (10 ECTS).

BIBLIOGRAPHY

Baeteman, Gustaaf. Paul De Vroede. Eds. 1987. *Vijftig jaar Faculteit der "Rechtsgeleerdheid" V.U.B.: feestbundel naar aanleiding van de feestzitting van 27 november 1985*. Antwerpen: Kluwer rechtswetenschappen.

Beauthier, Régine. 2007. *Droit et genèse de l'État*. Bruxelles: Editions de l'Université de Bruxelles.

Beyen, Marnix. 2002. *Oorlog en verleden: nationale geschiedenis in België en Nederland: 1938–1947*. Amsterdam: Amsterdam University Press. https://doi.org/10.5117/9789053564974

Colignon, Alain. Jacques Pirenne. 2021. *Belgium WWII*. Brussels: CEGESOMA.

Conway, Martin. 1993. *Collaboration in Belgium: Leon Degrelle and the Rexist Movement 1940–1944.* New Haven: Yale University Press. https://doi.org/10.2307/j.ctt211qx80

Cornelis, Gustaaf. Els Witte. Irina Veretennicoff. Eds. 1997. *Roger Van Geen: een kritisch-optimische kijk op onderwijs, wetenschap en maatschappij*. Brussels: VUBPress.

De Hert, Paul. Frederik Dhondt. 2017. "Interview met Jef Van Bellingen." In *Bewogen door maatschappelijke ontwikkelingen. Liber Amicorum Jef Van Bellingen*. Edited by Paul De Hert, Frederik Dhondt. 1–17. Brussel: ASP/VUBPress.

De Man, Hendrik. 1927. *Au delà du marxisme*. Bruxelles: L'Eglantine.

De Wever, Bruno. 1994. *Greep naar de Macht*. Tielt: Lannoo. https://dbnl.org/tekst/weve009gree01_01/

Dekkers, René. 1951. *Bibliotheca Belgica juridica: een bio-bibliographisch overzicht der rechtsgeleerdheid in de Nederlanden van de vroegste tijden af tot 1800*. Brussel: Paleis der Academiën.

Despy, Georges. 1989. "Notice sur Paul Bonenfant." *Annuaire de l'Académie Royale des Sciences, des Lettres et des Beaux-Arts de Belgique* 155: 65–134.

Despy-Meyer, Andrée. Alain Dierkens. Eds. 1991. *25 novembre 1941: l'Université Libre de Bruxelles ferme ses portes*. Bruxelles: Archives de l'ULB.

Feenstra, Robert. 1989. "John Gilissen." *Jaarboek KNAW*: 148–151.

Ferriere de, Claude. 1714. *Corps et compilation de tous les commentateurs anciens et modernes sur la Coutume de Paris*. Paris: Guillaume Cavelier.

François, Luc. Eric Vanhaute. Sven Vrielinck. 1995. *De vele gezichten van de nieuwste geschiedenis: bibliografie van de licentiaats- en doctoraatsverhandelingen betreffende de nieuwste geschiedenis van de Belgische universiteiten, 1975–1994*. Gent: Academia Press.

Gaudemet, Jean. 1980. "Note bibliographique : l'*Introduction historique au droit* (John Gilissen)." *Revue internationale de droit comparée* XXXII(2): 471–472. https://www.persee.fr/doc/ridc_0035-3337_1980_num_32_2_3868

Gilissen, John. 1950. “Les phases de la codification et de l’homologation des coutumes dans les XVII Provinces des Pays-Bas.” *Tijdschrift voor Rechtsgeschiedenis* XVIII(1): 36–67, 239–290. https://doi.org/10.1163/157181950X00058

Gilissen, John. 1951. “Étude statistique sur la répression de l’incivisme.” *Revue de droit pénal et de criminologie:* 513–628.

Gilissen, John. 1952. *Le régime représentatif en Belgique avant 1790*. Bruxelles: La Renaissance du livre.

Gilissen, John. 1954. “Les villes en Belgique. Histoire des institutions administratives et judiciaires des villes belges.” In *La ville. I: institutions administratives et judiciaires*. Edited by Société Jean Bodin pour l’histoire comparative des institutions. 531–600. Bruxelles: Librairie encyclopédique.

Gilissen, John. 1958a. *Le régime représentatif en Belgique depuis 1790.* Bruxelles: La Renaissance du Livre.

Gilissen, John. 1958b. “À propos de la réception du droit romain dans les provinces méridionales des pays de par-deça aux XVI^{e} et XVII^{e} siècles.” In *Mélanges dédiés à la mémoire de Raymond Moinier* [Mémoires de la Société d’histoire du droit des pays flamands, picards et wallons; IV]. 129–139. Lille–Paris: Giard/Montchrestien. https://doi.org/10.3406/rnord.1958.2283

Gilissen, John. 1973. “Histoire comparée du droit: l’expérience de la société Jean Bodin.” In *Buts et methodes du droit comparé: Aims and methods of comparative law*. Edited by Mario Rotondi. 256–297. New York: Oceana.

Gilissen, John. 1975. “Vergelijkende rechtsgeschiedenis: doel en methode.” In *Provocatie en inspiratie: Liber Amicorum Leopold Flam*. Edited by Henny Bijneveld. 843–848. Antwerpen: Ontwikkeling.

Gilissen, John. 1977. *China*. Brussel: VUB.

Gilissen, John. 1978. *Frankrijk. De Vijfde Republiek*. Brugge: De Garve.

Gilissen, John. 1979. *Introduction historique au droit.* Bruxelles: Bruylant.

Gilissen, John. 1980a. “L’apport de Meijers à l’histoire du droit.” *Tijdschrift voor Rechtsgeschiedenis* XLVIII(4): 355–371. https://doi.org/10.1163/157181980X00127

Gilissen, John. 1980b. “L’ordre judiciaire en Belgique au début de l’indépendance (1830–1832).” *Journal des Tribunaux* (22 October): 565–574.

Gilissen, John. 1981. “Le caractère collégial des premières formes de gouvernement et d’administration de l’État belge (1830–1831).” *Belgisch Tijdschrift voor Nieuwste Geschiedenis/Revue belge d’histoire contemporaine* XII(3): 609–639.

Gilissen, John. 1984. “De eerste administratieve organisatie van België ten tijde van de tijdelijke regering (september 1830 – februari 1831).” *Tijdschrift voor Rechtsgeschiedenis* LII(4): 301–342. https://doi.org/10.1163/157181984X00169

Gilissen, John. 1985. “L’enseignement du droit romain à l’Ecole, puis Faculté de Bruxelles (1806–1817).” In *Satura Roberto Feenstra Oblata*. Edited by Hans Ankum, J.E. Spruit, Felix Wubbe. 659–677. Fribourg: Éditions universitaires.

Gilissen, John. 1986. “Révolutions et droit au XIX^{e} siècle en Europe.” *Tijdschrift voor Rechtsgeschiedenis* LIV(2): 335–352. https://doi.org/10.1163/157181986X00077

Gilissen, John. 1991. *Historische inleiding tot het recht*. Antwerpen: Kluwer.

Gilissen, John. Armande Nauwelaerts. 1974. *De Ierse Kwestie*. Antwerpen: De Sikkel.

Gilissen, John. Ed. 1970. *La monocratie*. Bruxelles: Librairie encyclopédique.

Gilissen, John. Ed. 1972. *Le pluralisme juridique*. Bruxelles: Editions de l’ULB.

Gilissen, John. Eric Pollet. Eds. 1965. *Bibliographie de l’histoire du droit des provinces belges*. Bruxelles: s.n.

Gilissen, John. Frits Gorlé. 1978. *De U.S.S.R*. Brugge: De Garve.

Gilissen, John. Gabriël Croisseau. 1974. *Derde herziening van de Belgische Grondwet 1954–1971*. Antwerpen: De Sikkel.

Gilissen, John. Michel Magits. 1978. *Zuid-Afrika*. Antwerpen: de Sikkel.

Godding, Philippe. 1988. "In Memoriam John Gilissen." *Tijdschrift voor Rechtsgeschiedenis* LVII(1–2): 3–19. https://doi.org/10.1163/157181989X00119

Gorlé, Fritz. 1980. "Le poids de la tradition nationale russe dans le droit soviétique." *Tijdschrift voor Rechtsgeschiedenis* XLVIII(2): 99–123. https://doi.org/10.1163/157181980X00262

Heirbaut, Dirk. 2019. "Weg met De Page? Leve Laurent? Een pleidooi voor een andere kijk op de recente geschiedenis van het Belgische privaatrecht." *Tijdschrift voor Privaatrecht* LVI: 267–321.

Huyse, Lucm. Steven Dhondt. 2020. [1991]. *Onverwerkt verleden: collaboratie en repressie in België: 1942–1952*. Tielt: Lannoo.

Ingber, Léon. 1983. "Curriculum Vitae." In *Code et constitution. Wetboek en Grondwet. Liber Amicorum John Gilissen*. IX–XIV. Antwerpen: Kluwer.

Kersteman, Franciscus Lievens. 1772. *Aanhangsel tot het Hollandsch rechtsgeleerd woordenboek.* Amsterdam: Steven van Esvelt.

Magits, Michel. 1990. "De invoering van de praktische oefeningen in het rechtsonderwijs: meer dan een academische discussie?" In *Xenia G. Van Dievoet Oblata*. Edited by Fred Stevens, Dirk Van den Auweele, Guido van Dievoet. 67–73. Leuven: KU Leuven.

Magits, Michel. 2014. "Im Memoriam Jacques-Henri Michel, 1927–2013." *Tijdschrift voor Rechtsgeschiedenis* LXXXII(3–4): 345–348. https://doi.org/10.1163/15718190-08234p11

Magits, Michel. Tom Salmaekers. 1995. "Vijfentwintig jaar onderwijs aan de Vrije Universiteit Brussel." In *De tuin van akademos*, *studies naar aanleiding van de 25ste verjaardag van de Vrije Universiteit Brussel*. Edited by Els Witte, Jeffrey Tyssens. 247–311. Brussel: VUBPress.

Masson, Christophe. Burno Demoulin. Eds. 2018. *La paix de Fexhe (1316) et les révoltes dans la principauté de Liège et dans les Pays-Bas méridionaux: actes du colloque tenu à Liège les 15 & 16 septembre 2016.* Bruxelles: AGR.

Prayon-van, Zuylen. Napoléon Alphonse. 1892. *De Belgische taalwetten toegelicht*. Gent: A. Siffer.

Richebourg de, Charles A. Bourdot. 1724. *Nouveau coutumier général ou corps des coutumes générales et particulières de France et des provinces connues sous le nom des Gaules. Exactement vérifiées sur les Originaux conservez au Greffe du Parlement de Paris, & d'autres Cours du Royaume.* Paris: Michel Brunet.

Scheelings, Frank. s.d. "Frans De Pauw." *Nieuwe Encylopedie van de Vlaamse Beweging Online*. https://nevb.be/wiki/De_Pauw,_Frans

Société Jean Bodin pour l'histoire comparative des institutions. 1958. *L'étranger*. Bruxelles: Librairie encyclopédique.

Société Jean Bodin pour l'histoire comparative des institutions. 1969. *Gouvernés et gouvernants*. Bruxelles: Librairie encyclopédique.

Stengers, Jean. 1982. *Quarantième anniversaire de la fermeture de l'Université libre de Bruxelles (25 novembre 1941).* Bruxelles: ULB.

Stengers, Jean. 2004. "Le libre examen à l'Université libre de Bruxelles, autrefois et aujourd'hui." *Revue Belge de Philologie et d'Histoire* LXXXII: 547–583. https://doi.org/10.3406/rbph.2004.4843

Stutje, Jan Willem. 2018. *Hendrik De Man. Biografie: De man met een plan*. Kalmthout: Polis.

Thimus, François-Guillaume Joseph. 1844. *Traité de droit public: ou, Exposition méthodique des principes du droit public de la Belgique, suivi d'un appendice contenant le texte des principales lois de droit public*. Liège: Dessain.

Tyssens, Jeffrey. 1993. *Strijdpunt of pasmunt? Levensbeschouwelijk links en de schoolkwestie, 1918–1940*. Brussel: VUB Press.

Tyssens, Jeffrey. 1995. “Over het ontstaan van de Vrije Universiteit Brussel op het einde van de jaren zestig.” In *De Tuin van Akademos. Studies naar aanleiding van de vijfentwintigste verjaardag van de Vrije Universiteit Brussel*. Edited by Els Witte, Jeffrey Tyssens. 23–133. Brussel: VUBPress.

Van Causenbroeck, Bernard. s.d. “Herman Vos.” *Nieuwe Encyclopedie van de Vlaamse Beweging*. https://nevb.be/wiki/Vos,_Herman

Van Goethem, Herman. 1990. *De taaltoestanden in het Vlaams-Belgisch gerecht 1795–1935*. Brussel: Paleis der Academiën.

Van Tichelen, Joseph. 1981. “Souvenirs de la négociaton du Traité de Rome.” *Studia Diplomatica* XXXIV: 327–343.

Van Velthoven, Harry. 2019. *Bevriende vijanden: hoe de Belgische socialisten uit elkaar groeiden*. Kalmthout: Polis.

Vandenbogaerde, Sebastiaan. 2018. *Vectoren van het recht: Geschiedenis van de Belgische juridische tijdschriften*. Brugge: Die Keure.

Waelkens, Laurent. Fred Stevens. 2014. *Geschiedenis van de Leuvense rechtsfaculteit*. Brugge: Die Keure.

Wils, Lode, 2017. *Frans Van Cauwelaert. Politieke biografie*. Deurne: Doorbraak.

Winkel, Laurens. 2019. “100 years of the Legal History Review.” *Tijdschrift voor Rechtsgeschiedenis* LXXXVII(3): 259–267. https://doi.org/10.1163/15718190-00873P03

Witte, Els, 1995. “In de Tuin van Akademos. De vruchten van vijfentwintig jaar Vlaamse universitaire aanwezigheid.” In *De Tuin van Akademos. Studies naar aanleiding van de vijfentwintigste verjaardag van de Vrije Universiteit Brussel*. Edited by Els Witte, Jeffrey Tyssens. 9–21. Brussel: VUBpress.

Witte, Els. 2009. *Voor vrede, democratie, wereldburgerschap en Europa: Belgische historici en de naoorlogse politiek-ideologische projecten (1944–1956).* Kapellen: Pelckmans.

Witte, Els. Harry Van Velthoven. 1999. *Language and Politics: The Belgian Case Study in a Historical Perspective.* Brussels: VUBPress.

Witte, Els. Jan De Groof. Jeffrey Tyssens. Eds. 1999. *Het schoolpact van 1958: ontstaan, grondlijnen en toepassing van een Belgisch compromis*. Leuven/Brussels: Garant/VUBPress.

Wouters, Nico. 2019. “The Second World War in Belgium: 74 Years of History (1944–2019).” *Journal of Belgian History* 2–3: 12–82.

X. 1988. “Im Memoriam John Gilissen.” *Revue de droit pénal militaire et de droit de la guerre/The Military Law and Law of War Review* XXVII: 149–157.

X. 2013. “Philippe Godding †.” *Tijdschrift voor Rechtsgeschiedenis* LXXXI(3–4): 337–340. https://doi.org/10.1163/15718190-08134P01

X. Ed. 1959. *De Gelijkheidswet van 18 April 1898 en de vernederlandsing van onze wetgeving*. Brussel: Paleis der Academiën.

X. Ed. 1982. *Hommage à René Dekkers.* Bruxelles: Bruylant.

Press

Belgicapress. *Royal Library of Belgium*, https://www.belgicapress.be

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.04

*Lena Fijałkowska**

https://orcid.org/0000-0001-5674-703X

AT THE DAWN OF LEGAL HISTORY: TEACHING LAW IN ANCIENT MESOPOTAMIA

Abstract. The article presents an outline of legal teaching in ancient Mesopotamia, with emphasis on the available sources and the difficulties they present. Though our knowledge of this topic is still fragmentary, for several periods the scribal curriculum can be reconstructed, as well as the place of legal education therein. The innate conservatism of Mesopotamian culture notwithstanding, it turns out that the latter managed to produce surprisingly skilled and creative legal professionals.

Keywords: ancient Mesopotamia, scribes, legal education, scribal curriculum, law.

U ZARANIA HISTORII PRAWA: NAUCZANIE PRAWA W STAROŻYTNEJ MEZOPOTAMII

Streszczenie. Artykuł zarysowuje dzieje nauczania prawa w starożytnej Mezopotamii, przedstawiając zachowane źródła i problemy związane z ich interpretacją. Mimo że wiedza na ten temat wciąż pozostaje fragmentaryczna, możliwe jest odtworzenie, przynajmniej dla niektórych epok, zarówno programu nauczania jak i miejsca zajmowanego w nim przez edukację prawną. Jak się okazuje, typowy dla mezopotamskiej kultury konserwatyzm nie przeszkodził w kształceniu zaskakująco kompetentnych i kreatywnych profesjonalistów.

Słowa kluczowe: starożytna Mezopotamia, pisarze, edukacja prawnicza, wykształcenie pisarzy, prawo.

As stated by Raymond Westbrook in his introduction to the monumental *History of Ancient Near Eastern Law*, "law has existed as long as organized human society" (Westbrook 2003, 1). But it is the invention of writing that allowed for at least some of it to be recorded, and therefore studied by modern legal historians. As it were, both earliest written documents and earliest legal records originate from the ancient Near East. Writing was invented in Mesopotamia in the second half of the fourth

* University of Lodz, Faculty of Law and Administration, Department of the Studies in the Development of State and Law, lfijalkowska@wpia.uni.lodz.pl

Received: 8.11.2021. Revised: 11.01.2022. Accepted: 15.03.2022.

millennium and first used mostly for administrative purposes.[1] Documents concerning legal matters, both public and private, start to become numerous only 500 years later, though the first ones seem to date back nearly to the beginnings of writing.[2] The oldest known records of private law are stone artifacts, each probably documenting several transactions concerning large areas of land,[3] whereas legal texts on clay tablets appear in the so-called Fāra period (2600–2450) and grow in number with time. As for public law, Entemena, ruling the city Lagaš in the 25th century, issued the first "restoration edict," cancelling debts and liberating people assigned to corvée labor.[4] His successor, Urukagina, claims to have implemented much broader reforms.[5] In the next two and a half millennia, thousands of legal transactions were recorded on clay tablets, and for the much rarer royal acts durable supports like stone were usually used.[6] They all testify to the existence of a rich and diverse legal culture, with clear principles and, more often than not, surprisingly sophisticated institutions.[7] Therefore, the question arises as to the people involved in in its creation and development. The most visible to us are scribes who wrote texts of legal practice, since they are usually named at the

[1] For an exhaustive overview of the development of writing, as well as of the early texts and of the numerous problems they entail, see in particular Bauer, Englund, and Krebernik (1998, 15–414).

[2] The terms "private" and "public" are used in the modern sense, as this distinction was not known in the ancient Near East.

[3] For their publication and analysis see Gelb, Steinkeller, and Whiting (1991). The first *kudurrus* (stone monuments) can be dated to the Uruk III period (3100–2900), and are very difficult to read and interpret, since early cuneiform is still poorly understood.

[4] As one of his building inscriptions praises: "A liberation for Lagaš he ordered. He let children return to the mother, he let the mother return to the children. A liberation from loans and interests in grain he ordered." For the whole text see Steible (1982, Ent.79, 268–270). Similar edicts were issued on a regular basis in the second and first millennia, cancelling non-commercial debts and annulling their legal consequences, such as debt slavery.

[5] Again in a building inscription. For the text, see Steible (1982, Ukg 1, 280–287). For a summary from the legal point of view, see Wilcke (2007, 21–25).

[6] As the oriental law was mostly customary, texts of legal practice are by far the largest group of extant sources, but royal decrees, instructions, and law collections also contributed to its development. For an overview of the sources of information on ancient Near Eastern law see Westbrook (2003, 4–21). It is important to remember that we are dealing with over 2500 years of legal history recorded in written sources and with a large geographical region (Syria, Mesopotamia, and Asia Minor). This in turn means that although the cuneiform culture was a conservative one, and changes were slow to happen, they did happen eventually, and must be taken into consideration, regional variations included. However, the distribution of sources, both chronological and geographical, is very uneven, severely limiting the possibility to reconstruct the law in several periods.

The term "conservatism" is used here in its basic meaning, "a tendency to dislike change" (MacMillan English Dictionary 2007, 313). In Mesopotamia, it was more than simply dislike; the attitude towards change and progress is better described as strong opposition, noticeable in every area of life, be it architecture, agriculture, religion or scholarship (Leick 2007, *passim*).

[7] For the concept of a shared legal traditions in the Near Eastern societies, see in particular articles by R. Westbrook collected in Wells and Magdalene (2009).

end of them.[8] These scribes were not professional lawyers in our sense of the word, but they did receive at least some training in law, allowing them to competently write contracts.[9] However, little can be said about scribal education in the earliest periods.[10] As recently shown by N. Kraus for the Sargonic era (24th–22nd century), though it is hardly possible to reconstruct the scribal curriculum, the education would have taken place at some kind of administrative facilities, perhaps in form of apprenticeship in local institutions, as the school tablets were discovered in the proximity of such centers, and the emphasis seems to have been on the administrative uses of writing (Kraus 2021, 168–169). It is noteworthy that hardly any school texts concerning legal matters were found, save for one lenticular tablet with a property sale. Therefore, it remains unclear how Sargonic scribes learned to create legal documents, though they undoubtedly did learn it, numerous contracts from the Sargonic period bearing testimony to their skills (Kraus 2021, 106–111).[11]

The small number of school texts from the Ur III state (22nd–21st century) makes any study of the scribal curriculum of the period even more difficult. However, the evidence brought about by literary texts points toward a major change introduced by Šulgi, the second king of the dynasty. In one of the hymns written in his praise, he boasts of founding schools in the city of Nippur, reputed for its scholarship, as well as in his capital, Ur:

> In the south, in Urim, I caused a House of the Wisdom of Nisaba to spring up in sacrosanct ground for the writing of my hymns; up country in Nibru I established another. May the scribe be on duty there and transcribe with his hand the prayers which I instituted in the E-kur; and may the singer perform, reciting from the text. The academies are never to be altered; the places of learning shall never cease to exist. This and this only is now my accumulated knowledge! (Šulgi B 308–317)[12]

The same hymn starts with a depiction of Šulgi's own scribal training and his mastery of the scribal art:

> I am a king, offspring begotten by a king and borne by a queen. I, Šulgi the noble, have been blessed with a favorable destiny right from the womb. When I was small, I was at the academy,

[8] This is not always the case, however, especially in the earliest documents from Mesopotamia, as well as at the so-called peripheral sites, such as the Assyrian merchants' colony Kaneš in Anatolia (1st half of the 2nd millennium) or the late Bronze Age town of Emar in Syria. See Steinkeller (1989, 103–104), marriage documents from Kaneš discussed in Kienast (2015) and sale deeds from Emar, especially of the Syro-Hittite tradition, collected in Fijałkowska (2014).

[9] The term "scribe" is attested for the first time already in archaic texts from Ur (2900–2600) and becomes frequent in the Fāra period (Visicato 2000, 2).

[10] For what little is known about scribal education before the Sargonic era, see Nissen (1993) and Lecomte and Benati (2017) with previous literature. For a general outline of scribal education in Mesopotamia see Charpin (2010, 17–67).

[11] Although in this period, they still stay unnamed more often than not. See the tables in Visicato 2000.

[12] For the English translation see https://etcsl.orinst.ox.ac.uk/cgi-bin/etcsl.cgi?text=t.2.4.2.02&display=Crit&charenc=gcirc&lineid=t24202.p1#t24202.p1. Accessed 24 April, 2021.

> where I learned the scribal art from the tablets of Sumer and Akkad. None of the nobles could write on clay as I could. There where people regularly went for tutelage in the scribal art, I qualified fully in subtraction, addition, reckoning and accounting. The fair Nanibgal, Nisaba, provided me amply with knowledge and comprehension. I am an experienced scribe who does not neglect a thing. (Šulgi B 12–20)

Obviously, taking such a composition literally, as a mere account of events, would not be a good idea. However, the hymn clearly shows the importance of the scribal profession, confirmed in turn by the economic documents. The latter feature numerous scribes occupying various posts in the royal administration, from the highest (e.g. scribes at the court), to lower, but no less needed, at the palace and temples, performing various administrative tasks (Nissen 1993, 106–108). Their role in the field of law certainly encompassed writing documents of private practice as well as court records.[13] The royal foundation of schools may have been a response to an increasing demand for scribes, generated by the needs of the large state bureaucracy. The so-called junior scribes, i.e. probably advanced scribal trainees/interns working in the administration to gain experience could be provided with food rations by provincial governors, as was the case at Girsu (Waetzoldt 1989, 39). Unfortunately, the only information on the material taught in those school is once again provided by literary texts, this time by the Edubba literature, i.e. Sumerian compositions describing various aspects of life at a scribal school.[14] These compositions are not, obviously, accurate accounts of school life; rather, "they tell us much about how the scribes liked to view themselves and the educational process" (Black et al. 2004, 276).[15] Be that as it may, they do provide bits and pieces of information on the matters taught, writing legal documents being one of them. In Edubba D, a student claims to have mastered the scribal art:

> I want to write tablets: a tablet (of measures) of 1 gur of barley up to 600 gur, a tablet (of weights) from 1 shekel to 20 minas of silver, with marriage contracts that can be brought to me, partnership contracts (…), sale of houses, of fields, of slaves, warranties in silver, contracts of field lease, contracts of date palm cultivation, […], even adoption contracts, I can write all this. (Edubba D 40–48)[16]

---

[13] Ur III is the only period when court records (or rather summaries of legal proceedings, called di-til-la, i.e. "case closed") were generated within the administration and kept in provincial archives. The usual practice in all other epochs was simply to hand over the tablet containing the judgment to the winning party. For Ur III court records see Falkenstein (1956) and Culbertson (2009).

[14] The widely accepted meaning of the Sumerian term é.dub.ba is "tablet house." Another possibility would be "House which distributes tablets" or "House where tablets are distributed" (Volk 2000, 3).

[15] The surviving copies originate from the Old Babylonian era (1st half of the 2nd millennium), but the compositions themselves are older, describing the reality of the Ur III times (George 2005, 131–133).

[16] For the edition see Civil (1985).

Much more is known about the scribal curriculum from the next period (Old Babylonian), since the number of school exercises discovered in several cities allowed for a reconstruction of school curricula and their local variations.[17] As shown by Veldhuis for Nippur, the pupils first learned how to use the stylus and to write the elements of cuneiform signs and the simplest signs. A list of different combinations thereof followed,[18] then came the list tu-ta-ti,[19] and lists of Sumerian and Akkadian names. The next step consisted of the Sumerian lexical list ur_5-ra, a thematic list of objects,[20] followed by a series of more advanced lists, probably introduced at the same time as mathematical exercises[21]. At this point, the students also had their first encounter with law, thanks to a list of legal phrases in Sumerian – Proto-ki-ulutin-bi-še ("at the agreed time" – the *incipit* of the list). The first 15 lines begin with this expression, followed by ca. 40 lines of verbal paradigms (he gave, he gave to him, they gave to him, he paid, he paid him etc.), and then the vocabulary of loans, sale, marriage, and inheritance.[22] As with other lexical lists, first the pupils would have copied fragments written down by the teacher, and later they would have noted them from memory (Tanret 2002, 157). In Sippar, basic legal phraseology was taught a little earlier in the curriculum, before the list ur_5-ra, by means of the Sippar phrasebook, a collection of terms and expressions concerning family relations, types of real estate, time designations, verbal paradigms and other terms used in Sumerian contracts (Veldhuis 2014, 188–190). Possibly in late Old Babylonian period that phrasebook became a part of the ur_5-ra list, appended to it as its two first tablets (Veldhuis 2014, 156).[23] It remained a part of the elementary education through the first millennium, whereas the Nippur phrasebook, better known under the name *ana ittišu*, became rare in the later times and is known only from a few copies from Assyria (Veldhuis 2014, 328–329).[24]

[17] It is also clear that from this period on, scribal schooling took place in private houses and was conducted by professional scribes either at their houses, or at their patron's. As the scribal profession, like many other ones, tended to be transferred within the family, often a father would teach his son (Tanret 2002, 168; Charpin 2010, 25–33).

[18] The so-called Syllable Alphabet B. Outside Nippur, a different list, Syllable Alphabet A was used (Veldhuis 1997, 43).

[19] "Sets of three syllables with permutations of the vowel, in the order u-a-i" (Veldhuis 1997, 43).

[20] It was divided into six parts, concerning respectively trees and wooden objects (1), reed objects, vessels, leather objects, metals and metal objects (2), animals and wild cuts (3), stones, plants, fish, birds, clothing (4), geographical names and terms, stars (5), foodstuffs (6) (Veldhuis 1997, 47).

[21] The first stage of education was completed with Sumerian proverbs, the second one consisted in learning classical works of Sumerian literature.

[22] Only a partial reconstruction of the list is possible today. For the text see http://oracc.museum.upenn.edu/dcclt/Q000045.8#Q000045.3.

[23] Hence the name of the whole list, derived from the phrasebook's *incipit* – ur_5-ra=*hubullu* (loan). The Old Babylonian version of the list starts with the word ^{giš}taškarin=boxwood (Veldhuis 2014, 149–157).

[24] For this series and the doubts concerning its often-surmised use for teaching see Lafont (2010, 17–20).

Aside from legal terms and expressions, the Sippar Phrasebook also comprises a few so-called model contracts. This term refers to school texts containing one or more contracts in Sumerian, usually devoid of elements such as witnesses, date, and place, and unsealed. Some of them were written on prisms, i.e., multi-sided clay objects, others on large, multicolumn tablets; both types could contain even a dozen or more contracts. There are also teacher-student exercises, on the obverse of which, in the left column, the teacher would write the text for the student to copy multiple times in the right column. The reverse usually contained a previously studied literary or lexical text.[25] It is not always clear, however, which of those texts are really models, and which are student exercises, either copied from a model, written on dictation, or composed from memory, using previously learnt legal formulae (Charpin 2017, 162). Another problem consists in establishing the relationship between those exercises and actual legal documents. In other words, are the formularies and vocabulary similar enough for the former to be a useful tool in teaching the composition of the latter? Studying a prism containing, among others, several model contracts, Roth concluded that it "reflects the legal reality of the Old Babylonian documents" (Roth 1979, 255). However, in her edition of model contracts from Nippur, Spada notes similarities, but also important differences between both types of documents (Spada 2018), and Charpin points out that several of the exercises from Yale edited by Bodine do not have any "real-life" counterparts. Besides, many of the model contracts are unprovenanced, and since local legal traditions could vary considerably, it makes their comparison with real-life documents a problematic endeavor (Charpin 2017, 163). Another question concerns the dating of the models used for this kind of exercises; according to Bodine, one of the Yale texts was based on documents from the Ur III rather than on Old Babylonian ones (Bodine 2014, 133–134). His arguments seem valid, but such a practice, especially if widespread, would undermine the practical purpose of legal education. After all, it would not prove very useful to learn how to write contracts the way it was done several hundred years earlier, even considering the conservative character of the Mesopotamian culture. Finally, the place of those texts within the curriculum is not obvious. Bodine puts them at the "intermediate" stage, without further clarification (Bodine 2014, 178), whereas according to Veldhuis and Spada, they were a part of the first stage of the curriculum (Veldhuis 1997, 69; Spada 2018, 3), as suggested also by the connection to the Sippar Phrasebook, used early in the learning process.

Another problematic genre of school text are the so-called "literary legal decisions" or "model court cases," recording legal proceedings full of interesting, and sometimes even sensational details, but usually lacking elements necessary

[25] For the classification of school texts in general see Civil (1969, 27–28).

in actual documents, such as witnesses and date.[26] One of them is the famous Nippur murder trial, relating a murder of a Sumerian priest by three men. The killers confessed to the victim's wife, who failed to denounce them. As a result, both the murderers and the wife were condemned to death.[27] The text, however, does not merely relay the facts of the case, as is usual for judicial records. On the contrary, its interest lies above all in the account of the discussion in the assembly of Nippur, before the judgment was rendered. This never happens in actual trial documents, and the question arises as to the reason for such a presentation.[28] As pointed out by Neumann, it shows that legal teaching within the scribal curriculum was not limited to the merely technical skill of writing standard contracts, but it also aimed at developing other important professional abilities, such as proper juridical reasoning, argumentation, and discussion, as well as creativity (Neumann 2004, 92). By the same token, two other texts of this kind provide a factual justification of the assembly verdict, which is very rare in actual trial records, but was necessary for teaching purposes.[29] Moreover, some of those

[26] It is unclear whether those texts retell true court cases, perhaps somewhat embellished to catch the students' interest, or if they are entirely products of teachers' imagination (Neumann 2004, 79). For the list of documents of this kind, see Roth (1983, 281–282), and texts published in Hallo (2002; inheritance case), Klein and Sharlach (2007; *Sammeltafel* with a model adoption contract and two inheritance cases) and George (2009, 123–152). The latter document differs from Sumerian model court records in a few aspects, most importantly in language since it is written partly in Akkadian. See commentary by George (2009, 142–152). Additionally, four short legal disputes may be found on a multicolumn school tablet published in George and Spada (2019, 95–106), two concerning loans of barley, two others – burgled houses. There is also a school tablet with a short summary of a trial for slander on another tablet. Finally, a document tentatively qualified by Spada as a school text contains three legal cases, one of them possibly being a trial, since it ends with the punishment for the offenders (George, Spada 2019, 120–123).

[27] First published in Jacobsen (1959). Based on the king's name, the events can be dated to the Isin period (1923–1896), but the extant copies are Old Babylonian.

[28] The death penalty for the three killers is deemed indisputable, and the debate focuses on the fate of the widow. Most assembly members argue for a death penalty too, their point being that the silence of the women after the fact is tantamount to aiding the killers. Moreover, they take it as proof of her adultery and even of having instigated the murder herself ("A woman who values not her husband may give information to his enemy and thus he may (be able to) kill her husband. That her husband is killed, he may let her hear – why should he not thus make her keep silent about him? She killed her husband, her guilt is greater than theirs." The minority speaking in her favor uses the weaker sex argument: "Nin-Dada daughter of Lu-Ninurta may have killed her husband; but what can a woman do in (such a matter) that she is to be killed?" (Jacobsen 1959, 137–138). For a detailed analysis of the points of law see Lafont (1999, 399–407).

[29] A trial concerning the rape of a slave woman concludes with the following judgment: "Because he deflowered the slave-girl without (her) owner('s knowledge), Lugal-melam is to pay ½ mina of silver to Kuguzana her owner" (Finkelstein 1966, 359). A dispute about inheritance between an uncle and his nephew ends as follows: "(Because) the temple office, the house (and) fie[ld were held] in distraint, and [for] 10 years [he was looking at them with] jealousy – [Bēlī-ennam] must pay 2 mina of silver and [return] the temple [office, the house (and) the field]" (Klein, Sharlach 2007, 8–11).

model cases could have been used as exercises in solving particularly complicated legal problems, as at least two of them concern complex inheritance matters.[30] Still, it is not clear at which stage of the schooling they were used, though they seem to be appropriate for rather advanced pupils. Furthermore, the legal reasoning they teach, as well as the degree of complexity of some of the cases, would point towards students in the higher levels of education, perhaps even somewhat specialized in legal matters. A related problem concerns the frequency of their use, or, in other words, whether they were a permanent or only rare or even accidental part of the curriculum. Their scarceness in comparison with the several hundred of preserved model contracts would point to one of the two latter options, though that may change with further publication of Old Babylonian school documents used for legal education.

Yet another kind of legal material studied by scribal pupils were law collections, as testified by extant copies of the "codes" of Ur-Nammu, of Lipit-Ištar, and of Hammurabi, as well as of the Laws of Ešnunna, at least some of them being undoubtedly school exercises (Roth 1979, 12–17; Neumann 2004, 76). Additionally, small compilations dealing with single issues were used, such as "Laws about Rented Oxen" or "A Sumerian Laws Exercise Tablet" (Roth 1997, 40–45).[31] Once again, the question arises as to their place in the curriculum, and even to the very reason of their presence therein. Few scribal students would ever have use for that knowledge, mostly those who would later be active as judges or other high officials, whereas most would spend their lives drawing simple contracts or performing unsophisticated administrative tasks. Therefore, they should be taught to fairly advanced, perhaps even specialized students. However, this assumption is contradicted, at least regarding the smaller compilations, by the many mistakes in the preserved copy of the Sumerian Laws Exercise (Roth 1979, 16, and 1997, 43). Moreover, as pointed out by Veldhuis, compared with the practical requirements, students learned a lot of completely unnecessary Sumerian material, such as most of the lexical lists, and not near enough Akkadian (Veldhuis 1997, 82–83). That in turn suggests that one of the main goals of education was enculturation and formation of identity, rather that practice (Lenzi 2019, 23). Law collections could have been used for a similar purpose, as a part of cultural

[30] The third text on the tablet published in Klein and Sharlach (2007, 18–23) relays a dispute among four brothers, complete with a final, detailed record of individual inheritance shares (and as any student of modern civil law knows very well, there is nothing worse than being asked to count individual inheritance shares during a civil law exam; apparently, ancient Mesopotamia was not much different in this respect). The text published by George under the title "The tribulations of Gimil-Marduk" presents in detail the process of clearing a legal mess spanning nearly 50 years.

[31] It is not entirely clear if those unformal compilations are fragments of actually existing law "codes" or rather purely educational products. As noted by Roth regarding the Laws about Rented Oxen, they "reflect considerations similar to those found in groups of provisions within larger collections" (Roth 1997, 40),

heritage common to all students rather than as teaching material essential only for those who in future would deal in depth with legal matters.[32]

School texts from the next, Middle Babylonian period (2nd half of the 2nd millennium), are few and far between. Most of the Old Babylonian curriculum remained in place, though the Akkadian language was introduced to a degree by far exceeding its sporadic use in the earlier times (Volk 2000). The ur_5-ra list, now with the Sippar phrasebook as its fixed first part, was taught both in unilingual and bilingual versions, as well as the Hammurabi Code (Volk 2000, 71–72), which at this point was obviously a part of cultural heritage rather than a tool used to teach contemporary law.

A major change in the educational set-up occurred in the Neo-Babylonian period, when the first stage of schooling was divided in two parts. During the first one, the pupils learned to write, read, and apply basic mathematics, aided by material similar to the one from previous periods. The first three tablets of the ur_5-ra list played an important role (Gesche 2001, 61, 77). It must be noted, however, that its significance for the legal education was severely undermined by the character of the terminology it contained, in use a thousand years earlier and now largely outdated. Later the students would learn to write administrative and legal texts, sometimes quite complicated.[33] The laws of Hammurabi were still copied in schools, but they certainly could not be a source of legal knowledge anymore (Lambert 1989; Charpin 2009, 51). However, another legal collection seems to have been used for teaching, the so-called Neo-Babylonian Laws. The preserved tablet is a damaged school text containing only 15 provisions, and there is no indication that it may be a copy a Neo-Babylonian royal code.[34] According to Oelsner, it could be a fragment of a set of instructions for judges and other judicial functionaries (Oelsner 1997, 225), thus perfectly useful for the education of aspiring scribes in matters of jurisprudence.[35]

The second stage of study encompassed the classical compositions of Babylonian literature, more advanced lexical lists, as well as texts conveying knowledge needed for an *āšipūtu*, i.e., exorcist (Gesche 2001, 172–173).

Students who completed the first stage of schooling could work in the administration or as notaries, preparing contracts and other legal documents. However, their education was not yet sufficient, and they needed to significantly broaden their professional knowledge before becoming full-fledged specialists.

[32] Although it should be noted that only the first two "codes" are written in Sumerian. Laws of Ešnunna and of Hammurabi were both Old Babylonian, that is roughly contemporary with the students in question, and written in Akkadian.

[33] The loan contract, or parts of it, seems to have been recopied very often; an example of a more complex agreement is an apprenticeship contract for a barber (Gesche 2001, 147).

[34] For the text see Roth (1997, 142–149).

[35] See, however, the reservations expressed by Gesche, who puts the Neo-Babylonian Laws in the *Fachausbildung* stage of education rather than at school (Gesche 2001, 217).

This was the purpose of what Gesche calls *Fachausbildung*, while stating that its course is practically unknown (Gesche 2001, 218).[36] Traces of such training may have been found in a Neo-Babylonian family archive of Bēl-rēmanni, containing a surprisingly high number of duplicates of contract types usually not kept in several copies, such as debt notes, receipts, prebend sales, and a work contract (Jursa 1999, 13–14). According to Jursa, their origin lies precisely in the professional training of at least one family member. Not only was he tasked with copying whole legal documents, but he also had to learn to use the formulary in a flexible and creative way (Jursa 1999, 17, 30–31).

Another indication for the after-school professional training is the existence of highly specialized scribes, such as royal notaries active in Babylon and Borsippa during the reigns of Nabonidus and Cyrus the Great, who wrote and sealed real estate sales, probably officially registered (Baker, Wunsch 2001). It is rather safe to assume that the highest level of professional competence was required of such officials, and they certainly did not achieve it at school.

Though our knowledge of the scribal education, including its legal part, is still fragmentary, we can easily observe and assess its results, thanks to countless texts of legal practice, as well as such monumental sources as the law codes. As emphasized by Neumann, the very order of the Laws of Hammurabi, arranged according to typical scientific principles of the time, points towards a systematic work of the editors.[37] The same is true for the integration of customary practices and of earlier legal dispositions into the Code, which may be taken as a sign of nearly dogmatic thinking as well as of legal knowledge (Neumann 2004, 92). In addition, scribes were willing to interpret and clarify the provisions of the codes in various ways, by means of translation, of creating new variants while recopying, and of revising material shared among various law collections (Barmash 2008). Obviously, all of the above required not only wide juridical knowledge, but also the ability of correct legal reasoning as well as a solid dose of creativity.

The same qualities may be found in documents of practice. This statement may *prima facie* seem rather problematic, given that the latter are often described as highly formulaic and repeatable. Indeed, such a description is accurate for most of them, but not all. Occasionally, the scribe would be faced with an unusual legal situation, a very complicated dispute, a surprising request from a client, and their creativity would find an outlet. A truly extreme case are family law documents from the peripheral sites of Emar and Nuzi (2nd half of the 2nd millennium), full of instances of sham transactions and of very ingeniously used legal fiction, usually applied to circumvent legal prohibitions (Fijałkowska 2017). In Mesopotamia proper, the development of the sale on credit while maintaining the appearance

[36] Not much has changed in this respect during the last three thousand years or so. Today, a law graduate, even after 5 years of exclusively legal education, still needs further training to become a competent law practitioner…

[37] For the connections between legal training and Mesopotamian science see Lafont (2010).

of a cash transaction may be cited (Pfeifer 2013, 83–113), as well as the practice current among the prebendaries of the Nabu temple of Borsippa in the first millennium, who tended to conceal prebend sales under the guise of donations (Jursa 2008, 608–610).[38]

To sum up, it may be said that all in all, the goals of Mesopotamian legal education seem to have been very similar to the modern ones – building on a general cultural background, to provide the students with solid juridical knowledge, good professional skills and the ability to think creatively. The effects, in the form of works left behind by so many of them, bear testimony to its success.

BIBLIOGRAPHY

Baker, Heather. Cornelia Wunsch. 2001. "Neo-Babylonian Notaries and Their Use of Seals." In *Proceedings of the XLV^e Rencontre Assyriologique Internationale*. Vol. 2. *Seals and Seal Impressions*. Edited by I. Tzvi Abusch, Carol Noyes, William Wolfgang Hallo, Irene Winter. 197–213. Bethesda: Eisenbrauns.

Barmash, Pamela. 2008. "Scribal Initiative in the Clarification and Interpretation of Mesopotamian Law Collections." In *Birkat Shalom. Studies in the Bible, Ancient Near Eastern Literature and Postbiblical Judaism Presented to Shalom M. Paul on the Occasion of His Seventieth Birthday*. Vol. 2. Edited by Chaim Cohen et al. 551–563. Winona Lake: Eisenbrauns. https://doi.org/10.1515/9781575065908-043

Bauer, Joseph. Robert K. Englund. Manfred Krebernik. 1998. *Mesopotamien: Späturuk Zeit und Frühdynastische Zeit*. Freiburg–Göttingen: Universitätsverlag/Vandenhoeck Ruprecht.

Black, Jeremy. Graham Cunningham. Eleanor Robson. Gábor Zólyomi. 2004. *The Literature of Ancient Sumer*. New York: Oxford University Press.

Bodine, Walter R. 2014. *How Mesopotamian Scribes Learned to Write Legal Documents. A Study of the Sumerian Model Contracts in the Babylonian Collection at Yale University*. Lewinston: Edwin Mellen Press.

Charpin, Dominique. 2010. *Reading and Writing in Babylon.* Cambridge–London: Harvard University Press.

Charpin, Dominique. 2017. "Chroniques bibliographiques 20. Pour une diplomatique des documents paléo-babyloniens." *Révue d'assyriologie et d'archéologie orientale* 111: 155–178. https://doi.org/10.3917/assy.111.0155

Civil, Miguel. 1969. "Old Babylonian Proto-Lu." In *The Series lu_2=ša and Related Texts*. Edited by Erika Reiner, Miguel Civil. 24–73. Roma: Pontificio Istituto Biblico.

Civil, Miguel. 1985. "Sur les 'livres d'écolier' à l'époque paleo-babylonienne." In *Miscellanea Babyloniaca: mélanges offerts à Maurice Birot*. Edited by Jean-Marie Durand, J.-R. Kupper. 67–78. Paris: Recherches sur les Civilisations.

Culbertson, Laure E. 2009. *Dispute Resolution in the Provincial Courts of the Third Dynasty of Ur*. Dissertation. University of Michigan.

Falkenstein, Adam. 1956. *Die neusumerischen Gerichtsurkunden*. 3 Vols. München: Verlag der Bayerischen Akademie der Wissenschaften.

Fijałkowska, Lena. 2014. *Le droit de la vente à Emar*. Wiesbaden: Harrassowitz.

[38] The reason for it is not certain; it might have been a way to avoid the registration and taxation of sales (Jursa 2008, 609–610).

Fijałkowska, Lena. 2017. “Legal Remedies against Misfortune. Evasion, Legal Fiction, and Sham Transactions in Late Bronze Age Emar.” In *Fortune and Misfortune in the Ancient Near East*. Edited by Olga Drewnowska, Małgorzata Sandowicz. 119–128. Winona Lake: Eisenbrauns. https://doi.org/10.5325/j.ctv1bxgzrq.14

Finkelstein, Jacob. 1966. “Sex Offences in Sumerian Law.” *Journal of the American Oriental Society* 86: 355–372. https://doi.org/10.2307/596493

Gelb, Ignace J. Piotr Steinkeller. Robert M. Whiting Jr. 1991. *Earliest Land Tenure Systems in the Near East. Ancient kudurrus*. *Text.* Chicago: The Oriental Institute of the University of Chicago.

George, Andrew R. 2005. “In Search of the *é.dub.ba.a*: the Ancient Mesopotamian School in Literature and Reality.” In *An Experienced Scribe Who Neglects Nothing. Ancient Near Eastern Studies in Honor of Jacob Klein*. Edited by Yitschak Sefati. 127–137. Bethesda: Eisenbrauns.

George, Andrew R. 2009. *Babylonian Literary Texts in the Schoyen Collection*. Bethesda: CDL Press.

George, Andrew R. Gabriella Spada. 2019. *Old Babylonian Texts in the Schoyen Collection. Part Two. School Letters, Model Contracts, and Related Texts*. University Park: Eisenbrauns.

Gesche, Petra D. 2001. *Schuluntericht in Babylonien im ersten Jahrtausend v. Chr.* Münster: Ugarit Verlag. https://doi.org/10.1515/9781646020140

Jacobsen, Thorkild. 1959. “An Ancient Mesopotamian Trial for Homicide.” In *Studia Biblica et Orientalia III: Oriens Antiquus*. 130–150. Roma: Pontificio Istituto Biblico.

Jursa, Michael. 1999. *Das Archiv des Bēl-rēmanni*. Leiden: Nederland Institut voor het Nabije Oosten.

Jursa, Michael. 2008. “Economic Change and Legal Innovation. On Aspects of Commercial Interaction and Land Tenure in Babylonia in the First Millennium BC.” In *I diritti del mondo cuneiforme*. Edited by Mario Liverani, Clelia Mora. 601–628. Pavia: IUSS Press.

Kienast, Burkhardt. 2015. *Das Altassyrische Eherecht. Eine Urkundenlehre*. Wiesbaden: Harrassowitz.

Klein, Jacob. Tonia M. Sharlach. 2007. “A Collection of Model Court Cases from Old Babylonian Nippur (CBS 11324).” *Zeitschrift für Assyriologie* 97: 1–25. https://doi.org/10.1515/ZA.2007.001

Kraus, Nicolas L. 2021. *Scribal Education in the Sargonic Period*. Leiden–Boston: Brill. https://doi.org/10.1163/9789004443242

Lafont, Sophie. 1999. *Femmes, droit et justice dans l’Antiquité orientale: Contribution à l’étude du droit pénale au Proche-Orient ancient*. Fribourg–Göttingen: Vandenhoeck Ruprecht.

Lafont, Sophie. 2010. “L’apprentissage du droit en Mésopotamie: une méthode scientifique?” *Droit et Cultures. Hors série*: 11–28.

Lambert, Wilfred G. 1989. “The Laws of Hammurabi in the First Millennium.” In *Reflets des deux fleuves. Volume de mélanges offerts à A. Finet*. Edited by Marc Lebeau, Philippe Talon. 95–98. Leuven: Peeters.

Lecompte, Camille. Giacomo Benati. 2017. “Nonadministrative Documents from Archaic Ur and from Early Dynastic I–II Mesopotamia: a New Textual and Archaeological Analysis.” *Journal of Cuneiform Studies* 69: 3–31. https://doi.org/10.5615/jcunestud.69.2017.0003

Leick, Gwendolyn. Ed. 2010. *The Babylonian World*. New York: Routledge.

Lenzi, Alan. 2019. *An Introduction to Akkadian Literature*. University Park: Eisenbrauns.

Macmillan English Dictionary. 2007. Oxford: Macmillan Education. https://doi.org/10.1515/9781646020324

Neumann, Hans. 2004. “Prozessführung im Edubba’a.” *Zeitschrift für altorientalische und biblische Rechtsgeschichte* 10: 71–92.

Nissen, Hans J. 1993. “The Education and Profession of the Scribe.” In *Archaic Bookkeeping. Writing and Techniques of Economic Administration in the Ancient Near East.* Edited by Peter Damerow, Robert K. Englund. 105–109. Chicago: The University of Chicago Press.

Oelsner, Joachim. 1997. “Erwägungen zu Aufbau, Charakter und Datierung des sog. ‘Neubabylonischen Gesetzfragmentes’.” *Altorientalische Forschungen* 24: 219–225. https://doi.org/10.1524/aofo.1997.24.2.219

Pfeifer, Guido. 2013. *Fortschritt auf Umwegen – Umgehung und Fiktion in Rechtsurkunden des Altertums*. München: C.H. Beck.

Roth, Martha T. 1979. *Scholastic Tradition and Mesopotamian Law: A Study of FLP 1287, a Prism in the Collection of the Free Library of Philadelphia*. Dissertation. University of Pennsylvania.

Roth, Martha T. 1983. “The Slave and the Scoundrel. CBS 10467, a Sumerian Morality Tale.” *Journal of the American Oriental Society* 103: 275–282. https://doi.org/10.2307/601884

Roth, Martha T. 1997. *Law Collections from Mesopotamia and Asia Minor*. Atlanta: Society of Biblical Literature.

Seible, Horst. 1982. *Die altsumerischen Bau- und Weihininschriften*. Wiesbaden: Franz Steiner Verlag.

Spada, Gabriella. 2018. *Sumerian Model Contracts from the Old Babylonian Period in the Hilprecht Collection Jena*. Wiesbaden: Harrassowitz. https://doi.org/10.2307/j.ctv11sn5c3

Steinkeller, Piotr. 1989. *Sale documents of the Ur-III-Period*. Stuttgart: Franz Steiner Verlag.

Tanret, Michel. 2002. *Per aspera ad astra. L’appretissage du cunéiforme à Sippar-Amnānum pendant la période paléobabylonienne tardive*. Ghent: University of Ghent.

Veldhuis, Niek. 1997. *Elementary Education at Nippur*. PhD Dissertation. University of Groningen.

Veldhuis, Niek. 2000. “Kassite Exercises: Literary and Lexical Extracts.” *Journal of Cuneiform Studies* 52: 67–94. https://doi.org/10.2307/1359687

Veldhuis, Niek. 2014. *History of the Cuneiform Lexical Tradition*. Münster: Ugarit-Verlag.

Visicato, Giuseppe. 2000. *The Power and the Writing. The Early Scribes of Mesopotamia*. Bethesda: CDL Press.

Volk, Konrad. 2000. “Edubba’a und Edubba’a Literatur: Rätsel und Lösungen.” *Zeitschrift für Assyriologie* 90: 1–30. https://doi.org/10.1515/zava.2000.90.1.1

Waetzoldt, Hartmut. 1989. “Der Schreiber als Lehrer in Mesopotamien.” In *Schreiber, Magister, Lehrer.* Edited by Johann Georg Prinz von Hohenzollern, Max Liedtke. 33–50. Bad Heilbrunn: Kinkhardt.

Wells, Bruce. Rachel Magdalene. Eds. 2009. *Law from the Tigris to the Tiber: The Writings of Raymond Westbrook.* Vol. 1. *The Shared Tradition*. Winona Lake: Eisenbrauns.

Westbrook, Raymond. Ed. 2003. *A History of Ancient Near Eastern Law*. 2 Vols. Leiden–Boston: Brill. https://doi.org/10.1163/9789047402091

Wilcke, Claus. 2007. *Early Ancient Near Eastern Law. A History of its Beginnings*. Winona Lake: Eisenbrauns.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.05

COPE Member since 2018 JM13714

*Michał Gałędek**

https://orcid.org/0000-0002-9538-6860

REMARKS ON THE METHODOLOGY OF COMPARATIVE LEGAL RESEARCH IN THE CONTEXT OF THE HISTORY OF LAW IN POLAND

Abstract. Is there anything outstanding about the history of law in Poland? Is it particularly conducive to comparative research? In my attempt to answer these questions, I focussed on presenting two distinct comparative law methods: historical legal comparison and comparative legal history.

The paper is divided into two parts. The first part elaborates on the characteristics of the respective methods and on the challenges of comparative legal history in a temporally diachronic perspective and why they are not so pronounced in historical legal comparison. In this part, I tried to document the claim that the existence of a comparative platform of similarities is a condition to obtain more reliable and better-documented results of comparative research.

In the second part, I focussed on three cases visualising the possibilities for comparative legal research on the history of law in Poland. Regarding the pre-partition times, I analysed the comparative possibilities related to an analysis of the impact of the Roman law on the Old Polish legal culture. The other two examples concerned the history of law in post-partition Poland. First, I explored the potential triggered by the adoption of foreign laws in Poland in terms of comparative research. I used French commercial law to exemplify the problem. Then, I undertook to show the dormant potential of the particular situation of Poland divided into different legal areas for the development of the country's own codes of law.

Keywords: methodology, historical legal comparison, comparative legal history, diachronic, synchronic, Poland, reception of Roman Law, French Commercial Code, codification, legal transplant.

UWAGI O METODOLOGII BADAŃ PRAWNO-PORÓWNAWCZYCH W KONTEKŚCIE HISTORII PRAWA W POLSCE

Streszczenie. Czy dzieje prawa w Polsce wyróżniają się czymś szczególnym? Czy historia prawa w Polsce stwarza wyjątkowo korzystne warunki dla prowadzenia badań komparatystycznych? Podejmując się odpowiedzi na te pytania, skoncentrowałem się na prezentacji dwóch różnych ujęć prawno-porównawczych – na tzw. historycznym porównywaniu praw oraz porównawczej historii prawa.

* University of Gdańsk, Faculty of Law and Administration, Department of History of Law, michal.galedek@prawo.ug.edu.pl

Received: 8.11.2021. Revised: 11.01.2022. Accepted: 15.03.2022.

Artykuł został podzielony na dwie części. W pierwszej z nich zawarłem rozbudowane uwagi wstępne charakteryzujące oba podejścia i wyjaśniające, na czym polegają problemy związane z zastosowaniem porównawczej historii prawa w ujęciu temporalnie diachronicznym oraz dlaczego one nie występują w takim stopniu przy stosowaniu historycznego porównywania prawa. W tej części starałem się udokumentować twierdzenie, iż istnienie tzw. porównawczej platformy podobieństw stanowi warunek osiągnięcia pewniejszych i lepiej udokumentowanych wyników badań komparatystycznych.

W drugiej części skupiłem się na trzech egzemplifikacjach obrazujących możliwości prowadzenia badań prawno-porównawczych nad dziejami prawa w Polsce. W odniesieniu do czasów przedrozbiorowych koncentruję się na możliwościach komparatystycznych związanych z analizą wpływu prawa rzymskiego na staropolską kulturę prawną. Pozostałe dwa przykłady dotyczą historii prawa na ziemiach polskich w czasach porozbiorowych. Najpierw skupiam swoją uwagę na potencjale, jaki dla badań komparatystycznych stworzyła sytuacja przeszczepienia na grunt polski obcych praw. Analizuję ten problem na przykładzie francuskiego prawa handlowego. Następnie staram się wskazać na potencjał, jaki drzemie w szczególnej sytuacji, w jakiej znalazły się ziemie polskie podzielone na różne obszary prawne i wykorzystania tego faktu w pracach nad stworzeniem własnej kodyfikacji.

Słowa kluczowe: metodologia, historyczne porównywanie praw, historia prawno-porównawcza, diachroniczne, synchroniczne, Polska, recepcja prawa rzymskiego, francuski Kodeks handlowy kodyfikacja, przeszczep prawny.

1. METHODOLOGICAL REMARKS ON HISTORICAL LEGAL COMPARISON AND COMPARATIVE LEGAL HISTORY

There are two distinct approaches to comparative legal research: historical legal comparison and comparative legal history (cf. Löhnig 2014, 113–120; Donlan 2019, 78–95).

Historical legal comparison examines on legal norms that form legal concepts and principles. They originate from at least two different orders and the purpose of comparison is to understand law in different jurisdictions (cf. Ibbetson 2012, 131–145; Heirbaut 2013, 89–92). The law is determined by the legislator who establishes legal principles, after which it is interpreted in legal decisions and school of thought. As a rule, historical legal comparison pays little or no attention to the contextual factors of the creation and interpretation of the law. Also, comparison of different schools of academic thought does not meet the requirements of functional comparative law. Usually, legal scholars, in an effort to prove that their thought is objective (otherwise, it would be easy to discredit), avoid any broader self-critical presentation of contextual factors that could distort their views. This means that, essentially, historical comparison of law and school of thought as an elaboration of law analyses research material in disregard of the surrounding reality and narrows the object of comparison down to the wording of legal norms and their academic interpretation (Michelsen 2019, 105–107).

It should be noted, however, that juxtaposing historical legal comparison with comparative legal history that would ideally lead to a dichotomous division is

an oversimplification, because neither the legislator that creates the law nor the authorities that apply the law, nor legal scholars that interprets the law are able to entirely isolate their ideas from the context. If, however, exegesis of legal texts and focus on linguistic interpretation of the content of legal norms, that are being compared, are fundamental to historical legal comparison, it seems reasonable to juxtapose it with the typical techniques of comparative legal history.

In the latter method, historical research is dominant over legal research. Comparative legal research, rather than on legal norms, focusses on the functioning of law in the society (cf. Michaels 2006, 339–382), economy and politics, i.e., on the interactions of legal norms and the society, economy and the exercise of public authority. Central to such deliberations is an analysis of the factors that shape legal systems and orient their development. The object is not so much the content of legal norms as the elements that comprise legal cultures.[1] A comparatist focusses on social attitudes and reactions.[2]

In this approach, first of all it is safer to narrow the research field down to a limited section of a legal system, in which case, however, it would be methodologically unsound to extrapolate the characteristics of an entire legal order in a given jurisdiction from heuristic conclusions. However – on the other hand – a too broad object of research results in superficial analyses that may lead to erroneous reasoning (Dyson 2014, 131–145).

Secondly, an analysis of closely related cultural circles leads to more reliable conclusions. A higher number of similar or the same phenomena affecting the object of comparison makes the analysis easier. On the other hand, it is questionable how to approach countries and cultural circles whose legal orders show a number of similarities, even though they have developed independently of one another. What is the reason for those similarities, if there exist no direct (or even indirect) links between the respective cultures? Also, it is difficult to understand why systems differ if there are not enough points reference.

Thirdly, the risk of making cognitive errors is lower when comparing phenomena from the same historical era, i.e., ones that are temporally synchronous. This does not mean, however, that temporally diachronic comparative research is not possible in certain circumstances (Löhnig 2014, 114–115). Yet, the latter bears a higher risk. In diachronic comparison, legal cultures from different historical eras differ in a number of factors that affect the law. The atmosphere, or the spirit, of every era is different, and so is the level of development and political and geopolitical contexts, etc. The realities surrounding the examined laws are, in principle, different (cf. especially Gordley 2006, 763–767). Usually, a comparative platform (a platform of similarities), meaning a set of similar contextual conditions,

[1] See notes on comparative methods "zwischen unterschiedlichen Phänomenbereichen […] in variierende historisch-kulturelle Situationskomplexe" (Schriewer 2003, 24).

[2] On the complex nature of the concept of "legal culture" see: Nelken (2004, 1–29; 2012, 1–51).

is unavailable. A platform based on a set of similar contextual conditions is an anchor point for comparative research. If such a platform is unavailable, a researcher is confronted with an excess number of intersecting variables. As a result, the comparison of phenomena is done as if in the dark. Too many unknown factors need to be evaluated, whereas there exists only a narrow and fragile basis of what can be really taken for certain either by building a platform of similarities or by relatively precisely determining the reasons for differences between the compared legal culture phenomena.

It should be the intention of a comparativist to identify the causes behind specific changes and similarities. Yet, there are a number of causes that have a varying (or no) effect on the phenomenon that is subject to a comparative study. In comparative legal history, the researcher focusses not only on the interpretations that shape the normative characteristics of legal concepts but, more importantly, on the external aspects: the functioning of specific norms and concepts in the real world and on their application in real life, in the court, etc. However, the problem becomes more complicated if there is no platform of similarities when comparing phenomena from different eras. The dominance of differences in contextual conditions determining the functioning of legal norms and concepts makes it difficult to assess the reality. It is only too-frequently impossible to clearly and meaningfully explain why – despite the many differences between distant eras – there still are similarities between the compared phenomena and the legal cultures they are embedded in (Danemann 2006, 383–420). The problem consists in a different understanding and interpretation of that which is universal both in the world history *in genere* and in legal history *in specie* (Gurevich 1966, 3–18; Earman 1978, 173–181). The eternal dispute over universals in law and social relations does not make diachronic comparative research easier.[3]

Nonetheless, certain societies and legal cultures may find themselves in similar contextual conditions in different eras. In legal history, a platform of similarities is often created as a result of the reception and later assimilation of foreign law. In order to conduct comparative research focussed on the social reaction to a "transplant," the law transferred to a new jurisdiction needs to be the same (e.g., the same code) or at least a related set of norm (for example one that draws from the same patterns). To build a more stable platform of similarities, the initial conditions preceding the transfer of a foreign law should also be similar. This often happens when the reception of law results in rapid transformation of a legal culture dominated by customary law into one founded on the idea of comprehensive codification. Such a breakthrough took place in Poland at the turn of the 19th century (first, due to the partitions and later, as a result of the establishment of the Duchy of Warsaw) and it was not unique either in Europe

[3] I would like to thank Professor Jacek Wiewiorowski for drawing my attention to this aspect of the problem.

or elsewhere in the world (Gałędek 2020, 3–4). Similar reactions of social shock to such radical changes encourage comparative analyses that – as it seems – need not always be temporally synchronous.

However, similarities must not necessarily arise from radical changes in the fundamental assumptions of a given legal system, although studies on turning points and social reactions to thorough transformations of social relations seem to be the best for diachronic comparison.[4] Such turning points may not be directly linked with law. Below are presented three examples of revolutionary transformations: the first is a mental and cultural transformation, the second – intellectual,[5] and the third – economic and social.

The first example concerns the mental and cultural transformations linked with the formation of modern nations. In Europe, those processes took place mainly in the 19th century. This does not mean, however, that they happened simultaneously in every nation, as may be exemplified by the French and English nations on the one hand and the Lithuanian and Ukrainian nations on the other hand. Neither is the entire 19th century one and the same historical era, considering the rapid acceleration of civilisational processes. The social, economic and political reality of the early 19th century was completely different from that of the end of the century. Also, the change dynamics makes the first decade of the 20th century different from the post-war reality. Thus, a comparative study of two periods in the 19th or 20th century, respectively, that were only a few decades apart should be classified as diachronic comparison.

The same is the case with the second example – of the intellectual revolution in the scientific world, in philosophy or in views of the state and of the law. In Western Europe it happened sooner than in the East of the continent, making it reasonable (under certain conditions) to conduct diachronic research focussing on an earlier period in the West compared to other regions both in Europe and elsewhere in the world, which followed the same path later on in the 19th and 20th centuries, respectively.

Also, in the third example – of dynamic economic and social changes that were usually linked with fast development of commercial and industrial relations, those changes happened first in the West and later they spread to Eastern Europe and other regions of the world, which means that comparative research may focus, for example, on private law governing socioeconomic relations in other eras, given a similar level of their development, and reveal a number of similarities typical of a given stage of development.

To sum up, diachronic comparative analysis seems methodologically plausible in each of the abovementioned cases, giving a much higher probability

[4] Classical turning points are presented by Jean-Louis Halpérin (2014).

[5] Intellectual transformation relates to the narrow circle in society (intellectual elite) and their ability of understand ideas at a high level, whereas mental and cultural transformation relates to the way of behaving and thinking of society as a whole.

of correct results than if the research material were to be selected on a more discretionary basis. Despite time differences, there exists a relatively stable platform of similarities between the situations that are compared. If, however, there is no such platform of similarities, a comparison of comprehensively different phenomena is scientifically unsound, because differences in the compared phenomena are usually dominant and, moreover, they result from different overlapping causes. In such case, it is difficult or even impossible to conduct a proper study and reasoning.

All the abovementioned examples in which temporally diachronic research is plausible require the use of the methodology of comparative legal history. Historical legal comparison that focusses on the content of legal norms can only be subsidiary. This type of research is not problematic when it is diachronic. The methodology behind this technique does not require the comparativist to analyse the reality in which a given law is embedded or to take into consideration the factors that affect the content of regulations, and even if they do, it is not enough to understand the entire complexity of the contextual conditions of the law. Thus, if the object of research is the content of legal norms rather than the complex context, the risk of coming to wrong conclusions is much lower in comparative historical research using the temporally diachronic methodology than in comparative legal history. This concerns, in particular, private law in jurisdictions influenced by the Roman law. The universal and timeless Roman private law constructs became the foundations of contemporary legal systems in many countries in Europe and beyond (Dajczak 2004, 383–392; Dajczak 2005, 7–22). Because the changes taking place in private law were not dynamic, the risk of errors in historical legal comparison, even temporally diachronic, is not high. But even in public law, which, lacking systemic Roman models, underwent more thorough transformations in the history of Europe, comparison of legal norms from different eras should not pose insurmountable obstacles. In principle, historical legal comparison is a simplified study of law isolated from the non-normative context and, as a rule, any cognitive elements are limited. In this method, the contextual conditions of the development and functioning of the analysed legal norms do not require an in-depth analysis. Thus, the things that constitute the essence of differences between historical eras, hindering temporally diachronic research, may be in fact dismissed *a priori.* However, the simplified cognitive method of historical legal comparison only works on the condition that those who use it, aware of its cognitive limitations, refrain from drawing any far-reaching conclusions. Researchers notes technical similarities and differences but, for lack of data, do not comment on their genesis, not having studied the contextual conditions of the formation and functioning of the law that is subject to comparison.

2. THE POTENTIAL OF COMPARATIVE RESEARCH ON POLISH LAW

Example I. The impact of the Roman law on the Old-Polish legal culture

A classical topic of studies on the pre-partition law is the effect of the Roman law – with its typical principles and concepts – on both the Old-Polish law and the legal culture of the First Polish Republic (Godek 2001, 27–84). The problem attracts the attention of legal scholars even though the influence of the Roman law on the legal relations in Old Poland was limited or even residual in certain areas (the law of the noble class) and periods (the Middle Ages) and indirect (through the canon law; Vetulani 1969, 372–386). Nonetheless, studies on the impact and reception of the Roman law constitute the axis of legal research in Western Europe, and those patterns continue to penetrate the Polish scholarship (Wołodkiewicz 2009). Consequently, the formative significance of the Roman law for the European legal culture has undoubtedly become a central to scholarly deliberations, and it is impossible to describe world history, including Eurocentic history, without in-depth comparative legal research. Scholars of the Roman law are strongly convinced that historical legal comparison may help create the European private law in particular. In this context, the Roman law seems to serve as a methodological and material element (substrate) in the process of European codification of private law (Löhnig 2014, 113–114). Undoubtedly, comparative studies of Old-Polish law and legal culture and the laws and cultures of other countries and regions of Europe conducted through the prism of Roman influences constitute an attractive conglomerate of study topics.

For the methodological reasons described in the first part of the paper, the safest choice of topic is to compare problems associated with the impact of the Roman law to countries that have a similar legal background as Poland, both in terms of moderate and indirect influence of Roman patterns and similarities in contextual conditions. These criteria seem to be fulfilled mainly by neighbouring countries, such as Hungary and Czech Republic (Grodziski 1997, 73–82; Uruszczak 2005, 45–61), but not only by them. Perhaps it is equally possible to find sufficient analogies in such countries as Spain (cf. Lelewel 2015) or England, or 18th century Sweden. However, it would be difficult to conduct a comparative study of the effect of the Roman law on the German and Polish legal cultures, respectively, given different contextual conditions of the two countries and no equivalent of *usus modernus pandectarum* in Polish circumstances.

Comparative studies on the impact of the Roman law on the legal orders of respective countries, usually founded on historical legal comparison, may be either narrow and limited to a specific legal concept or particular legal principle, or they may be broad and cover an entire set of concepts and principles. A typical example of a broad research topic are studies on a legal code.

Meanwhile, research on selected aspects of legal culture, rather than legal norms, are by nature studies on a law in context. Thus, different tools are needed to analyse the influence of the Roman law on the Old-Polish legal culture. What makes this type of research attractive is the fact that social attitudes and the opinions on the Roman law may constitute an important component of a given legal culture. However, as has already been mentioned, comparative legal history analyses require first of all an entire spectrum of cognitive historical instruments, the legal qualifications of the researcher being of secondary importance. The most extensive studies on the impact of the Roman law may cover legal culture *in corpore*, or they may be limited to a certain aspect, such as a single state legal order and an analysis only of the impact on the law of the noble class or municipal law. The researcher must also remember that the natural transmission belt for the Roman law penetrate non-Romanised legal areas and saturate legal cultures with Roman elements was the canon law (Dębiński 2007).

Studies on the impact of the Roman law may also be limited in other ways to a specific legal culture research problem. One of such topics could be the role of universities as the basic channel of penetration of the Roman law to Poland. At least two different aspects of the problem, which could constitute independent research issues, would need to be analysed, namely the teaching of the Roman law in Poland, the popularity of studying abroad, and foreign influences in Poland (Godek 2013, 42, 49–53). The above example of contextual legal research belongs to a broader group of studies on the Roman law impact on the legal culture. All of them could also be present to a greater or lesser extent in other countries, offering an opportunity for comparative analyses. These issues could be reviewed in different ways: objectively, subjectively or functionally. Processes of the penetration of legal concepts, principles and ideas in a new territory are in a way universal problems and suitable for various comparative studies that can often – without too much risk – involve the temporally diachronic methodology.

To sum up the discussion on the potential of studies on the impact of the Roman law on the Old-Polish law and legal culture, it should be noted that the vector may be turned in the opposite direction on the same axis and a comparative analysis may focus on the elements of the local customary legal culture that survived despite the influence of the Roman and canon laws (Korpiola 2018, 404–429). Models based on the universal law significantly affected the evolution of the customary law and comparative studies on the specificity of local customs must not disregard the infiltration of the principles and concepts of the Roman law to customary laws.

Example II. Reception of French law in Poland

Regarding the partition and interwar periods – critical for the development of modern law – the situation of Poland in that time is particularly conducive to comparative research. This is due to the reception of a number of different legal systems in the respective regions of the country split between the invading empires. It is also the time when – as was discussed in the first part of the article – the law, science and philosophy as well as socioeconomic aspect underwent revolutionary transformations. The situation in the Congress Kingdom of Poland (formerly the Duchy of Warsaw) and in Polish Galicia (once autonomous) was different than in the Prussian Partition or in the areas incorporated into the Russian Empire (Taken Lands). In the former two regions, despite having lost their statehood, Poles preserved – albeit to a limited extent and not throughout the entire period of partitions – the national justice system and the autonomy of domestic scholarship and school of thought. Unlike in the Prussian Partition or in the Taken Lands, the Polish legal elites in Galicia and Congress Poland did not lose their ability to creatively adapt the legal systems in their jurisdictions.

Such situation is particularly conducive to in-depth comparative research. This is illustrated by the reception and adaptation of French private law codes first introduced in the Duchy of Warsaw and later maintained in the Kingdom of Poland.[6] Napoleon's Civil Code in particular and, to a lesser extent, the Commercial Code and the Code of Civil Procedure served as a model of codes for other countries across the world. The processes of their adaptation are particularly suitable for comparative analyses. Comparative studies may also include France, whence those codes originated.

An example is the synchronic research (I conducted together with Anna Klimaszewska) on the adaptation of the *Code de commerce* in the Congress Kingdom of Poland (and previously in the Duchy of Warsaw) and in France in the 19th century (Klimaszewska, Gałędek 2018). A number of levels of the adaptation processes may be identified and reactions to the Commercial Code may be discussed in several dimensions: the legislative and political dimension, the conceptual and academic dimension, the dimension of legal decisions and the social dimension.[7] Studies in each of the above areas required first of all adequate techniques of comparative legal history and research in the law in context. Different amendments of the Commercial Code in France and in Poland and different interpretation of the provisions of the Code, from the perspective of the language and of the system, respectively, were of some significance but did not essentially result in different interpretation of the *Code de commerce* in the respective countries.

[6] French private law codes were also maintained in the Free City of Krakow. On the adaptation of law there see Dziadzio (2020, 269–277) and Michalik (2021, 307–330).

[7] For more information, see Klimaszewska (2020, 143–163).

The starting point for the first of the identified levels, namely modifications in the code and an analysis of their causes, is a comparison of normative changes, the basic goal being to understand the causes and motivations driving the reform. A law is amended if it does not meet certain requirements. Changes may be triggered by technical defectiveness of a law (in which case the causes are usually not related to the reality surrounding legal concepts) or they may be a reaction to socioeconomic transformations or caused by political factors. In the case of the Polish law, however, the cause was different. The *Code of commerce* was amended (for example, by force of the *Organisation of the Merchant Class* of 1817), because the development of commercial relations in Poland did not match the regulations laid down in the Code. In this case, the *Code de commerce* was amended to suit the situation in the country which in the early decades of the 19th century was only beginning to undergo capitalist transformations with many features of the feudal system still in place (Gałędek 2015, 37–60). Only after several decades of socioeconomic evolution in the direction determined by Western capitalist patterns did the French Commercial Code become more suitable for the needs of the Polish economy. Since the 1840s, there was a growing interest in the most advanced organisational forms designed in the code, such as companies.

More frequent use of French commercial law concepts attracted the interest of the Polish scholarship and school of thought, which, in the first years after introduction of the *Code de commerce*, almost entirely disregarded commercial law. There was no tradition of teaching commercial law and there were no qualified scholars. This started changing only in the 1840s. However, the first Polish handbooks on commercial law were imitative. They focussed on propagating the French school of thought and unquestioningly accepted their ideas. With few exceptions (Pomianowski 2015, 235–236), no original assessments or adaptations of the teachings of French authors to the Polish reality were offered (Klimaszewska 2015, 219–231). In this context more creative – though equally rare – was the legal decisions and legal arguments of attorneys in records (Klimaszewska, Gałędek 2017a, 147–167; Klimaszewska, Gałędek 2017b, 169–182). However, neither judges nor attorneys representing the parties took recourse to the opulent patterns of French theory and practice of commercial law. Perhaps those were unavailable to them. Despite definitely insufficient knowledge of the commercial law and lack of qualifications to apply that law, Polish jurisprudence had to be able to adapt the Code to the Polish context. Yet, the conditions to autonomously develop the Polish studies of commercial law improved only a few decades after introduction of the *Code de commerce* in the Congress Kingdom of Poland, when the Central Warsaw School was founded in the 1860s. At that time, original studies on the French commercial law became more frequent.

Studies have identified the following three stages in the process of adapting the French commercial law: (1) the non-assimilated transplant stage up to the 1840s, when, in principle, the Polish scholarship and school of thought were silent; (2) the stage of uncritical imitation of French patterns in mid-century in the first reaction to the capitalistic approximation of the Kingdom of Poland to the relations that existed in France (at the time when the Code was created); (3) the stage of creative adaptation of the Commercial Code with the scholarship and school of thought emancipating themselves from the French influence and development of domestic legal decisions reflecting the local context of the Congress Kingdom of Poland. The last – and longest – stage ended when the *Code de commerce* was replaced by the Polish Commercial Code of 1934.

The process of adapting the French Commercial Code in France in the 19th century was entirely different. Although the starting point for research was almost identical in both countries, with the French Commercial Code entering into force in 1808 in France and in 1809 in Poland, in this case, the temporal synchrony is only apparently comfortable for comparative purposes. There is an entire conglomerate of differences between the two cultural regions. The Code was developed by the French for the French and it was tailored to centuries-old French commercial customs and to the French model of commercial judicial system. Moreover, it was mostly founded on the previous law – the 1673 Code Savary and on the rich pre-revolutionary commercial case law. Last but not least, the Commercial Code as a modernised and extended version of the pre-revolutionary legislation provided for the high level of development and specificity of the French economy (Klimaszewska 2011, 103–104). Consequently, the entry into force of the *Code de commerce* in France was, in principle, a continuation of long-established relations, principles and concepts. Adjusting to the formally new Code could not have been problematic either for merchants or for other entrepreneurs, nor for the commercial judicial system and school of thought.

Meanwhile, the *Code de commerce* was an entirely foreign construct in Poland. No one knew the French commercial customs nor the legal regulations that governed them, perhaps with the exception of a few merchants doing business in French markets. Thus, the norms of the French commercial law had to be learned and assimilated from scratch. There were also other disparities, typical of relations between a developed country and a country that strenuously tried to bridge the civilisation gap.

The differences in terms of preparedness for the application of the French commercial law in the first half of the 19th century were so numerous and so significant that the research could only identify them and determine their causes. Due to lack of conclusions based on similarities, other comparative goals could not be achieved. This only changed in the second half of the 19th century, after some of the discrepancies had been removed, making comparative studies possible on the basis of a comparative platform that guarantees a more comprehensive use

of materials. The question is whether, for methodological reasons, temporally diachronic research would be perhaps more plausible, for example assuming that the adaptation of the French commercial law in Poland in the first half of the 19th century should be compared to the reality in which that law was created in France in the 16th and 17th centuries, or that it would be worth juxtaposing the French reality of the first half of the 19th century and the Polish reality of the second half of the same century. It is a classical research problem and it comes down to choosing the right comparative optics in order to compare a more developed country that – like France – developed the object of reception and a less developed cultural environment, where – at least initially – it is difficult to successfully adapt the transferred law due to significantly different contextual conditions.

Example III. Comparative legal analyses of the authors of the Polish law

Another possible object for comparative legal research is the Polish attempts to create a new legal order based on the extensive and diverse experiences linked to Poland's direct contacts with other legal systems and cultures, combined with the deeply rooted conviction of its own national uniqueness embedded in Old-Polish traditions and distinct cultural heritage. This is best shown by Polish modern (founded on legal positivist assumptions) codification attempts, which were undertaken from scratch three times. The first two – interrelated – codes (*Collection of Court Laws* by Andrzej Zamoyski and *Stanisław August Code*) were compiled till 1795 by the end of the First Polish Republic; the second attempt at national codification was initiated after the collapse of the Napoleonic Duchy of Warsaw in 1814, when the decision was made to create the Congress Kingdom of Poland in a union with Russia; the third attempt, which left long-lasting results and was the only successful one, was launched with the establishment of the Codification Commission in 1919 and continued, based on the existing legislation, after Second World War both in the times of the People's Republic of Poland and in the Third Polish Republic. In each of this historical moments, the belief that there existed a certain universal canon of modern principles triggered a search for external patterns in countries that – as was assumed – had achieved a higher level of legal development to help build a new legal system in Poland.

Only in the first case – in the Stanisław August era – codification concepts and the research conducted on their bases were not of comparative nature (Borkowska-Bagieńska 1986, Szafrański 2007). Meanwhile, the codification efforts undertaken both in the Congress Kingdom and – which is of particular significance for the history of law in Poland – the measures taken in the 20th century were an attempt to rearrange and modernise the Polish legal space by representatives of the Polish legal elite mostly founded on non-Polish legal experiences. Their eclectic comparative analyses of foreign legal orders were supposed to enable creative

transformation and adaptation of those orders to the Polish context. They studied mainly the legislation of the invading empires and of France, whose codes were – obviously – also in force in Poland. The codes of the turn of the 19th century were also a new normative material that could be used in research in the reality of the Congress Kingdom, even though it still lacked sufficient case law and school of thought. Some of the legal elites working on new codes for the Congress Kingdom of believed, in the Enlightenment fashion, that they could find universal solutions that would at all times meet uniform standards for the whole mankind and equally satisfy the needs of every nation. They believed that such concepts and principles were already hidden in different codes existing in Poland – French, Austrian and Prussian ones. All that remained to be done was to confront them with one another and to understand the reasons for the differences between them and to choose the best solution – one that would be the least distorted by "outdated customs," prejudices and particular interests (Górnicki 2017, 135, 138–140; Gałędek 2021a, 41–58; Gałędek 2021b, 52–73).

A similar belief of legal elites underlined the codification efforts undertaken after the Great War. This time, too, the codifiers were convinced that humanity was entering a new stage in history and that universal progress was taking place in terms of socioeconomic relations, democratisation and social solidarity. Thus, the law had absolutely to be based on universally modern foundations. The difference was that in the previous century, the codifiers of the Congress Kingdom believed that the codes already existing in Poland were modern enough to be transplanted as ready-made solutions to Poland; in the Second Polish Republic, however, things were complicated by the fact that the respective regions had different foreign (Prussian, Austrian, French, Russian) codes that were mostly considered anachronistic and rooted in a bygone era, which made them useless in modern codes unless thoroughly transformed. Consequently, the focus of comparative studies intended to develop new codification shifted from comparison of provisions of positive law to a comparative analysis of different approaches to the law and school of thought in order to determine on this basis the direction of evolution of both social and legal relations.

Compared to the early 19th century, in the interwar period the Polish elites working on new codifications in the liberated country could confront much broader comparative legal material, not only foreign but also domestic, due to the fact that foreign codes had been in force in Polish lands. They analysed both foreign legal regulations and foreign and domestic case law and school of thought that had set the direction for the evolution of legal cultures in the course of the dynamic transformations in the 19th and early 20th centuries. In the interwar period, the codifiers were particularly determined to do an ambitious job. Assuming that their code would remain in force for many decades to come, they wanted it to be as perfect and as modern as possible. The purpose of comparative studies was

to detect solutions (concepts and principles) in foreign codes that would best reflect the spirit of the new era (Gałędek 2021a, 51–58; Gałędek 2021b, 63–71).

For all those reasons, source studies on Polish codifying work and the accompanying legal discourse create additional research possibilities arising from the specificity of Polish history. Even though in this case, they are not comparative analyses *sui generis* but rather studies on the Polish legal thought, they not only require the use of comparative instruments due to the specific nature of the research material, but they also make it possible to understand the achievements of the domestic jurisprudence in this field, which were naturally interested in comparative legal studies.

3. CONCLUSIONS

It seems that comparative legal research is an important and often indispensable element of most historical legal studies. Even in studies that do not use comparative analyses as a means to achieve their basic objective, establishing a point of reference seems useful and sometimes even necessary in order to understand the nature of a problem and to evaluate it. In order for comparative research to be of value, it is necessary not only to select and obtain the right comparative material but also to explore the context, i.e., the set of factors accompanying the development of legal norms and their interpretation.

As far as Poland is concerned, comparative legal history as a research method focussing on exploring the contextual background seems to have a unique potential. This is a side effect and a product of its history determined firstly by the cultural potential of the First Polish Republic that, to some extent, makes comparative studies of its unique development attractive and afterwards – since the partitions – by the historic upheaval at the time of revolutionary transformation of custom-based Old-Polish legal culture into the modern positivist legal thought paradigms. Analyses of the reception of law at that time create specific cognitive conditions for intercultural comparative legal research. The main problem in such studies is the reception of transplanted solutions in school of thought, and in case law, by the authorities and by the society. These studies also try to understand the differences that developed in the process of reception and the reasons behind them. Concerning the latter, it is possible to identify different categories of motivation: political, social, economic, philosophical and academic, or – looking from a different perspective – ideological, axiological, anthropological or cultural. A number of other questions arise, too, that need to be answered, such as the conditions that must be fulfilled to make the reception of a law successful, the possible forms of reception, and whether identical solutions and regulatory approaches may have the same effect in different social and political contexts.

BIBLIOGRAPHY

Borkowska-Bagieńska, Ewa. 1986. *Zbiór praw sądowych Andrzeja Zamoyskiego*. Poznań: Wydawnictwo Uniwersytetu Adama Mickiewicza.

Dajczak, Wojciech. 2004. "Poszukiwanie 'wspólnego rdzenia' prawa prywatnego w Europie." *Czasopismo Prawno-Hitoryczne* 56(2): 383–392.

Dajczak, Wojciech. 2005. "Problem 'ponadczasowości' zasad prawa rzymskiego. Uwagi w dyskusji o 'nowej europejskiej kulturze prawnej'." *Zeszyty Prawnicze* 5(2): 7–22. https://doi.org/10.21697/zp.2005.5.2.01

Danemann, Gerhard. 2006. "Comparative Law: Study of Similarities or Differences?" In *The Oxford Handbook of Comparative Law*. Edited by Mathias Reimann, Reinhard Zimmermann. 383–420. Oxford: Oxford University Press. https://doi.org/10.1093/oxfordhb/9780199296064.013.0012

Dębiński, Antoni. 2007. *Kościół i prawo rzymskie*. Lublin: Wydawnictwo KUL.

Donlan, Seán Patrick. 2019. "Comparative? Legal? History? Crossing Boundaries." In *Comparative Legal History*. Edited by Olivier Moréteau, Anicet Masferrer, Kjell Å. Modéer. 78–95. Cheltenham–Northampton: Edward Elgar. https://doi.org/10.4337/9781781955222.00009

Dyson, Matthew. 2014. "Ligations Divide and Conquer: Using Legal Domains in Comparative Legal Studies." In *Towards a European Legal Culture*. Edited by Genevieve Helleringer, Kai Peter Purnhagen. 131–154. Oxford: Hart Publishing. https://doi.org/10.5771/9783845263632-131

Dziadzio, Andrzej. 2020. "Der Code civil in der gerichtlichen Rechtsprechung in der Freien Stadt Krakau (1815–1846). Zwischen französischer und österreichischer Rechtskultur." *Beiträge zur Rechtsgeschichte Österreichs* 10(2): 269–277. https://doi.org/10.1553/BRGOE2020-2s269

Earman, John. 1978 "The Universality of Laws." *Philosophy of Science* 45(2): 173–181. https://doi.org/10.1086/288795

Gałędek, Michał. 2015. "Główne problemy polityki gospodarczej Królestwa Polskiego w epoce paskiewiczowskiej." In *Królestwo Polskie w okresie namiestnictwa Iwana Paskiewicza (1832–1856): system polityczny, prawo i Statut organiczny z 26 lutego 1832 r*. Edited by Lech Mażewski. 37–60. Radzymin: von boroviecky.

Gałędek, Michał. 2020. "Modernisation, National Identity and Legal Instrumentalism: Introduction." In *Modernisation, National Identity and Legal Instrumentalism: Studies in Comparative Legal History*. Vol. 1. Edited by Michał Gałędek, Anna Klimaszewska. 1–25. Leiden–Boston: Brill Nijhoff. https://doi.org/10.1163/9789004417274_002

Gałędek, Michał. 2021a. "Codification Processes in Polish Comparative Jurisprudence (1814–1831 and 1918–1939)." *The Journal of Comparative Law* 16(1): 41–58.

Gałędek, Michał. 2021b. "Codification Processes in Polish Comparative Jurisprudence (1814–1831 and 1918–1939)." In *Discovering the Unexpected: Comparative Legal Studies in Eastern and Central Europe*. Edited by William E. Butler, O.V. Kresin. 52–72. Clark: Talbot Publishing.

Godek, Sławomir. 2001. "Prawo rzymskie w dawnej Rzeczypospolitej. Przegląd stanu badań." *Czasopismo Prawno-Historyczne* 53(2): 27–84.

Godek, Sławomir. 2013. "Prawo rzymskie w Polsce przedrozbiorowej w świetle aktualnych badań." *Zeszyty Prawnicze* 13(3): 39–64. https://doi.org/10.21697/zp.2013.13.3.02

Gordley, James. 2006. "Comparative Law and Legal History." In *The Oxford Handbook of Comparative Law*. Edited by Mathias Reimann, Reinhard Zimmermann. 753–773. Oxford: Oxford University Press. https://doi.org/10.1093/oxfordhb/9780198810230.013.24

Górnicki Leonard. 2017. "Pogranicza systemów prawnych, w szczególności pozaborowych, w pracach nad kodyfikacjami prawa cywilnego i handlowego w II RP." *Acta Universitatis Wratislaviensis*. *Prawo* 324: 129–167. https://doi.org/10.19195/0524-4544.324.7

Grodziski, Stanisław. 1997. "Polska i Węgry – uwagi o podobieństwie ustrojowym." In *Polska i Węgry w kulturze i cywilizacji europejskiej*. Edited by Jerzy Wyrozumski. 73–82. Kraków: Międzynarodowe Centrum Kultury w Krakowie.

Gurevich, A. la. 1966. "Universal Law and Special Regularity in History." *Soviet Studies in History* 7(3): 3–18. https://doi.org/10.2753/RSH1061-198305013

Halpérin, Jean-Louis. 2014. *Five Legal Revolutions Since the 17th Century: An Analysis of the Global Legal History*. Cham: Springer. https://doi.org/10.1007/978-3-319-05888-7

Heirbaut, Dirk. 2013. "Rapport de synthèse: Some reflexions on the methodologies of legal history." *Rechtskultur* 2: 89–92.

Ibbetson, David. 2012. "Comparative Legal History – a Methodology." In *Making Legal History: Approaches and Methodologies*. Edited by Anthony Musson, Chantal Stebbings. 131–145. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139028578.010

Klimaszewska, Anna. 2011. *Code de commerce – Francuski Kodeks Handlowy z 1807 r*. Gdańsk: Arche.

Klimaszewska, Anna. 2015. "Nauczanie i nauka prawa handlowego w okresie paskiewiczowskim." In *Królestwo Polskie w okresie namiestnictwa Iwana Paskiewicza (1832–1856): system polityczny, prawo i Statut organiczny z 26 lutego 1832 r*. Edited by Lech Mażewski. 219–231. Radzymin: von boroviecky.

Klimaszewska, Anna. 2020. "The Reception of the French Commercial Code in Nineteenth-Century Polish Territories: A Hollow Legal Shell." In *Modernisation, National Identity and Legal Instrumentalism: Studies in Comparative Legal History*. Vol. 1. Edited by Michał Gałędek, Anna Klimaszewska. 143–163. Leiden–Boston: Brill Nijhoff. https://doi.org/10.1163/9789004417274_007

Klimaszewska, Anna. Michał Gałędek, 2017a. "Pojęcie czynności handlowych w wybranych orzeczeniach Sądu Apelacyjnego Wolnego Miasta Krakowa. Z zagadnień stosowania francuskiego Kodeksu handlowego z 1807 r. na ziemiach polskich." *Studia z Dziejów Państwa i Prawa Polskiego* 20: 147–167.

Klimaszewska, Anna. Michał Gałędek. 2017b. "Kwestia właściwości osobowej trybunałów handlowych w wybranych orzeczeniach Sądu Apelacyjnego Wolnego Miasta Krakowa." *Studia z Dziejów Państwa i Prawa Polskiego* 20: 169–182.

Klimaszewska, Anna. Michał Gałędek. 2018. *Fenomen prawnej wydmuszki? Implementacja zasad i instytucji francuskiego Kodeksu handlowego na ziemiach polskich do 1830 r.* Warszawa: Campidoglio.

Korpiola, Mia. "Customary Law and the Influence of the *Ius Commune* in High and Late Medieval East Central Europe." In *The Oxford Handbook of European Legal History*. Edited by Heikki Pihlajamäki, Markus D. Dubber, Mark Godfrey. 404–429. Oxford: Oxford University Press.

Lelewel, Joachim. 2015. *Historyczna paralela Hiszpanii z Polską*. Poznań: WiS.

Löhnig, Martin. 2014. "Comparative Law and Legal History: A Few Words about Comparative Legal History." In *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke*. Edited by Maurice Adams, Dirk Heirbaut. 113–120. Oxford: Hart Publishing.

Michaels, Ralf. 2006. "The Functional Method of Comparative Law." In *The Oxford Handbook of Comparative Law*. Edited by Mathias Reimann, Reinhard Zimmermann. 339–382. Oxford: Oxford University Press. https://doi.org/10.1093/oxfordhb/9780199296064.013.0011

Michalik, Piotr. 2021. "Stosowanie przepisów prawa spadkowego *Code civil* przez sądy Wolnego Miasta Krakowa – sprawa Sawiczewskich." *Krakowskie Studia z Historii Państwa i Prawa* 14(3): 307–330. https://doi.org/10.4467/20844131KS.21.024.14089

Michelsen, Dag. 2019. "Methodological perspectives in comparative legal history: An Analytical Approach." In *Comparative Legal History*. Edited by Olivier Moréteau, Aniceto Masferrer, Kjell Å. Modéer. 96–109. Cheltenham–Northampton: Edward Elgar.

Nelken, David. 2004. "Using the Concept of Legal Culture." *Australasian Journal of Legal Philosophy* 29(1): 1–29.

Nelken, David. 2012. "Using Legal Culture: Purposes and Problems." In *Using Legal Culture*. Edited by David Nelken.1–51. London: Wildy, Simmonds and Hill.

Pomianowski, Piotr Zbigniew. 2015. *Początki polskiego czasopiśmiennictwa prawniczego. Seria pierwsza "Themis Polskiej."* Warszawa: Campidoglio.

Schriewer, Jürgen. 2003. "Problemdimensionen sozialwissenschaftlicher Komparatistik." In *Vergleich und Transfer – Komparatistik in den Sozial-, Geschichts- und Kulturwissenschaften*. Edited by Hartmut Kaelble, Jürgen Schriewer. 9–52. Frankfurt am Main: Campus Verlag.

Szafrański, Wojciech. 2007. *Kodeks Stanisława Augusta*. Poznań: Wydawnictwo Poznańskie.

Uruszczak, Wacław. 2005. "Swoistość systemów prawno-ustrojowych państw Europy środkowo-wschodniej w XV–XVI w." In *Europa Środkowowschodnia od X do XVIII wieku – jedność czy różnorodność?* Edited by Krzysztof Baczkowski, Janusz Smołucha. 45–61. Kraków: Societas Vistulana.

Vetulani, Adam. 1969. "Opory wobec prawa rzymskiego w dawnej Polsce." *Analecta Cracoviensia* 1: 372–386. https://doi.org/10.15633/acr.2715

Wołodkiewicz, Witold. 2009. *Europa i prawo rzymskie. Szkice z historii europejskiej kultury prawnej*. Warszawa: Wolters Kluwer Polska.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.06

*Tomoyoshi Hayashi**

https://orcid.org/0000-0002-0273-6009

THE EDUCATION OF ROMAN LAW FROM 1874 TO 1894 IN JAPAN THE TRANSITION OF CONTEMPORARY MODEL OF LEGAL SYSTEMS IN THE WEST AND THE INTELLECTUAL BACKGROUNDS OF PROFESSORS IN CHARGE OF ROMAN LAW

Abstract. This article focuses on the position of Roman law in Japanese legal education from 1874 to 1894. Japanese law was drastically Westernised during this period, taking inspiration from Europe, and was modelled after common law and French law simultaneously. German law then became more dominant at the end of the period. All professors from Europe, regardless of their country of origin or legal background, unequivocally emphasised the importance of Roman law as the common basis of Western laws when teaching their Japanese pupils. Some of those pupils later contributed substantially to academic arguments on Roman law. Most notably, this period secured the place of Roman law in modern legal education in Japan.

Keywords: legal education, Roman law, *droit naturel*, reception of law, codification, *Pandekten*.

NAUCZANIE PRAWA RZYMSKIEGO W JAPONII OD 1874 DO 1894 ROKU. PRZEJĘCIE WSPÓŁCZESNEGO MODELU ZACHODNICH SYSTEMÓW PRAWNYCH ORAZ INTELEKTUALNE POCHODZENIE PROFESORÓW PRAWA RZYMSKIEGO

Streszczenie. Artykuł koncentruje się wokół zagadnienia pozycji prawa rzymskiego wewnątrz japońskiego modelu edukacji prawniczej w latach 1874–1894. Prawo japońskie poddane zostało w tym czasie głębokiej okcydentalizacji, biorąc przykład z Europy, oraz zostało jednocześnie ukształtowane na wzór *common law* i prawa francuskiego. Prawo niemieckie zyskało wiodącą rolę pod koniec tego okresu. Wszyscy przybywający z Europy profesorowie, niezależnie od kraju czy porządku prawnego ich pochodzenia, jednogłośnie wskazywali na znaczenie prawa rzymskiego jako wspólnej podstawy praw zachodnich, głosząc wykłady dla swoich japońskich studentów. Niektórzy z tych studentów w istotny sposób przyczynili się następnie do formułowania naukowych

* Osaka University, Graduate School of Law and Politics, hayashi@law.osaka-u.ac.jp

Received: 2.12.2021. Revised: 18.01.2022. Accepted: 17.03.2022.

argumentów na rzecz prawa rzymskiego. Przede wszystkim, to właśnie ten okres doprowadził do zabezpieczenia pozycji prawa rzymskiego we współczesnym modelu japońskiej edukacji prawniczej.

Słowa kluczowe: edukacja prawnicza, prawo rzymskie, prawo naturalne, recepcja prawa, kodyfikacja, pandekta.

1. INTRODUCTION

In this article, I present a brief overview of Roman law education in Japan in the early Meiji era, when a drastic modernisation and Westernisation of Japanese law occurred under the Meiji government. The story begins when William Ebenezer Grigsby, an English youth training to be a barrister, was recruited to be a professor at the *Tokio Kaisei-Gakko* in Tokyo and delivered his first lecture on Roman law to Japanese students in 1874. It ends in 1894, when Hirondo Tomizu, a Japanese-qualified English barrister, assumed the position of Professor of Roman and Civil Law at the *Teikoku Daigaku* (Imperial University), the former *Tokio Kaisei-Gakko.*

Here, I will provide a rough outline of Japanese history. After the Meiji Restoration in 1868, a sort of *coup d'état* by lower-grade samurai, the new Japanese government was keen to reform the legal system which, until then, had comprised of law originating in Japan and received from Chinese. It had to be modernised, which could only mean "Westernisation" under the circumstances. The unequal commerce treaties between Japan and leading Western countries, as well as consular jurisdiction, remained as a negative legacy of the Edo (Tokugawa) government; the Meiji government had to Westernise the legal system to be recognised as a new nation in order to receive equal diplomatic and international political treatment.

Japan may have been unique in enjoying a choice between multiple contemporary models for its legal reforms. Unlike former colonies, the country did not wholly inherit the legal system of a coloniser. If we glance at modern Japanese history, we find that the Edo government adopted a nation closure policy (*Sakoku*) until the mid-19th century. It should be mentioned that during this time, Holland and China were permitted to perform commerce and cultural exchange in a limited way. However, at the end of the period, not only the United States of America, but also United Kingdom, France, and Russia among others, tried to approach the Edo government diplomatically. Such countries also tried to promote the Westernisation of Japan in anticipation of mutual gains. The Edo government was forced to abandon the *Sakoku* policy under the threat of naval force by Western countries, in particular the USA, which found commerce with Japan to be beneficial. Japan was geopolitically situated between China and the USA and so, the USA demanded that some ports be opened to develop trade. Ports in Japan and trade with Japan were attractive to Western countries which hoped to develop commerce and gain more influence in the Asia-Pacific region.

Throughout the Edo era, the government ruled over clans, but gradually lost its hegemony and was eventually defeated by some clans, which later formed the new Meiji government. It should be noted that there were several foreign actors in Japan at the time. For example, the United Kingdom first fought with the Satsuma clan, which later became the leading actor of the Meiji regime. In the well-known Anglo-Satsuma War (*Satsu-Ei Sensou*) in 1863, the United Kingdom vessels overwhelmed the Satsuma forces. The leaders of Satsuma realised the great difference in military power between them and also the highly developed technologies the British enjoyed. In that context, the leaders of Satsuma approached British diplomats to gain favour and took the United Kingdom as its model for Westernisation in various fields including law. Thus, the UK became one ideal model for some influential leaders within the Meiji government. On the other hand, French diplomats kept on supporting the Edo government and offered them the latest knowledge and techniques, which were preserved and developed even after the Meiji Restoration by Edo bureaucrats who were hired by the new government. French tradition is obvious in three fields: law, ship building, and military strategy (Iida 1998, 5). Particularly in the field of law, bureaucrats and scholars with French backgrounds regarded France as an advanced country due to its success in early codifications of law. As such, there was potential for conflict over which Western model should be adopted by the Meiji government.

Therefore, at the national political level, the unique situation of being able to choose model legal systems was reflected in the establishment of institutions for legal education.[1] In 1874, the Meiji government founded a law course at the *Tokio Kaisei-Gakko*, a national educational institution under the supervision of the Ministry of Education and Culture, where English and US common law was primarily taught. After repeated renaming, it eventually became the Faculty of Law at the University of Tokyo.

Separately, in 1871, the Ministry of Justice founded a department called *Myohbo-Ryoh* (Department to Clarify Law), for judges and judicial bureaucrats who had Western legal backgrounds (Tezuka 1988, 7). The students were first taught the French language and general subjects, followed primarily by French law in upper grades. Since the end of the Edo era, attention was on the French legal system, especially in the area of court practice. Even after the abolition of the *Myohboh-Ryoh* in 1875, the school at the Ministry of Justice continued to nurture judges-to-be, until it was merged with the Faculty of Law at the University of Tokyo in 1885 (Tezuka 1988, 44, 131).

As described above, the English and French models coexisted in the Japanese legal education system from 1874 to 1885. Thereafter, there was a gradual turn from the English to the German model in the 1880s. With the institutional

[1] For a brief overview of the Westernisation of modern Japanese law in English, see Oda (2009, 13–20).

incorporation of the school into the Ministry of Justice in 1885, the English model appeared to dominate the French model. However, the English model was gradually overtaken by the German one.

Despite these transitions, or more precisely, the struggle among the schools that bore the traditions of Western nations' legal systems or science, the practice of respecting and studying Roman law as the common basis of Western legal systems remained untouched. Let us now consider the praxis of education, the professors' intellectual background, and the place of Roman law education in each school in more detail.

2. ENGLISH TRADITION AND ROMAN LAW EDUCATION

Grigsby delivered the first lecture, entitled "Roman Law," in 1874, at *Tokio Kaisei-Gakko* (Hayashi 2013a, 923–927). He was born in 1847, in Essex, England and studied Greek, Roman, and Hebrew, as well as divinity, from 1864 to 1869, at the University of Glasgow, where he obtained an M.A. degree. He then read law at Balliol College at the University of Oxford where he obtained a B.C.L. degree. On 22 November 1873, he was registered at the Inner Temple, one of the four Inns of Court in London, and was receiving professional training from senior colleagues when he was recruited in 1874 as a professor for a newly established law course at the sole undergraduate-level national educational institution in Japan.

On arrival in Tokyo on 6 May 1874, he assumed his professorship. Along with classes entitled, "Equity," "Agency," "Partnership," "International Law," "Criminal Law," and "Law of Real and Personal Property," he taught "Roman Law" to elite students who had been recommended by feudal clans to study Western legal systems. Nobushige Hozumi, who attended Grigsby's first class, recalled that there were nine male students. A US citizen, Professor H.N. Allin, was his sole colleague from abroad at the time.

Although the students were taught basic Latin at the primary level, Grigsby is presumed to have taught according to Justinian's Institutes in the English translation. Neither the textbooks nor notebooks of the students are extant. The only way to presume the content of Roman law education in his class is through examinations reported in the annual album of the *Tokio Kaisei-Gakkoh*, as follows (Calendar 1876, 85f; Hayashi 2013a, 926f, 941f):

1. What is meant by Fidei-commissa? To what are they analogous in English law?
2. Translate and explain: (1) "*Legari autem illis solis potest, cum quibus testamenti factio est*," (2) "*Falsa demonstratione legatum non perimi*"' and (3) "*Quantitas autem patrimonii ad quam ratio legis Falcidiae redigitur mortis tempore spectator*."
3. What is meant by an impossible condition? What is the effect of it (1) in a legacy and (2) in an obligation?

4. Trace the gradual steps by which a mother was allowed to succeed to the property of her children?
5. What was the contract *verbis*? To what kind of contract does it correspond in English law?
6. Give the chief incidents of contract of sale.
7. Enumerate the obligations *Quasi ex contractu*, and show what is meant by them.
8. Explain and comment on the phrase *Praetor non facit heredem*.

The examination did not deal with a detailed *casus*, and the course seems to have been an introductory one, which could be reflective of the young common law trained barrister's comprehension of Roman law. Nevertheless, the notion of importance was implanted in the minds of the students, some of whom (Nobushige Hozumi, Teruhiko Okamura and Naoshi Sagisaka) were sent to London in 1876 to further study common law at Middle Temple. All three qualified as barristers at Middle Temple.[2]

Grigsby left his professorship and returned to England in 1878. Although the Roman law class disappeared at the University of Tokyo with his departure, it was revived in 1882, and has been taught ever since. Japanese professors, as well as those from Germany and the USA, taught Roman law from 1882 to 1894 (Yoshihara 2018, 3–6; Yoshihara 2019, 2–5).[3]

A US attorney, Henry Taylor Terry, taught Roman law to first-year students from 1882 to 1884, while Otto Rudorff came from Germany in 1884 to teach the subject (Yoshihara 2018, 3f).[4] Azumi Watanabe, a Japanese professor, taught Roman law to the students of the newly founded *Bekka Hoh-gakka* (an extra law course) in Japanese from 1883 to 1887. Hozumi returned from Berlin and

[2] Of Hozumi's two mates in London, Sakisaka died a premature death at the age of 28 (see Shiozawa et al. 2000, 10). Okamura became a judge at the *Taishin-in* (Supreme Court) in 1883, and president of the private Chuo University in 1913 (Hozumi 1988, 124). Chuo University was originally founded as *Igirisu Horitsu Gakko* (English Law School) in 1885, a private law school where common law education was dominant. At this institution, Roman law was taught as an independent subject. Chuo stands for "middle," and the name is connected with Middle Temple. I do not deal with all the private law schools which were founded in Tokyo in this period, and merely refer to two with a French legal tradition as examples. However, they also played an important role in the legal education, and maintain their academic tradition to date. In addition to the above mentioned *Igirisu Horitsu Gakko*, *Tokyo Hogakusha* (Tokyo School of Law, founded in 1880) and *Meiji Horitsu Gakko* (Meiji Law School, founded in 1881) mainly taught French law. In the latter two institutions, no independent Roman law class was recognised at the foundation level. Each private law school represented the competing traditions of each national law. For a brief historical introduction to the above three institutions, see the following links, all of which were viewed on 14 April, 2021: http://global.chuo-u.ac.jp/english/aboutus/history/; https://www.meiji.ac.jp/cip/english/about/history/index.html and https://www.hosei.ac.jp/english/about/outline/history/.

[3] Along with the Roman law studies as his major works, Yoshihara worked continually on compiling exhaustive publication lists of the earliest Japanese Romanists in collaboration with Yoshihara Joji, his elder brother. Although written in Japanese, they are accessible online (https://home.hiroshima-u.ac.jp/tatyoshi/index3.html, Accessed 18 April, 2021). His overview of Roman education in Japan in the earliest period is based on these works, on which I rely as sources.

[4] Exactly when Rudorff terminated his lectures is unclear.

taught the subject from 1886 to 1889, along with the subject of jurisprudence, which he continued teaching as his own specialty. His experience in London and Berlin, as well as his lectures, will be briefly reviewed later. Heinrich Weipert, from Germany, taught Roman law from 1887 to 1889 (Yoshihara 2018, 4–6; Yoshihara 2019, 3).[5] Michisaburo Miyazaki, who studied at Leipzig, Heidelberg, and Göttingen, returned to Japan and taught *Kodai Roma Hoh* (Ancient Roman Law), *Housei Enkaku oyobi Roma Hoh* (Historical Outlines of Legal Institutes and Roman Law) among other courses from 1888 to 1894 (Yoshihara 2019, 4).[6] Then, Hirondo Tomizu, who qualified as a barrister at Middle Temple and also studied in France and Germany, was appointed as Chair of Roman Law in 1894.[7] Miyazaki changed positions, to Chair of Comparative Legal History.[8] In this period, as Roman law education continued, there was a gradual replacement of professors previously invited from abroad by those of Japanese origin with Western academic experience, predominantly those with English and German educational backgrounds.

Here I would like to focus on Hozumi's educational background and lectures. He was Grigsby's top disciple and was appointed lecturer of jurisprudence and Roman law on returning from Europe in 1881; his promotion to professor and dean of the Faculty of Law followed in 1882 (Hozumi 1988, 261).[9] He became a top scholar and statesman and was one of the three drafters (*San Hakushi*, the Three Doctors) of the Meiji Civil Code, which went into effect in 1898, following the well-known quarrel, which I will discuss later.

Let us briefly consider Hozumi's stay in London and Berlin in chronological order. He left for London on 24 June 1876, via the USA (Hozumi 1988, 121). Grigsby had prepared recommendation letters to certify that he could read Latin and that Hozumi had taken his course on Roman law (Hozumi 1988, 143–145). Hozumi went to King's College London and Middle Temple (Hozumi 1988, 146–151),[10] where he studied common law and Roman law. He qualified, top-of-the-class, as a barrister on 25 January 1879 (Hozumi 1988, 163). In addition

[5] Due to the rapid expansion and restructuring of the institution, including the incorporation of the *Tokyo Hoh Gakko* (Tokyo School of Law) as the successor to the school of the Ministry of Justice, in this period, Roman law was taught by many professors, with some variation in the subject name.

[6] He also taught German legal history in 1892. The chair system (*Kohza Se*i) was officially adopted in 1893.

[7] https://www.nihon-u.ac.jp/history/forerunner/tomizu/ (Tomizu's CV in Japanese).

[8] http://www.nihon-u.ac.jp/history/forerunner/miyazaki/ (Miyazaki's CV in Japanese). Miyazaki later developed his study into a comparative legal history of Europe and the Far East (Japan, China, and Korea) and Japanese legal history. He was called "the founder of Japanese legal history," which, I would add, in a critical sense, he acquired through his study in Germany.

[9] He also worked as a statesman and ultimately served as chief of the *Suhmitsu-in* (the Japanese Privy Council for the Emperor) from 1925 to 1926.

[10] He is presumed to have studied at both institutions simultaneously.

to practising law there, he also studied common law, jurisprudence, and Roman law, both at King's College and at Middle Temple; he was profoundly influenced by contemporary English jurisprudence and European history of legal thought, mostly by H.S. Maine, followed closely, probably, by John Austin.[11]

Despite his great success in London, Hozumi asked the Ministry of Culture and Education to transfer him from the Middle Temple to Berlin University, in a letter dated 1 May 1879 (Hozumi 1988, 213f., 383–387). Among the reasons for requesting the move from London to Berlin, he mentioned the excellence of German studies in Roman law as well as the advantage of developing comparative studies of law there (Hozumi 1988, 220f). His request was accepted, and he registered at Berlin University on 14 April 1880 (Hozumi 1988, 229f).[12] He attended some classes as an auditor, including the "History of *Corpus Iuris Civilis*" taught by Rudolf von Gneist (Hozumi 1988, 240). He left Berlin on 29 March 1881 for Tokyo (Hozumi 1988, 250).[13] Even as a young scholar, he correctly foresaw a shift in national policy and redirected his studies from the English model to the German one. Indeed, the model country for the Westernisation of law and other fields gradually changed from the parallel coexistence of the English and French models to the German one in the 1880s, following his return.

Here, a glance at the lectures on "Roman Law" by Hozumi provide greater insight. Yoshihara recently published several extant notebooks written by students, with critical comparisons among many handwritten notes and commentaries.[14]

---

[11] Shigeyuki Hozumi infers the possible influence on Nobushige Hozumi by John Austin (Hozumi 1988, 173f.). Shigeyuki Hozumi infers that Hozumi was influenced by German jurisprudence via the works of Austin (Hozumi 1988, 174, 220f.). The source and mode of influence on his doctrine are not fully analysed in this study. However, it is patently obvious that Maine was the most important figure in the development of Hozumi's immense works; he wrote a book titled *Revenge and Law* (Hozumi 1931) as part of his Evolution Theory of Law (*Hohritsu Shinkaron*). In this book, he attempted a vast comparison among Japanese history, Chinese history, ancient Germanic society, contemporary natives in the Micronesian islands, Islamic states, etc., and attempted to trace the tendency of rationalisation from revenge to compensation. Although he was a busy statesman and scholar, and was not reported to have engaged in fieldwork, he worked, by manner of speech, as an armchair legal anthropologist. A good example of his historical and comparative jurisprudence, written in English, is Hozumi (1912). As the *de facto* chief drafter of the Meiji Civil Code and scholar of comparative and historical jurisprudence, he contextualised it both globally and in its own historical development, which was based on his framework of the genealogical method of comparison among the seven great families of law (Chinese, Hindu, Mohamedan, Roman, Germanic, Slavonic and English), and traced the passage of Japanese civil law from the Chinese family to the European family of law (Hozumi 1912, 35, 41).

[12] Here, Shigeyuki Hozumi quotes the certificate of registration by Berlin University.

[13] Shigeyuki Hozumi quotes the report that was addressed to the Ministry of Education and Science.

[14] For the first part of his lectures, see Yoshihara (2020a); for the second part, see Yoshihara (2020b). Yoshihara mainly relied on a copy stored in the National Diet Library of Japan (Yoshihara 2020a, 809–811).

Additionally, Yoshihara published an analysis on them, with the aim of delineating the influence of traditional and contemporary European legal thoughts. He concluded that Maine's grasp of Roman law influenced Hozumi's notion of Roman law significantly, although Hozumi energetically propelled the reception of German legal science in that period (Yoshihara 2018, 28–30). According to the notebooks, he delivered his lectures in two parts. The first part comprised of an introduction and a historical overview of the development of Roman law from the regal period to contemporary Roman law studies in Germany and England. In the introduction, Hozumi establishes four points to clarify the perfection of Roman law: (1) the precision of the terms, critical methods in editing, and abundance of both general principles and practicality, all of which offer precious material for analytical jurisprudence, (2) the position of Roman law as the basis for the laws of modern civilised countries and as precious material for comparative studies of laws, (3) the unique life course of the birth, development, and end of Roman law, which offers incomparable material for historical studies of law, and (4) the possible contribution of precious material in Roman law to international law (Yoshihara 2018, 9; Yoshihara 2020a, 819). Then follows the historical overview, in which he emphasises the Law of the Twelve Tables as the starting point of the evolution of the law (Yoshihara 2018, 11). Subsequently, the overview covers Justinian's legislation, Byzantine jurisprudence, the revival of Roman law in medieval Italy, and the development of Roman law studies in Europe, up to contemporary German and English law studies. The second part describes the various legal institutes and rules according to the composition of *Institutiones*.[15] He deals with the law of persons (*ius personarum*) and the law of things (*ius rerum*), omitting the law of actions (*ius actionum*). I point out only one curious character in his lectures. At the beginning of the second part, Hozumi describes various fundamental notions of Roman law, such as *iurisprudentia, iustitia,* and *ius (ius publicum, ius privatum, ius civile, ius gentium, ius naturale,* etc.), which are treated at the Inst. 1,1–2.[16] In describing them, Hozumi not only treats the texts compiled by Justinian, but also incorporates the discussions and doctrines of Western legal thinkers into the descriptions. For his lectures, the notions and institutions within the *Institutiones Justiniani* served as clues for explaining the posterior arguments regarding law in the West, as well as something to be taught in their original historical context. *Institutiones* was the very text with which Grigsby taught Roman law to Hozumi in

[15] The textbook of Roman law by Tomizu (Tomizu [n.d.]) followed the *Institutionen* composition. In this period, the *Institutionen* composition was normal; later, Roman law textbooks with the *Pandekten* composition appeared. Okamoto's textbook, published in 1906 (Okamoto 1906) for the private Meiji University, is an early example. On its front page, the author bears the title "Doctor *Iuris,*" conferred in Germany. The enactment of the Meiji Civil Code in 1898, which was composed according to the *Pandekten* system, might have been a turning point. However, tracing the transition from the former to the latter precisely requires further research.

[16] Yoshihara (2020b, 42–62). This part is prescribed as the general part of the second part only, and appears immediately before the law of persons.

his youth. This formed the foundation of his argument on Roman law and various topics in jurisprudence. For example, he refers to the debate between Savigny and Thibaut in 1814, concerning the codification of German civil law, when he discusses various doctrines about the basis of law (Yoshihara 2020b, 48).

3. FRENCH TRADITION AND ROMAN LAW EDUCATION

In this section, the position of French law in Japan and the treatment of Roman law by the French legal tradition is considered. Since the last years of the Tokugawa government, Japanese political leaders have had a keen interest in French law. The Tokugawa government commissioned Rinshoh Mitsukuri, a scholar in Western studies, to translate major French acts. He continued serving the new government after the Meiji Restoration, and carried on with his translation activities. For example, he completed the translation of the French Civil Code in 1871.[17] However, it became evident that merely having positive law was not sufficient to operate a legal system within a country, and the need to rear jurists, primarily judges, and then advocates, with expertise in law was recognised among political leaders in Japan. Therefore, as I hinted above, the Ministry of Justice established a law school in 1871, that focused primarily on teaching French law. It naturally continued promoting the French legal tradition founded by the Edo government, treating France as the ideal model for law. The school had a full 8-year course (*Seisoku-ka*) for studying the French language, general subjects, and, mainly, French law. Later, a shorter course (*Sokusei-ka*), with 2 or 3 years for mainly French law, was added.[18] A few professors, invited from France, worked there, among whom the most eminent was Gustave Émile Boissonade de Fontarabie.[19] He was already qualified as a full professor at the University of Paris, as an *agrégé*, when he received an offer. He accepted it and

[17] Maeda (2014, 2). For a brief description of his career as a scholar and statesman, see https://www.ndl.go.jp/portrait/e/datas/336.html. He began his career as a scholar in Chinese and Dutch studies, later studying in France and adding French learning to his studies; however, he was not originally trained as a jurist and experienced difficulties in translating law (Okubo 1977, 33f.; Tezuka 1988, 8f.). Nonetheless, his translations were referred to as the *de facto* norm by judges at court who had few positive laws.

[18] Regarding the *Seisoku-ka*, the first students began studying in 1872 (Tezuka 1988, 17f.). Regarding the *Sokusei-ka*, the first students entered in 1877 (Tezuka 1988, 111). The latter course was founded to fulfil the needs of judges, who were to be appointed to judicial courts and be rapidly deployed across Japan. The lectures in the latter course were translated into Japanese, while those in the former were in French (Okubo 1977, 54–57). Boissonade himself admits that the students, presumably belonging to the *Sokusei-ka*, heard his lectures on natural law via interpreters (Study group 1989, 89).

[19] For his short biography in German, see Stolleis (1995, 95f). On his arrival and activity see also Ume 1889, XI.

came to Japan in 1873 (Okubo 1977, 50).[20] He stayed in Japan until 1895, and worked as a counsellor for legislation and diplomacy for the Japanese government, and as a law professor during his long stay (Okubo 1977, 195).

It is difficult to know the school's detailed curriculum as it was later merged with the University of Tokyo, and records that had presumably been stored in the Ministry of Justice were destroyed in the bombing during the Second World War (Tezuka 1988, 4). However, Roman law was not taught as an independent subject. "Civil Law" (*Min-poh*), "Penal Law" (*Kei-hoh*), "Political Law" (*Sei-hoh*), "Administrative Law" (*Gyohsei-hoh*), "Commercial Law" (*Shoh-hoh*), and "Economics" (*Keizaigaku*) were recognised as special subjects.[21] One characteristic subject was "Droit naturel" (*Sei-hoh*) because general law beyond the positive laws of each individual nation was taught in the name of natural law. In my understanding, the concept of natural law, so far as I can recognise in the records of Boissonade's lectures, was not a notion to criticise or guide the already existing positive law, although it did serve as a guideline for legislation in the future. It was introduced for pedagogical purposes. These lectures were aimed at future judges and attorneys in a country where positive laws were still in preparation and frequently absent in many fields. In this respect, a record of lectures, probably delivered at the *full 8-year course*, was published by the Ministry of Justice (Boissonade 1881).[22] A notebook containing Boissonade's lectures, presumably handwritten by a student of *Sokusei-ka*, was also found, transcribed, and published by a research group at Kansai University (The Study Group 1989). Here, I deal with both.

In the lectures of natural law, Roman law is frequently emphasised as something fundamental that underlies French and other modern European laws or, conversely, criticised as something irrational or inhumane that had been overcome by contemporary European law. There are several examples: At the outset of the lecture, Boissonade quotes the famous prescription of Ulpianus: *Iuris praecepta sunt haec: honeste uiuere, alterum non laedere, suum cuique tribuere* (D. 1.1.10.1; Boissonade 1881, 14–17). He emphasises the teaching not to hurt others, and sees it as a general rule that applies universally to European laws, while he regards the distribution of individual rights and obligations as the second most important. Ulpianus was regarded as a Stoic thinker, while his beliefs were regarded in his lecture as closely related to Christianity (Boissonade 1881, 14). His prescriptions for

[20] When he began his education at the school, a French attorney (*avocat*), Georges Hilaire Bousquet, had been working there since 1872 (Tezuka 1988, 12). Thus, two professors from France with expertise in French law were engaged in teaching in 1873.

[21] Tezuka (1988, 34f., 74f). Some recognitions rely on the personal record and notebooks of an alumnus, Johichiroh Tsuru.

[22] Additionally, regarding this lecture, he taught in French, and the students at the *Seisoku-ka* had to comprehend the lectures in French. The extant record itself is in Japanese, while the recorder, Inoue, is presumed to have translated Boissonade's original lectures.

justice and law were the starting point of Boissonade's natural law. The exact notion of natural law in Boissonade's legal thought is in itself a major theme. Okubo (1977) sees it as a notion that overlaps with *raison* in accordance with the French legal tradition (61–67). Here, I propose that he intended to impart practical knowledge of civil law in European legal systems in general in his lectures. He intended to equip students with practical criteria on which to judge cases after their graduation, given the absence of a comprehensive positive law, which would take more than one decade to be enacted in Japan. Natural law, according to him, served as a criterion of which the starting point was the *alterum non laedere* motto in Ulpianus.

On the other hand, he criticises the continuation of the *patria potestas* of the *paterfamilias*, even after his son's maturity, as well as the lack of legal capacity of married women in Roman law (Study Group, 61, 76). The references to Roman law are frequent in both of the two extant records of the natural law lectures, to which I have referred.[23] It is easy to imagine that the students understood the importance of Roman law, and that they gained interest in the historical development of Western law from Roman law through his lectures at the beginning of their legal studies.

One noted achievement of the French legal tradition in Japan is the nurturing of scholars. Kenjiro Ume was among Boissonade's students and later obtained a doctoral degree from the University of Lyon (see Stolleis 1995, 627f). His thesis was on transactions in French contract law and contained 270 pages of arguments on classical Roman law. He wrote another paper on ancient French law, as well as one on modern French law (Ume 1889, 1–270).[24] It was not merely at the level of comprehending the general framework of Roman law, but went far beyond it, with the chosen theme presenting full citations of the doctrines of classical jurists and

[23] The occupation in French law coming from the *occupatio* in Roman law and the equal dividing principles of *hereditas* (Study Group 1989, 28, 52) are but examples of the numerous references to Roman law found in his lectures.

[24] Here, I provide some notes on the Roman law part of his paper, which consists of nine Chapters: I. General notions – Definition, characters, and proof of the transaction, II. Some forms of the transaction, III. On the object of the transaction, IV. Some persons who can make transactions, V. Some modalities of the transaction, VI. Some effects of the transaction, VII. Some persons by whom and through whom the transaction can be insisted, VIII. On the extent of the transaction, and IX. On the nullity, on the nullification, on the cancellation of the transaction. It presented an extensive treatment of the *transactio* in Roman law, which included its notions, effects, and every possible legal relationship coming from it. His argument was based on his solid knowledge of the law of obligations in general, not just the law of contract. He sometimes alluded to German scholars, e.g. Jhering (Ume 1889, VII), Glück (Ume 1889, 7), and Lenel (Ume 1889, 168 n. 2); however, principally, he based his arguments on the French scholarly tradition. His supervisor, Accarias, was frequently referred to; the textbooks of Ortolan, Appleton etc., and Molitor's book on the obligations of Roman law were referred to; sometimes, he traced back to Cujas and Doneau. Texts in the *Corpus Iuris Civilis* were cited in both Latin and French, considering the possibilities of interpolations. In sum, he traced the legal reasoning of Roman jurists precisely and critically. He was probably the first Japanese person to do so.

constitutions in the *Corpus Iuris Civilis*, as well as the doctrines of French scholars from Doneau and Cujas to the contemporary Accarias and Ortolan.

He later became one of three drafters of the Meiji Civil Code, along with Hozumi and Masaakira Tomii. Tomii did not learn law in Japan, but in France, and continued his studies until he obtained a doctoral degree from the University of Lyon (Tomii 1883; Stolleis 1995, 618). Other Japanese people followed them in becoming doctors of law in France, with their papers containing arguments on classical Roman law without exception (e.g. Inoue 1881 and Kumano 1883). They gained the knowledge of Roman law required to meet the standard of French academia for conferring a degree.

In summary, Roman law studies served as the basis for the French legal tradition in Japan in a more concrete and practical way that influenced legal reasoning, compared to the English tradition. For example, Ume was usually regarded as a scholar of civil law and was rarely regarded as a scholar of Roman law or as a legal historian, despite his profound knowledge of Roman law.[25]

4. TURN FROM THE ENGLISH TRADITION TO THE GERMAN

The general model for Westernisation shifted from the UK and France to Germany in the 1880s, reflecting the struggle within the government and the victory of pro-German leaders, such as Kowashi Inoue (*Meiji 14 nen no Seihen*, Political Crisis of 1881; Takii 2003, 84–88). In the mid-1870s, a political movement was ignited with the goal of establishing a parliament, securing citizens' rights, and a democratic monarchy. Some politicians chose the UK, and others, France as a model of democracy. Within the government, some leaders seriously considered the British model as one more moderate than that of France. But the movement for democracy was oppressed by pro-Empire government actors. Leading pro-British statesmen were expelled from the government in the political change in 1881. Pro-German leaders chose Prussia as a model for the Japanese constitution with a strong sovereign power of the Emperor.

Then, Japanese political leaders visited Austrian and German scholars who majored in public and constitutional law and received lectures in the late 1880s which had a profound influence on the drafting of the Japanese constitution. Consequently, the Meiji Constitution, which was promulgated in

[25] In this footnote, I relate my personal experience. In his works on the transactions, Ume systematically analyses the so-called *stipulatio Aquiliana* in detail (Ume 1889, 37–46). The text in this formula for a creditor to settle every existing or potential charge to the debtor as already paid or abandoned is well known among Roman law scholars as complex and awkward (D. 46,4,18 Florentinus "*Institutiones*" 8; I. 3,29,2). He was probably the first Japanese scholar to treat it fully. I also wrote on the *stipulatio Aquiliana* and mentioned him as a forerunner on this topic (Hayashi 2013, 26).

1889, was based on the Prussian model and established a monarchy that allocated considerable power to the Emperor. This result was highly symbolic of the drastic Germanisation phenomenon of the period.[26]

The situation had a profound influence on legal education. First, the Ministry of Justice's law school was renamed the *Tokyo Hoh Gakkoh* (Tokyo Law School) and placed under the jurisdiction of the Ministry of Science and Education in 1884 (Tezuka 1988, 101–108). Second, it was merged with the Faculty of Law, University of Tokyo in 1885 (Tezuka 1988, 105f). The education of French law itself continued, but lost its independence as the primary legal tradition of study with the introduction of German legal studies. In the short history of this institution, many alumni had become judges and attorneys.

Since 1879, Boissonade had been preparing a draft of the Japanese Civil Code, which he based on the French model of *Institutiones* and slightly adapted by himself (Okubo 1977, 134–136). It was finally enacted by Congress and promulgated in 1890 (Okubo 1977, 162). However, it was the focus of a serious political quarrel (*Minpoh Ronsoh*, Quarrel on the civil law) and was prevented from taking effect by a new resolution of Congress. Ume insisted on giving effect to Boissonade's Civil Code, which later came to be known as *Kyuh Minpoh* (Old Civil Law) by scholars. Tomii was against it, despite his French background (Okubo 1977, 170). The scholars with an English background, especially the staff at the *Igirisu Hohritsu Gakkoh*, were mainly opposed to it (Okubo 1977, 169). Hozumi did not participate in the quarrel by declaring emotional opinions, but took the standpoint of postponement for prudence by publishing a book on the vast comparative history of codification (especially Hozumi 1890, 22).[27] Consequently, those opposing the code won the quarrel.

After the frustration with Boissonade's Civil Code, the government ordered a new Civil Code to be drafted. Hozumi, Ume, and Tomii were appointed as the three principal drafters, with Hozumi the *de facto* chief. The new Civil Code was based on the *Pandekten* system and was promulgated in 1898 (Maeda 2004, 1119). It remains in effect to date, following repeated amendments. It is called *Meiji Minpoh* (the Meiji Civil Code), and is the work of the three Japanese Romanists, two of whom studied in France.[28] Although it is reported to be the result of references to various modern civil laws, it is difficult to classify it as an imported

[26] As a historian of constitution and comparative law, Takii sees the influence of German constitution theory as Japan's confrontation with the Western impact, in Takii (2003). In this book, he describes the diplomatic conflict between Japan and France concerning the change of military advisers from France to Germany by the Japanese government (Takii 2003, 162–164).

[27] He even refers to the legislation of Greek Draco and Solon, as well as the Roman twelve tables, not to mention the debate between Savigny and Thibaut, in Germany (Hozumi 1890, 4f., 8–14, 44–46).

[28] For the possible influence of Boissonade's studies on the Meiji Civil Code, see the contributions in Maison (1991). Generally, it is said that the Meiji Civil Code contains a lot of French elements, in substance, because two of the three principal drafters had a French background (see Takizawa 2018, 7; Okubo 1977, 194f).

German Civil Code, or restructured French one, except for its composition (Maeda 2004, 1118).

As I described above, the professors who were in charge of Roman law at the University of Tokyo had diverse academic backgrounds. Miyazaki studied in Germany, whereas Tomizu studied in England. At the turn of the 20th century, young scholars increasingly chose Germany to studying abroad. After codification in Japan, contemporary foreign law was taught less at the university. However, Roman law retained its position in the curriculum because it was independent of any contemporary national legal system.[29]

5. CONCLUSION

My conclusion takes the form of an anecdotal epilogue. A journalist known only by the pen name of Kenzen Zanba wrote a series of articles entitled "Universities in the Cities East and West" in 1903 (Zanba 1903).[30] Although the author was not a scholar, and his criticism came from outside the academic community, his articles had an influence on public opinion and higher education at the time.[31] In this book, he compared Hozumi and Ume, both of whom were professors at Tokyo Imperial University (Zanba 1903, 52–80).[32] He contended that Hozumi had an interest in the fields of art, literature, the natural sciences, and philosophy, in addition to jurisprudence. Hozumi was an extensive reader, with a philosophical and fundamental approach. However, while his studies were

[29] I merely mention that Okamoto (1906) was a textbook for the private Meiji University, which bore the French legal tradition and did not, initially, teach Roman law independently. See also the above number.

[30] This pen name can mean "A sword which can slash a horse with the Buddhism spirit of Zen (or a warrior carrying such a sword and spirit?)," and is rather humorous. They were published in the Yomiuri Newspaper, with the main purpose of drawing a comparison between Tokyo Imperial University and the newly established Kyoto Imperial University (since 1897). The criticism covers the two institutions themselves and the professors in various fields as persons. Originally, the comments on Hozumi and Ume presented here were done in the comparative context of the former two on the one side at Tokyo, and Santaroh Okamatsu on the other side at Kyoto. However, I only introduce the passage concerning Hozumi and Ume, omitting the comments on Okamatsu.

[31] Zanba's criticism covered even the luxurious private lifestyle of Hozumi, who married Utako, a daughter of Eiichi Shibusawa, who was a member of the bourgeois. Zanba also condemned Hozumi's habit of staring at students from head to toe, like a rigorous scrutiny. As he was criticised for being snobbish, and for dominating his colleagues and students, despite his calm appearance, he submitted his own self apology in reply, which was published in the same newspaper (Zanba 1903, 81–84). For example, Hozumi said that he had a tendency to stare at the face of the person to whom he was talking for sincerity, and not for the purpose of harassing them. Hozumi took the criticism seriously and replied earnestly.

[32] I found two mistakes in it. Hozumi studied in London, not in Cambridge, as the author says (Zanba 1903, 74), while Ume studied in Lyon, not in Lille, as he says (Zanba 1903, 59).

grand and extensive, Hozumi was not a quick thinker. In contrast, Ume's mode of argument was quick and coherent. He was good at solving concrete and practical problems, and his talent contributed immensely to the codification project. Ume had a keen and acute intelligence and was self-assertive, too. Ume was also a talented bureaucrat. However, his learning lacked profundity and breadth. In terms of ability in the Latin language, Ume was by far the more skilled of the two.

The above is an outline of Zanba's observations, which I consider to be not utterly wide of the mark in respect of the traits. Considering their careers and works as well as the experiences of study abroad, such a contrast was natural. Hozumi faced the grand theories of jurisprudence in England, while Ume obtained a deep understanding of the *exegesis* in the law of obligations in Roman law in France. As there had been neither a model nor tradition for Romanists in Japan until they were born, such a diversity was natural.[33] It enriched the legal education in late 19th century Japan. The penetration of the German approach follows the period treated in this article.

BIBLIOGRAPHY[34]

Boissonade, Gustave. 1881. *Seihoh Kohgi [Lectures on the natural law]* (J). Lectures in 1877. Recorded by Inoue Misao as a student. Tokyo: Ministry of Justice.

Calendar. 1876. "The Calendar of the Tokio Kaisei-Gakko or Imperial University of Tokio. For the Year 1876. Published by the Director." http://www.jacar.go.jp/english/index.html. Ref. -2 A-009-00-01192100.

Hayashi, Tomoyoshi. 2012. "The Reception of Roman Law Education in Japan – on the First Lecture on the Roman Law at the Tokyo Kaisei-Gakko in 1874." An oral presentation made at the 66th SIHDA congress at Oxford, September 21, 2012.

Hayashi, Tomoyoshi, 2013a. "The Academic Background and the Educational Activities of W. E. Grigsby – A Professor who made the first lecture on the Roman law in Japan" (J). *Osaka Law Review (Handai Hogaku)* 63 (3–4): 923–946.

Hayashi, Tomoyoshi. 2013b. "The Catalogue of Words at the *Stipulatio Aquiliana*" (J). *The Hiroshima Law Journal (Hiroshima Hogaku)* 37(1): 526–542.

Hayashi, Tomoyoshi. 2018. "The Codification of the Japanese Civil Law and the Roman Law Education in the contemporary period – A Roman Law Historian's Overview." An oral presentation made at the 6th International Congress on Roman law held at the China University of Politics and Law, Beijing, P. R. C., October 14, 2018.

Hozumi, Nobushige. 1890. *Hohten-Ron [On the Codification]* (J). Tokyo: Tetsugaku-shoin.

Hozumi, Nobushige. 1912. *The New Japanese Civil Code – as Material for the Study of Comparative Jurisprudence*. Tokyo: Maruzen.

Hozumi, Nobushige. 1931. *Fukushuh to Hohritsu [Revenge and Law]* (J). Tokyo: Iwanami-shoten.

[33] I am a little more attracted by Hozumi's approach. However, the acuteness and coherence of Ume's argument is extremely attractive in another dimension.

[34] The "(J)" signs following the titles denotes articles and sources in Japanese. Where a title in a European language by an original author or original authors is shown, it is quoted without quotation marks and the Japanese is omitted. Otherwise, I quoted the Japanese title in alphabet and added my provisional translation in "[ ]" brackets.

Hozumi, Shigeyuki. 1988. *Meiji Ichi Hohgakusha no Shuppatsu–Hozumi Nobushige wo megutte [A departure of a Jurist in the Meiji Era–on Hozumi Nobushige]* (J). Tokyo: Iwanami-shoten.

Iida, Fumiya. 1998. *Kindai Nihon ni okeru Futsugo-kei Senmon Gakujutu Jinzai no Kenkyu (A Study on the specialized Experts with French Language Background).* Tokyo: Kazama Shoboh.

Ino-Ouet [Inoue], Seiti [Seiichi]. 2002. [1881]. *De la Cession des Créances en Droit romain et en Droit Français.* Dijon: Imprimerie et Lithographie F. Carré. Reprint. Tokyo: Shinzansha Co.

Kumano, Binezo [Binzoh]. 1883. *Droit romain: De Nautico Foenore Droit français: cours forcé des émissions fiduciaires.* Paris: Imprimerie de Charles Noblet.

Maeda, Tatsuaki. 2004. *Historical Documents of the Japanese Civil Code* (J). Tokyo: Seibundo.

Maison du, Japon. 1991. *Boissonade et la Réception du Droit Français au Japon*. Paris: Société de Législation Comparée.

Maki, Hidemasa. Fujiwara Akihisa. 1993. *Nihon Hohseishi [Japanese Legal History]* (J). Tokyo: Seirin-shoin.

Oda, Hiroshi. 2009. *Japanese Law*. 3rd ed. Oxford: Oxford University Press.

Okamoto, Yoshiziro. 1906. *Roma Hoh Kohgi [Lectures on Roman law]* (J). Reprint. Tokyo: Shinzansha Co.

Okubo, Yasuo. 1977. *Nihon Kindai Hoh no Chichi Bowasonaado [Boissonade – The Father of the Japanese Modern Law]* (J). Tokyo: Iwanami-shoten.

Oumé, Kendjirô. 1889. *De la Transaction: 1 en droit romain; 2 dans l'ancien droit français; 3 en droit français.* Reprint. Paris: Hachette Livre.

Shiozawa, Zenji, Akira Takahashi. 2000. "President Seizo Katsunuma's lamentation for the death of 'Barrister Naoshi Sakisaka' – His gravestone and Shigetake Sugiura's epitoph" (J). *Bulletin of Yamanashi Medical University* 17: 10–19.

Stolleis, von Michael. 1995. *Juristen. Ein biographisches Lexikon. Von der Antike bis zum 20. Jahrhundert*. München: C.H. Beck.

Study Group on the Legal Theories in the Early Meiji Era. 1989. *Studies on the Lectures of G.E. Boissonade at the Ministry of Justice Law School* (J). Suita.

Takii, Kazuhiro. 2003. *Bunmei-shi no nakano Meiji Kenpoh – Kono Kuni no Katachi to Seiyoh Taiken [Meiji Constitution in the History of Civilizations – The Forms of this Country and the Western Impact]* (J). Tokyo: Kodansha.

Takizawa, Tadashi. 2018. *Le droits Français cinquième ver.* (J). Tokyo: Sanseido.

Tezuka, Yutaka. 1988. *Meiji Hougaku Kyouiku-shi no Kenkyu [Studies on the History of the Legal Education in the Meiji Era]* (J). Tokyo: Keio-tsushin.

Tomii, Massa-akira [Masaakira]. 1883. *Droit romain: des droits du vendeur non payé; Droit français: du droit de résolution du vendeur non payé.* Lyon: Imprimerie Pitrat Ainé.

Tomizu, Hirondo. 2004. *Roma Hoh [Roman law]* (J). Reprint. Tokyo: Shinzansha Co.

Yoshihara, Tatsuya. 2018. "Hozumi Nobushige and his Lectures on Roman Law" (J). *Journal of Law (Nihon Hogaku)* 84(1): 1–51.

Yoshihara, Tatsuya. 2019. "Miyazaki Michisaburo's Lectures on Roman Law" (J). *Journal of Law (Nihon Hogaku)* 85(2): 137–166.

Yoshihara, Tatsuya. 2020a. "Hozumi Nobushige's Lectures on Roman Law. Part 1" (J). *Journal of Law (Nihon Hogaku)* 85(3): 809–877.

Yoshihara, Tatsuya. 2020b. "Hozumi Nobushige's Lectures on Ronan Law, Part 2" (J). *Journal of Law (Nihon Hogaku)* 86(1): 37–125.

Zanba, Kenzen. 1903. *Tohzai Ryohkyoh no Daigaku – Tokyo Teidai to Kyoto Teidai [Universities in the Cities East and West – Tokyo Imperial University and Kyoto Imperial University]* (J). Tokyo: Kodansha Publishing Co.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.07

Richard W. Ireland[*]

https://orcid.org/0000-0002-9342-6400

A LEGAL HISTORY OF LEGAL HISTORY IN ENGLAND AND WALES

Abstract. This article explores the development of the study of legal history as a subject in the law schools of England and Wales. It outlines changes in university education more generally, and in legal scholarship in particular and how those changes impact the particular subject under study. Drawing on empirical studies and personal reflections relating to past experience it concludes by speculating on potential different outcomes, both positive and negative, which may emerge when the universities of England and Wales emerge from the uncertainty of the COVID-19 pandemic, during which the piece was written.

Keywords: legal education, legal history, universities, England and Wales, legal scholarship.

HISTORIA PRAWA HISTORII PRAWA W ANGLII I WALII

Streszczenie. W artykule przedstawiany jest rozwój nauki historii prawa jako przedmiotu nauczanego na angielskich i walijskich wydziałach prawa. Wskazuje się w nim ogólnie na przemiany edukacji uniwersyteckiej, a w szczególności na zmiany zachodzące w zakresie nauki prawa, a także na to, jak te zmiany wpływają na poszczególne przedmioty studiów. Opierając się na badaniach empirycznych oraz osobistych przemyśleniach związanych z własnymi doświadczeniami, artykuł kończy się przedstawieniem przypuszczeń dotyczących możliwych konsekwencji, tak pozytywnych jak i negatywnych, które mogą ujawnić się, gdy uniwersytety w Anglii i Walii wydobędą się z niepewności okresu pandemii COVID-19, w trakcie której artykuł został napisany.

Słowa kluczowe: edukacja prawnicza, historia prawa, uniwersytety, Anglia i Walia, nauka prawa.

There are some apparent paradoxes in writing of the role of legal history in relation to the common law tradition. The common law is, in its essence, retrospective: the system of precedent relies on the principle of the "good old law" where judicial innovation is generally frowned upon and the wisdom of earlier authorities invoked to solve contemporary problems. Not only were ancient cases cited, but medieval texts such as Bracton might be discussed in appropriate

[*] Aberystwyth University, Department of Law and Criminology, rwi@aber.ac.uk

Received: 8.11.2021. Revised: 11.01.2022. Accepted: 15.03.2022.

instances, whilst until recently the citation of the work of a living jurist was considered a solecism. Yet that is not to say that common lawyers are all, at heart, legal historians; indeed there would seem to be an essential contradiction in the investigation of past by exponents of these two disciplines. The lawyer arguing his or her case will look to the past to support his contentions for the law as it stands, or should stand, at the present. The aim is avowedly what theoretical historians would caption, and often condemn, as "Whiggism."[1] For legal historians the task is of a different nature. Discussions have continued amongst academics for years as to what the essential characteristics of "legal history" might be: doctrinal or contextual camps, to use admittedly imprecise terms, have held different views as to whether the true focus should be on the development of legal norms or on the question of where those norms came from and went to (the reader may be alarmed to learn that my own work was once described as "not really legal history"). Yet legal historians have, I think, this in common: they want to study what the law and its institutions meant to the time in which they developed rather than what they mean, or can be made to mean, at the present day. Invocation of precedent and legal history, then, have different rationales: they are associated in the same way as cookery is related to agriculture.

The other anomaly which the history of the common law discloses is that despite its status as a supposed towering monument to reason, a status often proclaimed by its practitioners, it has, until relatively recently, not been the subject of university study. The law of England (we will use the usual terminology here though it is not without difficulty[2]) was learned in practice, a skill to be handed down by those who had mastered it, rather than discussed in abstract in the Senior Common Room. It is true that a gentleman might have made the acquaintance of Justinian during his student years, as he might of Cicero or Virgil, but common law was a different matter altogether. The gulf between the law as a professional rather than an academic sphere was proclaimed on both sides, by the distinguished scholar as well as the eminent judge.[3]

It is true that things began to change when William Blackstone gave lectures in Oxford on the law of England in 1753, and was appointed to the Vinerian

[1] The phrase was coined by Herbert Butterfield in his influential *The Whig Interpretation of History* (Butterfield 1931). Not all legal historians avoid the "Whig" approach but it is generally regarded amongst them as a methodological failing rather than a professional requirement. Whilst the tracing of developments which lead to a contemporary doctrine or state of affairs is a legitimate exercise, to understand the past as a teleological unfolding, a growth directed to the end of the present is to ignore or confuse its meaning in its own time for its own participants.

[2] The story of the assimilation of Welsh Law to that of England is a complex and protracted one, but found its most influential expression in Henry VIII's Acts of Union of 1536 and 1543. For a full discussion see Watkin (2012).

[3] Even when I started teaching law over forty years ago there was the scent of the idea that law, like motor maintenance, was not really a subject which should share a corridor with departments which taught philosophy or the liberal arts.

Chair five years later. His celebrated *Commentaries on the Laws of England* was published in the following decade. Other universities followed suit: Cambridge established the Downing Chair in 1800, and University College and King's College London began courses in 1826 and 1831 respectively. Yet even so it must be said that these developments, important as they certainly were, did not open the floodgates to mass undergraduate study of tenures, estates and felony. It was not until the reform of the legal system and of legal education in the nineteenth century that the question of teaching law as a university subject attained a degree of urgency and significant support. The Select Committee on Legal Education, established in 1846, found that the existing provision of university tuition in law was extremely limited. The Committee stressed the need for university training, not for the professional elements of legal study which would be provided by a "special institution," but to elucidate its "scientific" and "philosophical" aspects. The major initiatives which followed came from Oxford and Cambridge, but law was also taught at Manchester from 1872. In 1891 the Gresham Committee looked again at the provision of law teaching in London, and other universities followed thereafter, Liverpool in 1892 and the London School of Economics in 1895.[4] In the twentieth century many more Law Schools were established within universities, the process increasing significantly with the expansion of the British higher education sector after the reforms of 1992. By then Law was an attractive degree subject for student applicants and changes in professional admission requirements made "qualifying law degrees" a usual starting point in the training of both barristers and solicitors, although as I write this latter has ceased to be a graduate-only profession following a change in regulations.

So far we have seen that law was late in achieving the status of a recognised university discipline, but have said nothing of the development of legal history as a branch of that discipline. It was, no doubt, true that some elements of historical analysis would have been essential to an understanding of the characteristics of the legal system or the otherwise baffling structure and terminology of land law and it is probably in such settings that historical elements first began to permeate the university curriculum more widely. But there was also in the nineteenth century an engagement with the history of law at a much deeper scholarly level. The Selden Society was founded in 1887 and its volumes continue to represent the best of original, source-based legal historical studies of English law.[5] The publication

[4] See *The Ormrod Committee* (1971, 9). This report contains a useful chapter on the history of legal education, which has also drawn a more specialist academic literature. See, for example Twining 1994. For the nineteenth century developments in legal education see in particular Polden (2010, 1201–1211). For the material relating to Aberystwyth discussed in this article see further Chapter 1 in the volume relating to that Law School currently in preparation by C. Harding, J. Williams and R.W. Ireland.

[5] The Stair Society, founded in 1934, performs a similar function in respect of Scots Law, whilst the Welsh Legal History Society published its first volume in 2001. The publications of this

in 1895 of Pollock and Maitland's *History of English Law Before the Time of Edward I* was a landmark and it still merits its place on the shelves (and not merely for display) of every serious legal historian.

The outgrowth of expertise from the older universities was inevitable in the newer ones, for those who went on to teach law in an academic environment had themselves been, inevitably, trained in a strictly limited number of institutions. It would be an enormous task, tedious to both reader and the writer, to investigate the development of courses at every individual university. I will, however, say a little about the teaching of legal history at Aberystwyth, not simply because it is the one which I know best, but also because, as we will see, it played a not insignificant role in nurturing the development of the discipline more generally. The passing on of the educational torch was evident from the inception of the law school at what was then the University College of Wales, Aberystwyth in 1901. One of the initial Professors of Law, Jethro Brown, had been a protégé of Maitland's at Cambridge and dedicated his inaugural lecture to his mentor. Paradoxically, but importantly, in 1911, after Brown had left for a distinguished career in his native Australia, the compulsory course in Roman Law, with its attendant requirement of a knowledge of Latin and in itself a legacy of the Oxbridge system, was made optional at Aberystwyth and a new course on the History of English Law was introduced. The inaugural lecture in this subject was given by the visiting Dr (later Sir) William Holdsworth, another name of considerable eminence in the development of the discipline. I pause at the title of the new course to remind readers that although English Law had been incorporated into Wales in the reign of Henry VIII, medieval Welsh law had itself become the subject of scholarly investigation in the nineteenth century. Such a development was not ignored in what was then the only law school in Wales and had been considered in visiting lectures by the eminent legal historians Edward Jenks and Paul (later Sir Paul) Vinogradoff in 1903 and 1904 respectively. English legal history remained the subject on the syllabus as the undergraduate course, however. One John Van Druten was appointed principally to teach the subject in 1924, though he is better known now as a playwright, whose adaptation of Christopher Isherwood's Berlin stories, *I Am A Camera*, later formed the basis of the Oscar-winning film *Cabaret*. There was still considerable interest in Welsh native law in the 1920s, as in 1928 special celebrations and a commemorative volume marked a millennium since Hywel Dda, the king by whose name the laws are known, had visited Rome.[6]

With an increase in the number of municipal universities in the early twentieth century and a subsequent wave of expansion in the higher education

latter often comprise collections of articles, though editions of source materials form the basis of some volumes.

[6] For more details see Jenkins (2003). For Van Druten see Williams (2003). Aberystwyth would also later employ G.D.G. Hall, whose edition of the medieval text *Glanvill* remains the standard reference for the work.

sector in the 1960's the pool of graduates who might seek an academic career in law expanded, though appointments from the ancient universities remained common. Other developments at the same time had an impact on the work of legal historians. There was, within History faculties, an increased enthusiasm for "social history," a concentration on the lives of people outside the political elite. Such "history from below" explored amongst other areas issues of criminality and social protest. The movement spread into the consciousness and methodology of some teachers within law departments. It also led to debates, alluded to earlier, about exactly what constituted "legal history." There were questions too, when conferences began to be held which attracted those who taught in both disciplines, about the relative merits of the historical approach to teaching law, and the legal approach to teaching history. Such debates are less frequently staged in the present day, with the impression being given that the area can welcome all approaches. I suspect, however, that divisions between different types of teaching of the history of "legal" material (and different conceptions of what that term means) remain, and those differences are to be found to some extent at an institutional as well as an individual level. To this possibility I will return later.

The growth of the constituency teaching and learning legal history led to, and in its turn was boosted by, the development of literature directed to that end. Works by Plucknett and Potter were being relied on, alongside those Maitland and Holdsworth, well into the 1970s. The publication of John (later Sir John) Baker's *Introduction to English Legal History*, the relatively slim first edition of which was published in 1971 was, in this respect, a major landmark, providing a student text which was wide-ranging in its temporal scope and took account of recent scholarship. Other such student-directed texts followed, such as A.H. Manchester's *A Modern Legal History of England and Wales 1750–1950* from 1980, as well as a substantial flourishing of more specialised (both in their chronological focus and/or doctrinal focus) monographs. Journals too featured research articles and *The Journal of Legal History* was established in 1980.

It is from this exciting early period that we gain our first detailed analysis of the extent to which legal history had established itself within the British university system. John Baker circulated questionnaires to twenty eight university law faculties in England, Wales and Northern Ireland in 1977 and produced a brief typed discussion paper based on the findings. "21 of the 28 faculties consulted offer optional courses in legal history (taken in the 2nd or 3rd year of study)," he found, and 8 (including 3 of the 21) offer legal history as part of a compulsory 1st-year introduction to English law and the legal system. In total "about 3 students in 7 study some legal history in their academic courses, but only 1 or 2 in 7 take a full course." Undergraduate courses fell into two categories: the broad survey of legal development and the narrower focus on modern legal history. Baker also noted that a number of these courses had been started in the 1970s. Incidentally, he noted, lectures at the Bar on the subject had ended in 1978 (Baker 1979).

Baker's initiative led to a further analysis, conducted by Michelle Slatter and myself for the 1983 British Legal History Conference and subsequently published in the *Journal of Legal History* (Slatter, Ireland 1985). This survey included polytechnics as well as universities and also included Scotland, although the results for that country will not be discussed here given the focus of this article. Readers unfamiliar with the British tertiary education structure should note that polytechnics were institutions which could award, amongst other qualifications, degrees under the auspices of the Council For National Academic Awards, before becoming universities and awarding degrees in their own right after 1992. The questionnaire was sent to Law Departments in some forty universities in total, attracting thirty-two replies. It analysed only the separate courses in the subject, excluding historical elements in other substantive courses and, as had Baker, did not address Roman Law courses. Of course the recipient targets excluded, save anecdotally, discussion of the extent of teaching of matters which could have a "legal" dimension in History or other departments. Nonetheless it showed legal history teaching to be in good health. In the university Law departments in England and Wales 21 of the 27 responding institutions offered their own legal history courses to undergraduates, invariably as optional elements of the degree scheme. 10 of the courses were of the "general" extended nature, whilst of the rest the period after 1700 formed the basis of the majority, whilst 4 covered earlier periods. Baker's text was the most used, with Manchester's the only other to figure to any extent. Whilst the number of courses on offer seems encouraging, take-up by students was rather mixed, with some institutions struggling to attract students to the option whilst others reported healthy numbers, there being no apparent correlation between the temporal focus of the course and its popularity. An interest in history generally was seen, unsurprisingly, as a dominant factor in student choice as was the attraction of a course which provided a change from the more orthodox substantive legal curriculum, one respondent memorably remarking that the option attracted the "drop-outs and antis" (Slatter, Ireland 1985, 218).

The returns of polytechnics revealed that out of the twenty-two which responded, out of twenty-three surveyed, 7 ran discrete options in legal history whilst 5, including one of these, provided sub-course units. Interestingly two others provided the opportunity for law students which, in the words of our report, did not constitute "legal history" as such, but "at least plough a parallel furrow." I wonder a little at these words now, since they again raise the definitional problem mentioned at the outset of this article. One of the polytechnic courses, for example, was devoted to the history of crime and punishment and was taught by staff outside the law department (as was a course at Warwick university which in itself contained elements drawn from this area). It may be, a point to which I will return in the conclusion to this article, that this particular area, which has grown

considerably in interest the years since this survey, needs to be reconsidered in its relation to the categories there considered. I at least have now changed my mind as to the appropriate boundaries of the discipline.

If there were encouraging signs, in some places at least[7], of a vigorous interest in learning legal history in Law departments, there was also an interest in research and publication in the area at around the same time. Conferences attracting academics to meet, deliver papers and exchange ideas, were not unknown to the subject; a meeting in 1913 in London had resulted in the publication of *Essays in Legal History* in the same year. Yet that seems to have been the last such specialist collaboration. In July 1972, however, Aberystwyth (and in particular Dafydd Jenkins and Edmund Fryde) took the initiative and hosted a conference, which attracted some 61 paying participants and in its turn resulted in the publication of *Legal History Studies 1972* by The University of Wales Press. The creation of a Continuation Committee led to the regular gathering of the British Legal History Conference, held in various locations every two years, which attracts a multitude of scholars in the discipline from all over the world. Those who have attended the event in recent years will be amazed to find that the Registration fee for the Aberystwyth event, which ran over four days, was the princely sum of 50 pence, whilst accommodation and meals were estimated to cost around £8.00. The subsequent volume could be obtained for £2.35, post free.[8] It is perhaps inevitable that the history of the conference itself, its contents and participants, have now been subjected to scholarly analysis.[9]

Dafydd Jenkins also took a leading role in a series of meetings to bring scholars together to discuss Welsh medieval law, which followed from a conference to discuss the Law of Women, convened by Morfydd Owen in 1970 (Jenkis 2003, 44). The meetings continue to the present under the title of the Seminar Cyfraith Hywel and attracts participants from Wales and elsewhere. One of the bonuses of the interest in the area is the publication of more scholarly works which make this fascinating subject available to a wider readership. Worthy, perhaps, of particular mention is Jenkins's *Hywel Dda: The Law*, which can (and should!) be read by those who have no previous background in the law and legal system of medieval Wales. The legal history of Wales more generally was greatly served by the publication of Thomas Glyn Watkin's *The Legal History of Wales*, the first edition

[7] Modesty forbids me from identifying the course on medieval law which could attract a student audience of around 90 persons to lectures in the 1980s!

[8] For details of all the material in this paragraph see Jenkins (2003). The Conference was held at Dublin in 2003, being incorporated into the "British and Irish Legal History Conference" for that event. It was due to be held, with the collaboration of the Irish Legal History Society in Belfast in 2021 but the coronavirus pandemic has led to the postponement of that event until 2022.

[9] In addition to the paper by Dafydd Jenkins an address on these matters was given to the 2007 conference at Oxford by the eminent legal historian Patrick Polden, though it was unpublished. I am grateful for his help.

of which emerged in 2007. There is now no excuse for legal historians to ignore the Welsh experience.

The title of this article promised a history of legal history in England and Wales. Yet no more recent survey than those I have discussed above has, to the best of my knowledge, been conducted in the years which followed. The impact of COVID-19, still rampant at the time of writing, on British universities remains to be seen, but it may be considerable and may extend even to the breadth of syllabuses offered in particular institutions. A survey conducted in 2019 might have assisted in the writing of this piece, one conducted in, say, 2025 might be even more revealing. If we are to gauge the current state of the discipline in the universities (and in particular the Law Schools) of that jurisdiction then we have to rely on observation and anecdote. I do not, accordingly, claim too much for the objectivity of all the remarks which follow and still less am I able to predict the future of the discipline.

Let us begin with a positive note. The revolution sparked by the internet has had an impact on the study of legal history as it has on the rest of the world. Digitisation of primary source material has had enormous advantages for scholars, particularly those who live and work far from the archival repositories which hold the originals. David Seipp's online provision of yearbook material[10], or the vast repository of the Anglo-American Legal Tradition site[11], for example, allow access to sources which would have seemed impossible only a relatively short while ago. Early printed books, statutes, pictorial images and almost everything else can now be made available by a click or a tap: the long train journey and the limp sandwich are no longer a precondition of scholarly engagement with the law of the past. Access to material has been made easier and more democratic, though the meaning, context and use of that material still demand the scholar's skill and judgment. Particular societies may have a web presence promoting legal-historical study[12], whilst blog posts and online fora, including social media connections, allow not only an engagement with the work of other researchers in the area but also the facilitation of contact with them. Twitter has become, particularly, to judge from my own experience during the pandemic, a substitute for the conference bar for the exchange of ideas, interests and contacts.

Another positive development has been the growth of legal historical research, particularly amongst graduate students and early-career academics. Baker largely excluded information on postgraduate research from his survey on the legitimate

[10] *Medieval English Legal History. An Index and Paraphrase of Printed Year Book Reports, 1268–1535*, https://www.bu.edu/law/faculty-scholarship/legal-history-the-year-books/, Accessed 4 January, 2021.

[11] *Anglo-American Legal Tradition*, aalt.law.uh.edu, Accessed 4 January, 2021.

[12] Given my desire to include Welsh material here I feel bound to mention http://welshlegal-history.org/ and http://cyfraith-hywel.cymru.ac.uk/index.php, but many other interesting sites are to be found, of course, by recourse to a search engine.

basis that such work was as likely to be carried on in History as in Law faculties.[13] The Slatter and Ireland survey similarly concentrated an undergraduate courses and, as I have said, no contemporary survey exists to substantiate this claim that there has been an increase. Yet it seems to me that the number of students completing research at Master's or Doctoral level has increased significantly. Firstly the gap, as we will suggest later, between the subject matter of research in Law and History departments has narrowed and new and attractive fields of inquiry established. Secondly I think that changes in university education have promoted this trend towards research degrees. With a greater proportion of the population of England and Wales graduating from universities the need to stand out, particularly in those who seek to pursue an academic career has increased.[14] Moreover the demands on even a newly-appointed lecturer to contribute to her department's research profile (now, since the introduction of the Research Assessment Exercise and subsequently Research Excellence Framework, an important measurable "audit" with real-world implications for both institutions and individuals) means that a Ph.D., which can be drawn upon for immediate publications ("hitting the ground running" in the jargon) becomes a particularly valuable asset in a job applicant. Those from other countries, or other disciplines, may find that a rather strange statement. But a doctorate was not an expected or indeed a usual qualification for law teachers in the past. I have always suspected that young, bright lawyers were snapped up early by universities, eager to exploit their enthusiasm before they realised that their degree might yield rather greater financial rewards in other spheres of employment. Whatever the reason it became increasingly clear to me over the last two decades or so that at graduation the more senior (in both age and position) members of the Department mostly turned out decorated by relatively humble strips of silk or fur, being increasingly upstaged by the magnificent robes sported by more recent appointees!

Many of the theses I have supervised or examined over the last ten years or so have taken as their subject aspects of the history of crime and punishment. This is, of course, a self-selecting sample, as this is an area in which I work. Yet I suspect that it is also an area which has witnessed a real growth, at both undergraduate and postgraduate level. There are a number of reasons which may explain this trend. It was noted earlier that a pioneering course along these lines had been noted in a polytechnic in the 1983 survey and it may be that the expansion of the university sector has seen a greater openness to the social sciences which has spread throughout the sector as a whole. Criminology would seem to be a popular student choice and has been adopted within older law schools as an alternative to traditional law degrees, which,

[13] Baker did note the taught Postgraduate courses at Cambridge and London.

[14] I see that the first research degree on a legal history subject which I supervised was completed in 1984. It was a weighty and scholarly dissertation which was submitted as an LL.M. Today I think it might even have been worthy of a doctorate.

it must be said, no longer offer the guarantee of a career path which once they did. Aberystwyth's Law Department became a Department of Law and Criminology in 2005 and a course entitled "A History of Criminology" was introduced as part of the new syllabus. At the same time History scholarship has continued to investigate social-historical topics, including the history of crime, and it is now difficult to conceive of a history syllabus which does not incorporate such an approach. Theoretical analysis of the state and its powers has also had an impact across a range of disciplines, with works such as Michel Foucault's *Discipline and Punish* having an influence beyond a rather specialist audience of prison historians. If this seems to speak of an increased fluidity across disciplinary boundaries then that, while true, is not absolute. There are many, I suspect, who regard themselves as "legal historians" who would cavil at the idea that the label should be attached to someone writing about social attitudes to riots or to popular extra-judicial punishment rituals. Whether this attitude is articulated or not it seems clear to me that there is a noticeable difference between the background, methodology and profile of those who attend a Crime Historians meeting and those at a British Legal History Conference. Almost as a token of its arrival as an established discipline "Historical Criminology," the title which seems to have become attached to this area of interest, has now developed its own introspective turn, with scholars investigating its nature as well as its objects.[15]

But not everything in the legal-historical garden is lovely. COVID-19 is having, and will have, effects as yet unknowable on the British university sector. Already before the pandemic some universities were looking to trim

[15] See, for example Yeomans (2018), Churchill (2018) and Lawrence (2018). The "crime historians" and "historical criminologists," in my experience, tend to be (though these are not universal characteristics) younger and to work in newer institutions than the traditional "legal historians." As one who attends both kinds of conference I attach no value judgment to the distinction. As to whether it can be drawn at all, well that depends on the individual and the purpose. I don't worry about labels but about quality, but I concede that a cosy "broad church" attitude would overlook the very real difference between the study of nineteenth century prison conditions and the doctrinal development of medieval land law. I'm interested in both, but that may indicate a butterfly mentality rather than a theoretical position. For what it's worth, I think that land law, as has as much to offer social historians as crime (it's an offer some have gratefully accepted), whilst crime historians might benefit from a greater involvement with medieval ideas. For some points here see Ireland (2015). I should add one further observation at this point. There are now, I think, more women involved in both of these areas than there were forty years ago and this is clearly a change to be welcomed. Whether this simply reflects a general trend in academic life or is more specifically related to this subject matter, I cannot say. Nor indeed, in default of empirical evidence, am I able to state whether such a change has led to differences of approach to the discipline. There is no doubt that an increased concentration on gender, race, colonialism, as well as a greater engagement with political and social theory is evident in more recent teaching and research. Whilst such developments seem to reach across university disciplines more widely, they seem to have a very real importance for those interested in law, crime and their social framework.

budgets and cut expenditure. It may seem strange to suggest that any particular area of scholarship would suffer more than any other in the light of these more general trends. Yet I think it might, particularly in respect of teaching within law schools. As Departments of law pull in their horns they will inevitably focus on "core" teaching areas, those required for professional exemption purposes and expansion of the syllabus beyond those legal monoliths will probably (and naturally) concentrate on subjects which will appear more eye-catching and contemporary. Moreover, teaching at universities now makes more use of those on short-term contracts, while older entrenched members of the profession retire. The individual enthusiasm for the subject which the 1983 survey showed to be so important for its introduction to a syllabus and the time needed to devise and consolidate new courses are not assisted by a system facing economic retrenchment. I may be pessimistic and mistaken in these assumptions, but they represent a genuine, rather than a self-serving, concern. When I took early retirement from Aberystwyth, where, as we have seen, legal history was introduced as an undergraduate course in 1911, I knew that the medieval course I had taught for nearly forty years would go with me. This was not because of hostility or lack of interest, but simply a matter of practical necessity.[16] It may be that other courses, particularly those of a more traditional nature, will meet the same fate.[17]

This is mere speculation. There is another, more positive, way of looking at the future of legal history as a discipline. I suspect, though I do not know, that it may grow in significance within history faculties, as interdisciplinarity continues to be a goal within academic life. Yet the subject need not be handed completely to colleagues outside the law school. Given that the supply of law graduates in England and Wales may continue to outstrip the demand of the traditional legal professions, a bold and confident approach to the subject, by individual teachers and by those who run departments and universities may seek to position the study of the history of law as part of a wider, more analytical approach to the totality of legal study, as indeed was its proclaimed role when it was first establishing itself. A sense of perspective, a nuanced understanding of cause and effect and of the motors and processes of legal change, could be better promoted as deepening the range of transferable skills so valuable to the modern law graduate. We need to point out the advantages of studying legal

[16] Welsh medieval law teaching had been unavailable to law students at Aberystwyth some years earlier on the retirement of Professor J.B. Smith. It retains a toehold at Swansea University. At Aberystwyth a course combining the history of crime, punishment and criminology remains on the syllabus, itself representing the turn towards this area of interest addressed in this article. I don't want to sound too personally distressed here, since teaching in these other areas was itself pioneered at Aberystwyth by myself!

[17] For attempts to identify and engage with challenges for the future of legal education more generally see Denvir (2020).

history, stressing its centrality to a real understanding of the law and the society within which it operates, rather than see it as a "niche" interest or the luxury of more expansive times.[18]

For as long as law is taught in universities its history will necessarily be of interest to scholars, for no-one with a real interest in the law can fail to grasp the importance of where it comes from. Legal rules are constructions of individuals and individuals, to be understood fully, must be historically situated. For some this interest will be functional and perfunctory ("what was the intention of parliament?") but others will wish to go further and deeper. Such an exercise will be prompted not merely by a desire to demonstrate that academic lawyers are rather more than the mechanics of a morally dubious trade which some more traditional university types considered them when they first appeared in the Senior Common Rooms. The history of law is rich and fascinating, but it is also important. The large, excited and scholarly assemblies at legal history conferences testify to these characteristics. The publication of this special edition of the current journal and the warmth of the international contacts which make it possible only serve to underline them.

BIBLIOGRAPHY

Baker, John H. 1979. *The Teaching of English Legal History in the United Kingdom (excluding Scotland)*. Unpublished Discussion Paper held by the author.

Butterfield, Hebert. 1931. *The Whig Interpretation of History*. London: George Bell & Sons.

Churchill, David. 2018. "History, periodization and the character of contemporary crime control." *Criminology and Criminal Justice* 18(4): 475–492. https://doi.org/10.1177/1748895818811905

Denvir Catrina. Ed. 2020. *Modernising Legal Education*. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781108663311

Ireland, Richard W. 2015. "Why Everything We Know About Criminal Justice History is Wrong." *Law, Crime and History* 5(1): 130–142.

Jenkins, Dafydd. 2003. "Legal History at Aberystwyth." *Cambrian Law Review* 34: 27–55.

Lawrence, Paul. 2018. "Historical criminology and the explanatory power of the past." *Criminology and Criminal Justice* 18(4): 493–511. https://doi.org/10.1177/1748895818794237

Ormrod, Roger. 1971. *The Report of the Committee on Legal Education* ["The Ormrod Committee"]. Cmnd 4595. S.l.

Polden, Patrick. 2010. "The Education of Lawyers." In *The Oxford History of the Laws of England*. Edited by William Cornish, J. Stuart Anderson, Ray Cocks, Michael Lobban, Patrick Polden, Keith Smith. 1175–1201. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199258819.003.0034

Sandberg, Russell. 2021. *Subversive Legal History: A Manifesto for the Future of Legal History*. London and New York: Routledge. https://doi.org/10.4324/9780429200618

[18] This paper was completed before the publication of Russell Sandberg's book *Subversive Legal History: A Manifesto for the Future of Legal History.* Sandberg argues for the centrality of historical analysis in Law Schools. I can only hope that such a position will become a reality in the future.

Slatter Michele. Richard W. Ireland. 1985. "Report on legal history in the universities and polytechnics of the United Kingdom." *Journal of Legal History* 6: 214–232. https://doi.org/10.1080/01440368508530839

Twining, William. 1994. *Blackstone's Tower: The English Law School*. London: Stevens & Sons/Sweet & Maxwell.

Watkin, Thomas G. 2012. *The Legal History of Wales*. Cardiff: University of Wales Press.

Williams, Melanie. 2003. "John Van Druten – A Lawyer Drawn To Fame: From 'Aber Bay' to *Cabaret*." *Cambrian Law Review* 34: 71–82.

Yeomans, Henry. 2018. "Historical context and the criminological imagination: Towards a three-dimensional criminology." *Criminology and Criminal Justice* 18(4): 456–474. https://doi.org/10.1177/1748895818812995

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.08

*Philipp Klausberger**

https://orcid.org/0000-0002-7601-6514

IS INIURIA AUTEM OCCIDERE INTELLEGITUR, CUIUS DOLO AUT CULPA ID ACCIDERIT. SOME REMARKS ON GAIUS TEACHING TORT LAW

Abstract. When it comes to teaching law in the ancient world, the name Gaius spontaneously comes to mind. Gaius was a classical jurist who probably lived in a province in the east of the Roman Empire. Since he had no *ius respondendi* and thus was not entitled to deliver juristic opinions under the authority of the emperor, he devoted himself primarily to teaching law. His textbook of *Institutes*, which Barthold Niebuhr discovered in a library in Verona in 1816, gives us a good insight into the didactic skills of Gaius. Moreover, they allow us to see how legal teaching must have proceeded in the second century AD. This article deals with the presentation of tort law in the *Institutes* and puts the *Institutes* in the context of other writings by Gaius.

Keywords: law of torts (Roman), illegality, fault, negligence, quasi-delict (Roman law).

IS INIURIA AUTEM OCCIDERE INTELLEGITUR, CUIUS DOLO AUT CULPA ID ACCIDERIT. KILKA UWAG O GAIUSIE UCZĄCYM PRAWA DELIKTOWEGO

Streszczenie. Gdy mówi się o nauczaniu prawa w świecie starożytnym, od razu przychodzi do głowy imię Gaiusa. Był on jurystą epoki klasycznej, który żył prawdopodobnie w prowincji, na wschodzie Cesarstwa. Ponieważ nie posiadał *ius respondendi*, a zatem nie był uprawniony do wydawania opinii prawnych w imieniu cesarza, poświęcił się przede wszystkim nauczaniu prawa. Jego podręcznik instytucji, który odkrył Barthold Niebhur w bibliotece weroneńskiej w 1816 roku, daje dobrą możliwość przyjrzenia się pedagogicznym umiejętnościom Gaiusa. Co więcej, pozwala nam przyjrzeć się, jak wyglądało nauczanie prawa w II wieku n.e. W artykule omówiono sposób przedstawienia prawa deliktowego w *Instytucjach*, a także omówiono je w perspektywie innych pism Gaiusa.

Słowa kluczowe: rzymskie prawo deliktowe, bezprawność, wina, niedbalstwo, rzymskie quasi-delikty.

* Leopold-Franzens-Universität Innsbruck, Institut für Römisches Recht und Rechtsgeschichte, philipp.klausberger@uibk.ac.at

Received: 2.12.2021. Revised: 18.01.2022. Accepted: 17.03.2022.

1.

Is iniuria autem occidere intellegitur, cuius dolo aut culpa id acciderit: A person kills wrongfully when it [the killing] happened by malicious intent or by fault. *Nec ulla alia lege damnum, quod sine iniuria datur, reprehenditur. Itaque inpunitus est, qui sine culpa et dolo malo casu quodam damnum committit*: And there is no other statute which sanctions a damage that has been inflicted without any wrong. Thus, anyone who causes a damage accidentally without either fault or malicious intent remains unpunished (Gaius Inst 3.211).

With these words, Gaius explains to his students the first chapter of the *lex Aquilia*. This statutory regulation, as is well known, provides a sanction for the unlawful killing of another man's slaves or certain animals: *Ut qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto* (see e.g. Zimmermann 1990, 953 sqq.). The *iniuria*-element thus proves to be a central criterion for defining the plaintiff's as well as the defendant's position under the *lex Aquilia*. From the plaintiff's point of view, it is a matter of accusing the defendant of having unlawfully inflicted damage. From the defendant's point of view, however, the *iniuria*-criterion provides the chance to give reasons for his conduct in order to justify them (cf. MacCormack 1974, 201). Thus, the *iniuria*-criterion appears to be Janus-faced: on the one hand, it is a matter of establishing liability, especially since not every *occidere*, but only an *occidere* qualified as *iniuria*, will make the tortfeasor liable. On the other hand, it may also be a matter of discharging liability, especially if the defendant succeeds in justifying his conduct in the trial.

Gaius equates the *iniuria*-element, which is central to liability under the *lex Aquilia*, with *dolus* or *culpa*: only if one of these two qualifications is met, the defendant shall be condemned. On the other hand, the defendant will be acquitted if he did not act with *dolus* or *culpa*, but merely *casus* (chance) was the relevant impulse. Thus, Gaius on the one hand introduces *dolus* and *culpa* as prerequisites for liability (Schipani 1969, 251 sqq.). On the other hand, he marks the limit of liability with *casus*. As a rule, damages which occurred accidentally would not oblige to compensation under the *lex Aquilia* nor under any other statute.

Gaius presents his students a certain abstract guideline on how to approach a case involving the *lex Aquilia*. However, the passage drawn from his *Institutes* does not show how Gaius would further explain the question of liability. To gain a deeper insight, one must go a step further and consult the other writings of Gaius.

2.

In his commentary on the Provincial Edict, Gaius describes the following case:

> Gaius (7 ad ed prov) D. 9.2.8.1 (= Lenel, Pal 185)
> *Mulionem quoque, si per imperitiam impetum mularum retinere non potuerit, si eae alienum hominem obtriverint, volgo dicitur culpae nomine teneri. Idem dicitur et si propter infirmitatem sustinere mularum impetum non potuerit: nec videtur iniquum, si infirmitas culpae adnumeretur, cum affectare quisque non debeat, in quo vel intellegit vel intellegere debet infirmitatem suam alii periculosam futuram. Idem iuris est in persona eius, qui impetum equi, quo vehebatur, propter imperitiam vel infirmitatem retinere non poterit.*
>
> Furthermore, if a mule driver cannot control his mules because of weakness that he cannot hold back his mules – and it does not seem unreasonable that weakness should be deemed negligence; for no one should undertake a task in which he knows or ought to know that his weakness may be a danger to others. The legal position is just the same for a person who through inexperience or weakness cannot control a horse he is riding. (Watson 1985, 280)

A muleteer could no longer keep the animals entrusted to him under control. The mules broke free and trampled a slave to death. The muleteer attempted to excuse his behaviour with inexperience, but according to Gaius this defence will fail: *volgo dicitur culpae nomine teneri*. The same applies (as Gaius states) if the muleteer could not restrain the animals due to weakness. This seems in fact sensible: no one, according to Gaius, should undertake an activity if he knows or should know that his weakness could endanger others.

One may note that Gaius does not state that being weak or lacking experience would in any case provide negligence and thus make the tortfeasor liable; this would indeed result in some kind of strict liability. But the jurist makes clear that *imperitia* (inexperience) or *infirmitas* (weakness) cannot be used as a blanket excuse. It is true that the muleteer is not accused of being weak or lacking experience. But, he is accused of having undertaken an activity that he is not capable of despite his ignorance or weakness (Schipani 1969, 247 sq.; MacCormack 1974, 212; Tritremmel 2020, 135).

In other words: The fault does not lie in being weak or lacking experience. The fault lies in undertaking a dangerous activity that exceeds the person's strength and abilities (cf. Cardilli 2014, 326). One could call this figure by the German term *Einlassungsfahrlässigkeit* ("negligence in admission"). This does not only apply if the muleteer knows that he is not sufficiently skilled or strong. Rather, it already applies if the driver could have recognized that he does not have the appropriate skills. Thus, the concept of *culpa* shifts away from the individual abilities of the actual agent. It focuses on those abilities that, under an objective approach, would be required to perform such activities (cf. Jansen 2003, 254 sq.).

Gaius thus nominally remains on the basis of liability for *culpa*. When taking a closer look at the consequences, however, Gaius stresses the limits of this

model: *culpa* may lie even if the tortfeasor could not have acted otherwise in the specific situation. In this case, he is merely held liable for having brought himself in that situation without necessity. When Gaius recurs to *aequitas* in this context, he primarily argues that such an understanding of *culpa* does not seem unfair in respect to the tortfeasor: there is an objective defect in the tortfeasor's sphere, and so he is held liable if this defect has resulted in damage to third parties.

Of course, one may also see this the other way round from the injured party's point of view: why should, one is inclined to ask, the individual capabilities of the tortfeasor concern the injured party? If someone undertakes a certain activity, he must also guarantee that he has sufficient knowledge and skills. Such a guarantee may be obvious in contract law. Hence, this idea can also be fruitful in tort law. The tortfeasor is held liable for a lack of knowledge and skills not only vis-à-vis his partner in contract, but also vis-à-vis the public in general (cf. Jansen 2003, 254 sq.). This is intended to avoid endangering the public, especially in connection with activities involving enhanced risk.

3.

Let us take a closer look at the *Res cottidianae* of Gaius. Modern research considers the *res cottidiane (sive aurea)* to be an expanded and deepened version of his institutions (Nelson, Manthe 2007, 88 sqq.). It is therefore obvious that the *Res cottidianae* also serve primarily didactic purposes. In this work, Gaius presents a group of *obligationes quasi ex maleficio.* As a teacher, he summarizes a series of obligations that resemble torts, but in some respects deviate from the basic conception of the tort. A key to the understanding of the *obligationes quasi ex delicto* lies in *culpa*.

> Gaius (3 rer cott) D. 44.7.5.5 (= Lenel, Pal 506)
> *Is quoque, ex cuius cenaculo (vel proprio ipsius vel conducto vel in quo gratis habitabat) deiectum effusumve aliquid est ita, ut alicui noceret, quasi ex maleficio teneri videtur: ideo autem non proprie ex maleficio obligatus intellegitur, quia plerumque ob alterius culpam tenetur ut servi aut liberi…*
>
> Also a person from whose upper floor (whether it is his own or a hired place or even one in which he is living rent free) something has been thrown or poured down with the result that it caused harm to another is regarded as liable in quasi-delict; but because generally here he is liable for the fault of another, either of a slave or a child, he is not properly considered to be liable in delict. (Watson 1985, 643)

According to this text, the person from whose apartment something has been thrown or poured out into the street, is liable under the *actio de effusis vel deiectis* regardless of whether or not he is the perpetrator (Wołodkiewicz 1968, 372; Wittmann 1972, 64). This decouples liability from any specific fault on the

part of the owner of the apartment. The person who lives in the apartment is liable solely because he exercises control over the apartment from which the danger arises (Zimmermann 1992, 313). It seems to be irrelevant whether he actually could have prevented the damage. On the contrary, it is irrefutably presumed that the person living in the apartment exerts a certain degree of control, and the blame is put on him for any deficiency of this control. In this respect, it seems justified to hold that person even liable for fault of a third party here. Elsewhere, Gaius explains this from the perspective of the injured party: *Cum sane impossibile est scire, quis deiecisset vel effudisset* … In individual cases, it will be difficult to determine which person actually threw or poured something out of the window (Gaius [3 ad ed prov] D. 9.3.2 [= Lenel, Pal 135]). If one holds the person liable who actually controls the apartment, the injured party can determine the addressee of his liability claims rather easily (Ankum 2003, 18).

There is according to Gaius another quasi-delict which displays a similar legal conception:

> Gaius (3 rer cott) D. 44.7.5.6 (= Lenel, Pal 506)
> *Item exercitor navis aut cauponae aut stabuli de damno aut furto, quod in nave aut caupona aut stabulo factum sit, quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium, sed alicuius eorum, quorum opera navem aut cauponam aut stabulum exerceret: cum enim neque ex contractu sit adversus eum constituta haec actio et aliquatenus culpae reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur.*
>
> The man who runs a ship or an inn or a stable is regarded as being liable in quasi-delict for damage or theft which has been committed on the ship or in the inn or stable, provided that there was no wrongful act on his part but on the part of one of the persons through whose work he ran the ship or the inn or stable; for since this action has not been established against him on the basis of contract, yet because he used the services of bad men, he is in some degree guilty of fault, and, consequently, he is held to be liable in quasi-delict. (Watson 1985, 643)

In the context of quasi-delicts, the recourse to *culpa* appears again in analogous actions for theft or damage to property against shipowners, innkeepers or stable owners. These entrepreneurs are held liable for such acts regardless of their own fault (cf. Gröschler 2002, 77 sqq.; Klausberger 2013, 207). Gaius justifies this with the fact that these entrepreneurs are, in a sense, charged with fault (*culpa*) because they use the services of bad people. Here, too, fault is irrefutably presumed in the quasi-delictual liability (Gröschler 2002, 111 sq.). Fault is somewhat typified, similar to the figure of *culpa in eligendo* ("fault of selection"; cf. MacCormack 1971, 525 sqq.; Tritremmel 2020, 150 sqq.) or *culpa in vigilando* ("fault in supervision"). That keeps liability in the common frames insofar as fault is not completely waived (cf. Mattioli 2010, 196 sqq.). When one looks at the consequences of this typified *culpa*, however, this goes far beyond individual *culpa*.

Regarding the social background, one will assume that shipowners, innkeepers and stable owners were of a dubious reputation in ancient times.

However, towards them or their staff the assets of the travellers were exposed and by this way an increased risk of theft or damage arose (Wicke 2000, 88; Mattioli 2010, 211). If a traveller's property gets harmed, he therefore should be able to claim directly against the entrepreneur and not have to settle for tort claims against the auxiliary person. Furthermore, it is the shipowner, innkeeper or stable owner who employs assistants. In doing so, he extends his economic radius of action, but also creates additional sources of danger for the property of the passengers. The entrepreneur, therefore, is not supposed to receive only the benefit of the use of assistants and pass on the risks to the public. Rather, these risks are absorbed in the quasi-delict liability and passed on to the entrepreneur.

These spotlights on tort law show Gaius stretching the concept of individual fault in several ways. Thus, a muleteer is not allowed to plead lack of knowledge or skill; rather, he is already reproached for having undertaken an activity which he is not capable to perform properly. An activity that is fraught with danger therefore also entails an increased standard of care. All this takes place within the interpretation of the *iniuria*-criterion of the *lex Aquilia*. In addition, the praetor reacts with the quasi-delicts to certain sources of danger (Zimmermann 1990, 17 sq.); here, in the final effect, an unconditional obligation to vouch for the behaviour of others is introduced. This approach can be explained by the special dangerous situation to which the praetor reacts by introducing special liability elements.

4.

Finally, let us take a look at contract law. In contrast to tort law, contract law has a specific structure insofar as only the contracting parties are bound to each other by the *vinculum iuris*. Torts, on the contrary, establish rules of behaviour vis-à-vis the general public. Moreover, in the *bonae fidei iudicium*, the concept of good faith (*bona fides*) is added as a general standard. Nevertheless, as we will see in a moment, there can be a reciprocal influence of contract and tort law.

In his commentary on the Provincial Edict, Gaius discusses a case related to the liability of the borrower:

> Gaius (9 ad ed prov) D. 13.6.18.pr (= Lenel, Pal 208)
> *In rebus commodatis talis diligentia praestanda est, qualem quisque diligentissimus pater familias suis rebus adhibet, ita ut tantum eos casus non praestet, quibus resisti non possit, veluti mortes servorum quae sine dolo et culpa eius accidunt, latronum hostiumve incursus, piratarum insidias, naufragium, incendium, fugas servorum qui custodiri non solent. Quod autem de latronibus et piratis et naufragio diximus, ita scilicet accipiemus, si in hoc commodata sit alicui res, ut eam rem peregre secum ferat: alioquin si cui ideo argentum commodaverim, quod is amicos ad cenam invitaturum se diceret, et id peregre secum portaverit, sine ulla dubitatione etiam piratarum et latronum et naufragii casum praestare debet…*

> The standard of care to be adhered to in relation to things lent for use is that which any very careful head of family keeps in relation to his own affairs to the extent that the borrower is only not liable for those events which cannot be prevented, such as deaths of slaves occurring without fault on his part, attacks of robbers and enemies, surprises by pirates, shipwreck, fire, and escape of slave no usually confined. What is said about robbers, pirates, and shipwreck is to be understood as applying only to the case in which something is actually lent to someone to take to distant parts. It is different where I lend silver to someone because he says he is giving a dinner party for his friends, and he then takes it off on a journey. For in that case without a shadow of doubt, he must answer for disaster due even to pirates, robbers, or shipwreck. (Watson 1985, 406)

Someone has lent silver so that the borrower can use it at a banquet for friends. However, the borrower takes the silver on a journey. During the journey it is lost through shipwreck or robbery. At the beginning, Gaius mentions the general standard of liability in *commodatum*: the borrower is usually liable for the care of a *diligentissimus pater familias*. One may find the reason for this broad standard of liability on the part of the borrower in the fact that the borrower fully benefits of the use of the borrowed item without having to pay any fee in return. The borrower's liability gets limited only in cases of force majeure (Cardilli 1995, 502). That would be for instance the case of loss by shipwreck or robbery. Gaius nevertheless holds the borrower in this specific context liable for such events, which are generally assigned to *casus* (chance).

The reason for this lies in the contractual limitation to the right of use. If the borrower is only allowed to use the silver for hosting a banquet, taking it on a trip is not covered by the contract. In addition, the silver is exposed to a significantly higher risk compared to the use in accordance with the contract (Rundel 2005, 73 sq.). If this increased risk will strike, the borrower will be held liable.

For such a liability, the term *versari in re illicita* was established in the Middle Ages and in modern times. Whoever moves on forbidden grounds, all consequences of that forbidden behaviour are attributed to that person and will make that person liable (Altmeppen 2009, 13 sq.). This imputation also concerns events that seem accidental when considered isolated from the respective context. In this respect, the principle that there is no liability for accidental events seems to be broken.

The example of the borrower who takes the borrowed silver with him on a trip is brought into discussion by Gaius in another setting. In the *Res cottidianae* he states that the borrower is also liable for chance if fault (*culpa*) was involved regarding the chance:

> Gaius (2 rer cott) D. 44.7.1.4 (= Lenel, Pal 498)
> *[…] Sed et in maioribus casibus, si culpa eius interveniat, tenetur, veluti si quasi amicos ad cenam invitaturus argentum, quod in eam rem utendum acceperit, peregre proficiscens secum portare voluerit et id aut naufragio aut praedonum hostiumve incursu amiserit.*

> But in the majority of cases, he is liable if negligence on his part occurs, for example, if, when proceeding abroad, he wished to take with him silver which he had received for the purpose that he shall be inviting friends to a dinner, and he lost it [the silver] either through a shipwreck or an attack by pirates or the enemy. (Watson 1985, 640)

> He is also liable for occurrences which could not be prevented when it was his fault that the property was lost; for instance, if anyone, having invited his friends to supper, should borrow silverware for that purpose and then, having gone on a journey and taken the silverware with him, should lose it, either by shipwreck or by an attack of robbers or enemies. (Scott 1932, 76)

Watson translates *in maioribus casibus* with "in the majority of cases," whereas Scott reads these words as an expression for force majeure. Considering the context, I think Scott is right here. When the borrower exceeds his right of use, this will as a rule fulfil *dolus* or at least *culpa*. In any case, he will be liable for any of those two criteria of liability. Having given a basis for liability, everything else seems to take place on the level of causality. If the loss of the borrowed object is the consequence of a corresponding breach of the borrowing agreement, the borrower will be held liable for that. Even if the loss is in the last consequence due to force majeure (*vis maior*), he will not be able to exonerate himself, because he is already charged with *dolus* or at least *culpa* with the transgression of his right of use beforehand (Cannata 1966, 117).

In addition, Gaius states in his *institutiones* that exceeding a contractually granted use may, at the same time, mean committing the delict of theft (*furtum*):

> Gai. Inst. 3.196
> *Itaque si quis re, quae apud eum deposita sit, utatur, furtum committit; et si quis utendam rem acceperit eamque in alium usum transtulerit, furti obligatur, ueluti si quis argentum utendum acceperit, quasi amicos ad cenam inuitaturus, et id peregre secum tulerit, aut si quis equum gestandi gratia commodatum longius aliquo duxerit, quod ueteres scripserunt de eo, qui in aciem perduxisset.*

> And so a depositee commits theft if he uses a thing deposited. A borrower of a thing for use commits theft if he puts it to another use. And so, it is theft if a person borrows silver saying that he wants it for a dinner for his friends and takes it off with him on a journey, or borrows a horse for a ride and uses it to go somewhere far away, as in the case in the old books of the horse borrowed and taken into battle. (Gordon, Robinson 1988, 379, 381)

Here, we encounter for the third time the example of the borrowed silver taken on a trip in the writings of Gaius. If someone has borrowed a thing for a certain purpose and uses this thing for another purpose, this excessive use fulfils the delict of theft (*furtum*). The borrower who exceeds his right of use is thus mentioned in the same breath with the bailee who puts the thing to unauthorized use.

If the borrower therefore commits a delict by exceeding his right of use, this may affect his contractual liability. If the borrower is liable as a thief under the *condictio furtiva* for the value of the object, irrespective of its existence, and if the *actio furti* can also be used to demand a fine for theft, it seems sensible to hold the borrower in

the same way contractually liable under the *actio commodati directa* for the value of the object as an alternative to the *condictio furtiva.*

The liability even for accidental loss of the borrowed object may thus also be explained by influences of tort law on contract law. If, in addition, the borrower's breach of contract also proves to be a delict (*furtum*), the consequences under contract law are adapted to tort law. Thus, the liability for accidental loss by the borrower also fulfils a somewhat penal function. This is intended to prevent a borrower from exposing the borrowed object to risks contrary to the contract. Here, too, the increased liability may be explained by aspects of enhanced risk.

5.

When we look back at the institutional passage cited just at the beginning, we can see that it has on the whole proved to be sensible. The principle that, as a rule, liability is only for malicious intent (*dolus*) and fault (*culpa*) would, however, tolerate exceptions. The same applies to the statement that damage inflicted without any wrong (*sine iniuria*) does not make one liable for compensation. This was not quite correct even in the time of Gaius. The noxal liability of the animal owner was later understood by Ulpian as liability without unlawful conduct (*sine iniuria facientis*). For, according to Ulpian: an animal cannot wrong itself because an animal cannot act rationally (Ulpian [18 ad ed] D. 9.1.1.3: *nec enim potest animal iniuria fecisse, quod sensu caret*; cf. Zimmermann 1990, 1097).

Why do not we find any references to this in the institutions? Apart from the problem of historical tradition, one must keep in mind the situation of Gaius as a teacher of law. In teaching law, students expect catchy statements rather than a casuistic thicket. Incidentally, this observation is not limited to the ancient world. Anyone who accompanies first-year students year in and year out through the introductory phase of their studies will experience this expectation permanently.

The at first sight categorical formulation *is iniuria autem occidere intellegitur, cuius dolo aut culpa id acciderit* ("he kills unlawfully, by whose *dolus* or *culpa* this has happened") must therefore be seen against the background of its didactic goal. The fact that Gaius himself saw the problem in a more differentiated way is evidenced by the other excerpts from his work. Thus, Gaius appears to be a role model even for our modern times: on the one hand, he proves to be a clear teacher, and, on the other hand, also a differentiating practitioner of law.

BIBLIOGRAPHY

Altmeppen, Holger. 2009. "Versari in re illicita." In *Festschrift für Rolf Knütel.* Edited by Holger Altmeppen, Ingo Reichard, Martin Schermaier. 13–34. Heidelberg: C.F. Müller.

Ankum, Hans. 2003. "L'édit du préteur *de his qui deiecerint vel effuderint*." *Studia Iuridica* 41: 7–26.

Cannata, Carlo Augusto. 1966. *Richerche sulla responsabilità contrattuale nel diritto romano*. Milano: Giuffrè.

Cardilli, Riccardo. 1995. *L'Obbligazione di "praestare" e la responsabilità contrattuale in diritto romano*. Milano: Giuffrè.

Cardilli, Riccardo. 2014. "Gestione empirica dell'imputazione e 'culpae adnumeratio' nella riflessione dei giuristi romani." *Index* 42: 299–330.

Gordon, William M., Olivia F. Robinson. 1988. *The Institutes of Gaius. Translated with an Introduction*. Ithaca (NY): Cornell University Press.

Gröschler, Peter. 2002. *Actiones in factum – Eine Untersuchung zur Klage-Neuschöpfung im nichtvertraglichen Bereich*. Berlin: Duncker & Humblot.

Jansen, Nils. 2003. *Die Struktur des Haftungsrechts*. Tübingen: Mohr Siebeck.

Klausberger, Philipp. 2013. "Zur Actio de damno aut furto adversus nautas, caupones, stabularios." In *Fontes Iuris*. Edited by Pierangelo Buongiorno, Sebastian Lohsse. 205–218. Napoli: Edizione Scientifiche Italiane.

MacCormack, Geoffrey. 1971. "Culpa in eligendo." *Revue Internationale des Droits de l'Antiquité* 18: 525–551.

MacCormack, Geoffrey. 1974. "Aquilian Culpa." In *Daube Noster: Essays in Legal History for David Daube*. Edited by Alan Watson. 201–224. Edinburgh–London: Scottish Academic Press.

Mattioli, Fabiana. 2010. *Ricerche sulla formazione della categoria dei cosidetti Quasi Delitti*. Bologna: Bononia University Press.

Nelson, Hein L.W., Ulrich Manthe. 2007. *Gai Institutiones III 182–225: Die Deliktsobligationen. Text und Kommentar*. Berlin: Duncker & Humblot. https://doi.org/10.3790/978-3-428-52508-9

Rundel, Tobias. 2005. *Mandatum zwischen utilitas und amicitia. Perspektiven zur Mandatarhaftung im klassischen römischen Recht.* Münster: LIT Verlag.

Schipani, Sandro. 1969. *Responsabilità "ex lege Aquilia": criteri di imputazione e problema della "culpa."* Torino: Giappichelli.

Scott, Samuel P. 1932. *The Civil Law*. Vol. VII. Cincinnati: The Central Trust Company.

Tritremmel, David. 2020. "Vicarious Liability in Roman locatio conductio?" *University of Vienna Law Review* 4: 128–167.

Watson, Alan. 1985. *The Digest of Justinian*. Latin Text edited by Theodor Mommsen with the aid of Paul Krüger. English translation edited by Alan Watson. Philadelphia (PY): University of Pennsilvania Press.

Wicke, Hartmut. 2000. *Respondeat Superior. Haftung für Verrichtungsgehilfen im römischen, römisch-holländischen, englischen und südafrikanischen Recht.* Berlin: Duncker & Humblot. https://doi.org/10.3790/978-3-428-50139-7

Wittmann, Roland. 1972. *Die Körperverletzung an Freien im klassischen römischen Recht*. München: C.H. Beck.

Wołodkiewicz, Witold. 1968. "Deiectum vel effusum e positum aut suspensum nel diritto romano." *Rivista Italiana per le Scienze Giuridiche* 22: 365–391.

Zimmermann, Reinhard. 1990. *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Cape Town: Juta & Co.

Zimmermann, Reinhard. 1992. "Effusum vel deiectum." In *Festschrift für Hermann Lange zum 70. Geburtstag am 24. Januar 1992*. Edited by Dieter Medicus, Hans-Joachim Mertens, Knut Wolfgang Nörr, Wolfgang Zöllner. 301–330. Stuttgart–Berlin–Köln: Kohlhammer.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.09

COPE Member since 2018 JM13714

*Łukasz Jan Korporowicz**

https://orcid.org/0000-0002-5725-5018

TEACHING COMPARATIVE LAW IN EIGHTEENTH-CENTURY ENGLAND: THOMAS BEVER AS A COMPARATIVE LAWYER AS EXEMPLIFIED BY HIS LECTURES ON POLISH LAW AND THE CONSTITUTION[1]

Abstract. The origins of comparative legal studies usually date back to the late 19th century. These kind of studies, however, were undertaken on a regular basis much earlier. Among the first serious adherents of the idea of comparing different legal systems was Thomas Bever. Bever was a civilian lawyer who successfully combined practice in the ecclesiastical and admiralty courts of England with Oxford's fellowship and teaching duties. In the 1760s and 1770s, Bever was teaching the Civil law course on behalf of (or independently of) the current holders of the Regius Professorship. His lectures, unique in many aspects, were crowned with a set of comparative lectures. Bever was presenting the constitutional and legal systems of several European countries, including Poland, both in historical and modern dimensions. The aim of this article is to discuss Bever's attitude towards comparative legal studies as well as to present his comparative method by reference to part of his lectures devoted to the old Polish law and constitution.

Keywords: Eighteenth-century, Oxford, Comparative law, Teaching, Old Polish law.

* University of Lodz, Faculty of Law and Administration, Department of Roman Law, lukasz.korporowicz@wpia.uni.lodz.pl

[1] The earlier version of this article was presented as a paper during the 2020 Annual Meeting of the American Society of Comparative Law, co-organized by the UCLA School of Law International and Comparative Law Program and the Transnational Program on Criminal Justice (online conference, 15–16 October 2020). This article is part of the research founded by National Science Centre (Poland) on Thomas Bever (project: "Thomas Bever's Comparative Legal Deliberations. An Analysis of the so-called *Appendix* to Bever's Oxford Lectures, Taken from the Surviving Manuscripts;" DEC-2020/04/X/HS5/00408). The author would like to thank also for all the comments regarding the subject of the article to the participants of the discussion during the abovementioned conference. In addition, author would like to express his gratitude for all the comments to Gwilym J. Owen and Richard H. Helmholz who read the article before its submission.

Received: 2.12.2021. Revised: 18.01.2022. Accepted: 17.03.2022.

NAUCZANIE PRAWA PORÓWNAWCZEGO W OSIEMNASTOWIECZNEJ ANGLII. THOMAS BEVER JAKO PRAWNIK KOMPARATYSTA NA PRZYKŁADZIE JEGO WYKŁADU O POLSKIM PRAWIE I USTROJU

Streszczenie. Zazwyczaj początki badań prawnoporównawczych datuje się na schyłek dziewiętnastego stulecia. Badania tego rodzaju prowadzone były jednak już znacznie wcześniej. Wśród pierwszych poważnych zwolenników koncepcji zestawiania różnych systemów prawnych był Thomas Bever. Był on prawnikiem cywilistą, który skutecznie łączył praktykę występując przed angielskimi sądami kościelnymi i admiralicji z przynależnością do jednego z oksfordzkich kolegiów oraz obowiązkami wykładowcy. W latach 60. i 70. osiemnastego stulecia Bever prowadził w zastępstwie (bądź równolegle do) królewskiego profesora wykład prawa rzymskiego. Jego wykłady, które były pod wieloma względami wyjątkowe, wieńczyła seria spotkań prawnoporównawczych. W ich trakcie, Bever omawiał ustrój i porządki prawne kilkunastu europejskich krajów, tak w ujęciu historycznym, jak i współczesnym. Celem artykułu jest omówienie poglądów Bevera nad temat badań prawnoporównawczych, jak również zaprezentowanie tematyki wspomnianych wykładów.

Słowa kluczowe: osiemnasty wiek, Oxford, prawo porównawcze, nauczanie.

1. THOMAS BEVER – BIOGRAPHICAL NOTE

Although Thomas Bever is not widely known, even among legal and legal educational historians, it is appropriate to call him one of the leading figures of Oxford's civil law faculty of the second half of the eighteenth century.

He was born in c. 1725. In that year he was baptised at the parish church of Stratfield Mortimer (Berkshire), a village in which Bever's family had resided since at least the fifteenth century (Barton 2004, 585; Helmholz 2016, 336). At first, the Bevers were tenants of the manor (its owner changed several times between the fifteenth and late seventeenth centuries), but in the time of the Restoration part of the original manor was acquired by Thomas's ancestors. It comprised other lands that they already purchased in earlier decades. In 1724, the Duke of Kent sold another part of the manor to Robert Bever (the younger). He conveyed the so-called Bever House to his younger brother, Thomas, the father of Thomas Bever – the civilian (Ditchfield, Page 1923, 425). This short family background demonstrates that Bever came from a well-to-do, landed gentry family. It is interesting, however, that up to Thomas's matriculation in Oxford, none of the Bever family was studying in any of the two English universities.

Bever's intellectual abilities manifested themselves early. In 1736 he became King's Scholar at Eton College (Austen-Leigh 1927, 30). After spending eight years there, on 16 May 1744 he matriculated at Oriel College, Oxford. After four years, he obtained a bachelor's degree in arts and after that he obtained a fellowship at All Souls College and started to study civil law. In 1753 he obtained a bachelor of civil law degree and in 1758 he was awarded a doctoral degree (Foster 1888, 105).

Shortly later, he applied to be admitted to the College of Advocates, known as the Doctors' Commons. His admission took place on 21 November 1758 (Squibb 1977, 193). However, unlike most of the civilians who became practitioners, Bever did not resign from his fellowship at Oxford.

While spending time in Oxford, Bever was eagerly involving himself in different library-related works. This was probably connected with his bibliophile attitude. He was a collector of many books as well as music scores (Eggington 2014, 86–87, 253–254; Boden 2016, 237). In the 1750s, he was responsible for cataloguing part of the collection of Codrington Library. From 1763 to 1780, he was a member of the Library Committee of the College (Chateris 2000, 179–180). In addition, his civilian training was used also by the University. Between 1758 and 1759 Bever was an assessor of the University's Chancellor's Court and he was temporarily replaced by William Blackstone (Prest 2008, 120, 4).

The most important of all the academic activities undertaken by Bever, however, was his lecturing of civil law after 1762. This was not his first didactical duty. A year earlier, Bever along with Robert Vansittart was listed by Blackstone to deputise for him in reading his common law lectures (Prest 2008, 161). As to the civil law lectures, Bever was not appointed Regius Professor, but he started to fulfil most of the professor's duties. The circumstances that led to open this new course are briefly explained in the printed version of Bever's introductory lecture. It was proclaimed that Bever received an approbation to teach civil law from Robert Jenner, the Regius Professor, as well as receiving formal permission from the Vice-Chancellor of the University. It was pointed out that Jenner's ill health rendered him unable to deliver the lectures to the civil law students (Bever 1766, *Advertisement*). It seems that Bever's lectures were meant to be a temporary remedy. This may explain why Bever never became a deputy professor of civil law and the course remained a private one (Barton 1986, 598).

Archival queries demonstrate that he was teaching civil law both in the 1760s and in the 1770s. The latest confirmed academic year of Bever's teaching is the year 1772/1773.[2] It cannot be ruled out, however, that the lectures were continued in the following years too. It is worth noting that at least since 1767, the original excuse for Bever taking the course could no longer be made. In that year Robert Jenner died and the Regius professorship was entrusted to Robert Vansittart. There is not much reliable information regarding Vansittart's teaching habits. It is not clear if Bever was continuing his lecturing on behalf of the new Regius Professor or alongside him.

Besides his fellowship in All Souls College and membership of Doctors' Commons, Bever was also involved in other non-academic tasks. The analysis of different registrars and published records show how absorbed in work he

[2] The so-called Edinburgh manuscript of Bever's lectures was written down in academic year 1772/1773.

was, especially in the final two decades of his life. As early as 1770 Bever was fulfilling only one ecclesiastical function – he was an Official to the Archdeacon of Oxford (*The New* 1770, 43). This did not change in the following years (*The New* 1776, 42), but suddenly in 1779, *The Royal Kalendar* certifies that Bever was involved in numerous different works. He was Commissioner to the Archdeacon of Huntingdon, judge of the Cinque Ports, Chancellor of Bangor, Commissioner to the Dean and Chapter of Westminster as well as Official to the Archdeacon of Oxford (*The Royal Kalendar* 1779, 107). In 1783, he was appointed Official to the Archdeacon of Nottingham ("Personnel"). Since the late 1780s, Bever was also performing the duties of the Chancellor of Lincoln (Beatson 1788, 145). In 1789 he is named as the Commissary of the Royal Peculiar of St. Catherine's church and hospital (*The Royal Kalendar* 1789, 200).

It is not clear why Bever suddenly started to be involved in so many extra-academic works. He did not resign from his fellowship at All Souls College. It is possible that at that time he ceased to teach civil law, but it is not clear whether this was the result of the increasing number of extra-academic duties.

Bever left behind numerous narratives, but only some of them were published. Among them, it is necessary to enumerate first the 1766 edition of his introductory lecture entitled *A Discourse on the Study of Jurisprudence and the Civil Law*. The work, however, was not technically an introductory lecture, but rather a general synopsis of the lectures' content. For this reason, the work seems to be a bit chaotic and was harshly received by the critics (*The Critical* 1766, 470). In 1781, a book entitled *The History of the Legal Polity of Roman State* was published. It seems that at least some parts of that book were reused lecture materials used by Bever. Besides these two printed works, a substantial number of his manuscripts survived until modern times. Most of them can be found in All Souls College. They include lecture notes, short works on the history of feudal and canon law, a question and answer manuscript that contains the questions derived from one of Puffendorf's treatise and Bever's responses to them (Coxe 1842, 34). Additional manuscripts survived in other British archives and libraries: Law Society (London), British Library, Trinity Hall (Cambridge) and Edinburgh. Some of Bever's manuscripts, however, were lost. One of his biographers noted that during his final illness, he destroyed some manuscripts by throwing them into the fire (Chalmers v 1812, 195).

In the obituary note published in *The Gentleman's Magazine*, it was only pointed out that he died at his house in the Doctors' Commons on 8 November 1791 "after a short illness" (*The Gentleman's* 1791, 1068). More elaborate information regarding the causes of his death was presented by Alexander Chalmers who noted that Bever died because of asthmatic problems. The biographer admitted, however, that the illness "probably would not then have been fatal, if he had suffered himself to be removed from London to a less turbid air" (Chalmers 1812, 195). Bever was buried in his hometown parish church (*Ibidem*).

2. THE LECTURES

As has been mentioned, since 1762 Bever was delivering a course of lectures devoted to civil law studies. There is no doubt that at least in the first few years he was doing this on behalf of Robert Jenner who permitted Bever to deputise for him. Nonetheless, Bever's lectures were never transformed into public ones. It is possible that the reason for that related to Bever's double life as a member of the academic community as well as that of a legal practitioner. Surviving syllabuses and teaching calendars of Bever's lectures support that supposition. They clearly show the atypicality of the course. The very first of Bever's lectures started on 10 May 1762 (Edinburgh Dc. 4.25, title page). In 1764, the course of lectures began on 14 May and lasted until 2 July (The Newberry). In 1765, the same lecture started on 21 May (Sprigge 2017, 86). The information regarding the academic year 1772/1773 is even more peculiar. The course was divided then into two parts. The first part commenced in October, but after only one month, the classes were suspended until March. From 2 March until Easter (11 April 1773), Bever was delivering the second part of his lectures. It is certain that these odd arrangements were down to Bever's other activities beyond that of the University.

The overall course comprised more than thirty individual classes. In 1764, there were thirty-one regular lectures and one additional lecture known as the "Appendix." The number of reading days in a single week differed – from three to five (The Newberry). In the academic year 1772/1773, the overall number of lectures increased to thirty-six ordinary classes and three additional ones that bear the name "Appendix."

The lectures were also unusual because of their content. Typical English civilian lectures were based on Justinianic sources. In the previous centuries and in the early eighteenth century, most of the Regius Professors were analysing certain titles taken from the *Digest* of Justinian. It seems that many of them interlaced those titles with their canonical counterparts. In Bever's time, more common practice was to base the lecture on the pattern of the *Institutes*. This was a kind of simplification. The *Institutes* were the book of the bachelors of civil law – newly established bachelors were entitled to teach the content of this Justinianic textbook (Griffiths 1888, Tit. IX, sec. 5, § 6–7). In the case of Bever, however, neither model was used.

Bever divided his lecture into three general parts. The first one can be described as the closest to the usual Roman civil law lecture. Bever divided the first part into several sections – starting with the "Introduction" (known also as "Preliminaries historical and moral"), then he moved to the "Objects of Law," "Ways of Acquiring Property" and "Of Civil Injuries, to Person and Property." The categories of persons and property loosely refer to the Roman categories of *personae* and *res*. While the law of persons was presented in a typical way, the

category of property is the mixture of the law of things, law of contracts and modes of acquiring property. The overall character of these subjects and the way in which they were presented by Bever suggests his dependence on Blackstone's *Commentaries*. It is also characteristic that Bever avoided procedural issues. The second part of the lectures was entitled "Political Law." This part is not traditional at all. Bever dealt there with the constitutional ideas, forms of government as well as prerogatives of the authorities. It was constructed as a learned discussion about constitutional theory. Its linkage with the traditional civilian lecture seems to be only historical. Indeed, the civilian sources were heavily reinterpreted by the medieval and early modern jurists who were building their constitutional theories on the experience of ancient law. In the end, Bever was presenting the subjects assembled under the title "Public Law." This was the shortest of all three parts of his lectures. They were planned as a short introduction to some general concepts of international relations and law. As in the case of "Political Law," the civilian context of the deliberations seems to be mainly historical.

After these three ordinary parts, Bever was familiarising his students with the so-called "Appendix." In this additional part, he was presenting a brief legal and constitutional history of different European countries. During these final lectures, Bever was transforming, and he was entering into the shoes of the true legal comparatist. This fact deserves a bit of a broader explanation. The attitude of Bever presented during the last part of his lectures was very unusual. Comparative legal studies did not exist at that time. In fact even today most of the representatives of the theory of comparative law place the origins of the comparative method in the 19th century and the true development of it in the last decades of it (Heutger and Schrage 2006, 512).

Manuscripts of Bever's lectures survived until modern times in several forms. As has already been mentioned, his lecture notes can be found in All Souls College together with the remaining manuscripts attributed to Bever. In Trinity Hall, Cambridge there is a set of several lectures under the general title "Bever Civil Law" (Trinity Hall, MS 41). The bound volume contains the notes of four consecutive lectures: 10. *Persons*, 11. *Family status. Husband – Wife*, 12. *Origin and Return of Property* and 13. *Occupancy*. The authorship of the notes is unclear. Inside the manuscript, it is possible to spot the inscriptions of John Coxe Hippisley, a civilian who was matriculated at Hertford College in 1764 (Blacker 1891, 10). It is likely that he was the author of at least part of the notes, but the manuscript had been written by several other hands as well ("Law Lectures"). The third copy of the lectures is currently in possession of the archives of the University of Edinburgh. This seems to be the latest version of the lectures, written down in the academic year 1772/1773 by an author who used the initials "P.S." All the notes were collected in five volumes (Edinburgh Dc. 4.25–4.29).

3. COMPARATIVE APPROACH

As has already been shown, Bever's lectures were far from the typical civilian academic course. However, it must be emphasised that in the eighteenth-century Oxbridge civil law professors were allowing themselves freedom regarding the content of their lectures. By way of example, Francis Dickins, Professor at Cambridge, was treating medieval canon law as a continuation of the ancient Roman law, while Robert Jenner and French Laurence, both of Oxford, were much more focused on the law of nations.

In the case of Bever, the most conspicuous feature of the lectures is the comparative approach. The above-mentioned "Appendix" seems to be a kind of "icing on the cake" of the lectures. After weeks of teaching civil law, constitutional theory as well as the law of nations, Bever was introducing his students to the diverse world of legal systems of continental (mostly) Europe. It might be suggested that the three parts of the ordinary lectures can be described as the course of a general jurisprudence while the "Appendix" was designed more as an illustration of practical jurisprudence.

The number of reading days devoted to the comparative lectures increased between the 1760s and the 1770s. The course syllabus from 1764 provided only one lecture of the "Appendix." The course of lectures delivered in the academic year 1772/1773, instead, provided three separate reading days. What is even more important is the number of the legal systems discussed increased only slightly – by two. It means that Bever significantly increased the information about the various countries and their law.

In the latest version of the lectures, Bever was discussing fifteen different legal and constitutional systems. Some of them related to a single country, but the others were amalgamations of legal systems of certain territories. The above mentioned fifteen headings were: (1) the German continent, (2) France, (3) Italy states, (4) Spain and Portugal, (5) Poland, (6) Prussia, (7) Sweden, (8) Denmark, (9) Russia, (10) Turkey, (11) Scotland, (12) Ireland, (13) England, (14) Holland and (15) Switzerland.

Such enumeration of states is reminiscent of the content of the book written a century earlier by another English civilian – Arthur Duck. In his 1653 treatise *De Usu et Authoritate Iuris Civilis Romanorum in Dominiis Principium Christianorum*, Duck also discussed extensively fifteen legal systems: (1) states ofthe German Empire, (2) Italian states, (3) the kingdom of Naples and Sicily, (4) France, (5) Spain, (6) Lithuania, (7) England, (8) Switzerland, (9) Scotland, (10) Poland, (11) Hungary, (12) Denmark, (13) Sweden and (14) Bohemia (Helmholz 2015, 215–220; Marzec 2015). It can be assumed that Bever knew about Duck's work, and he could use it as a certain starting point for his comparative deliberations. It is necessary, however, to note several important

differences. First, Duck had a different aim in presenting these legal systems. He was predominantly focusing on the primary aim of his work, clearly stated in book's title, "the use and the authority of the Roman civil law." Therefore, Duck was talking about the legal and political systems of different states, and he was seeking the civilian traces in them. Bever, instead, was focusing on the general concept of law and constitution of the discussed countries. Civilian tradition was not omitted by him, but it was only part of the larger picture. Another difference is also connected with the aim of Duck's work. He emphasised that he was interested in the "Christian kingdoms" of Europe. This explains the lack of Turkey in his work. Instead, Bever was not introducing such limitations.

4. BEVER'S VIEWS ON POLISH LAW AND CONSITUTION

To explain more clearly the method used by Bever it would be best to focus on one of the kingdoms that he discussed in the "Appendix." It seems that Poland (Edinburgh Dc. 4.29, 131–135) might be a good example for several reasons. First Polish legal and constitutional systems were much different from the English eighteenth-century experience. The distance, social and religious differences made Poland a rather exotic subject for the discussion. It must be admitted that some Polish-British relations existed in the 1760s and 1770s due to the Anglophilia of Polish king Stanisław August Poniatowski, but in comparison to long-standing diplomatic relations between Great Britain and the Western European countries, Polish-British relations were not strong. Finally, the Polish example is interesting also because of the lack of substantial English language literature on Polish law, constitution, and its history.

Bever started his lecture by referring to the ancient history of Eastern Europe. He explained what kind of nations lived "beyond the Danube." In his opinion, a common name for those was Sarmatia. His deliberations on this subject were a mixture of semi-mythical stories repeated by many authors since the times of the Ancient Greeks.

According to Bever, in the early medieval period, the entire area of Eastern Europe was left by the ancient tribes who moved to the south and they were soon replaced by the eastern nation known as "Polaey." The term used by Bever was most unusual (though it appears in some eighteenth- and nineteenth century works). Bever used the term to describe one of the Slavic groups, the Polans, who were the ancestors of the future Polish nation. Bever's early history of Poland is far from perfect even in comparison to other early-modern historiographical descriptions (at least several of these works were easily accessed by Bever; some of them of English origin, some others of continental origins but translated into English). After a short introduction, Bever moved swiftly to the history of late medieval Poland, the creation of the kingdom and its development. It is

characteristic that Bever did not consider the passage of time as vital for his discussion. For him, Polans became suddenly Poles; the tribal organisation of the Polans appeared to be equal to the feudal organisation of the Polish state etc. Bever was also eager to make a fanciful comparison between Polans and their early family (tribal) organisation and the Scottish clans or the Irish septs.

Regarding the law and constitution, Bever noticed that at first the Kings had unlimited powers, but they were steadily restrained by the local feudal lords. Again, the picture seems to be achronological. His description is based more on Polish sixteenth and seventeenth-century reality than the medieval one. Bever acknowledges however the legislative achievements of Casimir the Great (1310–1370) who enacted the first semi-codification of Polish law (*Piotrków-Wiślica* statutes). As to the later kings, Bever noticed only that the statutes "were improved by several succeeding Princes, especially Sigismund II" (1520–1572). This general statement summarised almost two centuries of rather intense political changes and reforms about which he remained silent.

In a later part of the lecture, Bever focused mainly on the constitutional history of Poland in the early modern period. He discussed the end of the Jagiellonian dynasty (1572) and the election of the new king – Henry of Valois who eventually escaped from Poland in 1575 to become a king of France. He mentioned also the establishment by Stephan Báthory of permanent "tribunals for the regular distribution of justice." This time Bever's knowledge was accurate. The tribunals he mentioned were the Crown Tribunal (for Poland) and the Lithuanian Tribunal, both established respectively in 1578 and 1581 by Báthory. The tribunals were designed as the supreme appellate courts for Polish and Lithuanian nobility (Stone 2001, 187–188).

The final part of the lecture was devoted to the current political situation in Poland. Bever was aware of what was happening in Poland at the time. He was very fond of the reforming attempts of Stanisław August Poniatowski. He contrasted Polish national defects (that he extensively described earlier in his lecture) with Poniatowski's virtues as the monarch. It seems that Bever was fully aware also of the political events of the ongoing first partition of Poland that took place later in 1772 (see Lukowski 1999, 52–81). He speaks about the partition and Poniatowski's position in the following way: "he [i.e. the king] has now the mortification to see his dominions parcelled out, and torn off, by an insolent association of three powerful neighbours" (Edinburgh Dc. 4.29, 135).

It is hard to estimate what kind of literary sources Bever used to demonstrate the legal history of Poland to his students. In the lecture notes, it is possible to find only two clear references to the literature. Bever refers to the printed memoirs of Frederick II of Prussia. Their English translation had already been published in England in 1751 (*Memoirs* 1751). They are, however, hard to accept as a source of knowledge about the law. Bever proclaimed also that the Polish historians "are generally very mean and contemptible." The only exception, in his opinion, was

Gotfryd Bogumił Lengnich. Bever mentioned two of his books. Further references to their content and the circumstances of their publications raise the question of whether he read them. Some fragments of the lecture seem to resemble Samuel Puffendorf's comments regarding Polish history gathered in the treatise translated into English under the title *An Introduction to the History of the Principal Kingdoms and States of Europe* (Puffendorf 1719, 303–328).

Regarding king Poniatowski, it is possible that Bever was consulting someone who personally knew the king – "from the accounts given of him by those who well known him" (Edinburgh Dc. 4.29, 134). This assumption cannot be treated as an exaggeration. It seems that Bever was a well-connected man who spent much time in London where he could meet many people from political and diplomatic circles. At that time, the Polish and Lithuanian Commonwealth finally had stable diplomatic relations with St James's Court. The Polish ambassador, Tadeusz Burzyński, obtained an honorary doctoral degree in civil law from Oxford University in July 1771 (Foster 1888, 105). In addition, Burzyński was rather an active representative of the Polish cause in England. He was visiting the Earl of Rochford – Secretary of State for the Northern Department. It is rumoured also that Burzyński was interested in studying English law, and for this reason he was in contact with Lord Mansfield (Konopczyński 1947, 111). Even, if that statement is an exaggeration there is no doubt that Burzyński was a well-known person in London and the whole of England in the late 1760s and early 1770s.

Besides, it cannot be forgotten that Poniatowski was an Anglophile who travelled to England in 1754 and who liked to refer to the British constitutional example in his reforming programs (Butterwick 1998, *passim*, especially 102–123). It is known also that the king was exchanging correspondence with the members of the York family (especially Lord Chancellor Hardwicke's son) and Lord Mansfield (Butterwick 1998, 124–125; Poser 2013, 144). These contacts were not secret. Public opinion seems to know about them. All of this may explain Bever's uncommon worship of the Polish king – "[W]ith qualities that render him worthy of the most flourishing Crown in the universe" (Edinburgh Dc. 4.29, 135).

5. CONCLUSIONS

The life story of Thomas Bever is quite unusual in comparison to other English civilians of the second half of the eighteenth century. He lived a double life of the Oxford don and ecclesiastical law practitioner. Also, the civil law lectures that he delivered to Oxford students in the 1760s and 1770s were far from ordinary. Bever was willing to enter the world of comparative legal studies that at the time were still in their infancy. The comparative approach he brought to the lecture hall must be viewed as a serious and unprecedented step (at least concerning the scale of the enterprise). It is true that Bever followed the steps of some great English

civil lawyers who were willing to admit that legal comparisons are important (e.g. Duck and George Harris[3]). His predecessors, however, limited the sharing of their knowledge to readers of their books. Bever, instead, shared that knowledge with Oxford's students.

The importance of that event is not diminished by Bever's crude and unmethodical approach to comparative law. It is true that, at least in regard of Poland, Bever was repeating some general ideas that may not always be recognized today as scientific. His method was more descriptive than comparative. Nevertheless, the task that he undertook was a fresh approach that ultimately may be treated as an introduction to much more elaborate English jurisprudence that developed in the nineteenth century.

BIBLIOGRAPHY

Austen-Leigh, Richard A. 1927. *The Eton College Register, 1698–1752*. Vol. 1. Eton: Spottiswoode–Ballantyne & Co. Ltd.

Barton, John. 1986. "Legal Studies." In *The History of the University of Oxford*. Vol. 5. Edited by T.H. Aston. 593–603. Oxford: Oxford University Press.

Barton, John. 2004. "Bever, Thomas." In *Oxford Dictionary of National Biography*. Vol. 5. 585. Oxford: Oxford University Press.

Beatson, Robert. 1788. *A Political Index to the Histories of Great Britain and Ireland.* Vol. 1. Second Edition. London: Printed for G.G.J. & J. Robinson.

Bever, Thomas. 1766. *A Discourse on the Study of Jurisprudence and the Civil Law*. Oxford: Clarendon Press.

Blacker, Bever H. 1891. "Hippisley, Sir John Coxe (1748–1825)." In *Dictionary of National Biography.* Vol. 27. 10. London: Smith, Elder & Co.

Boden, Anthony. Ed. 2016. *Thomas Tomkins: The Last Elizabethan*. London–New York: Routledge. https://doi.org/10.4324/9781315084794

Butterwick, Richard. 1998. *Poland's Last King and English Culture. Stanisław August Poniatowski 1732–1798*. Oxford: Clarendon Press.

Chalmers, Alexander. 1812. *The General Biographical Dictionary.* Vol. 5. New Edition. London: Printed for J. Nichols and Son.

Chateris, Richard. 2000. "Thomas Bever and Rediscovered Sources in the Staats- und Universitätsbibliothek, Hamburg." *Music & Letters* 81.2: 177–209. https://doi.org/10.1093/ml/81.2.177

Coxe, Henry. Ed. 1842. *Catalogue of Manuscripts in the Library of All Souls College*. Oxonii: E Typographeo Academico.

Ditchfield, Peter H. William Page. Eds. 1923. *A History of the County of Berkshire*. Vol. 3. London: Victoria County History. *British History Online*. Accessed 1 October, 2020. http://www.british-history.ac.uk/vch/berks/vol3

Eggington, Tim. 2014. *The Advancement of Music in Enlightenment England. Benjamin Cooke and the Academy of Ancient Music*. Woodbridge: Boydell Press.

Foster, Joseph. Ed. 1888. *Alumni Oxonienses. The Members of the University of Oxford, 1715–1886. Later Series. A–D.* Oxford: Parker and Co.

[3] About Harris and his comparative approach see Korporowicz (2021, 120–139).

Frederick II, King of Prussia. 1751. *Memoirs of the House of Brandenburg: From the Earliest Accounts to the Death of Frederick I, King of Prussia*. London: Printed for J. Nourse.

Griffiths, John. Ed. 1888. *Statutes of the University of Oxford Codified in the Year 1636 under the Authority of Archbishop Laud Chancellor of the University*. Oxford: Clarendon Press.

Helmholz, Richard. 2015. "Arthur Duck (1580–1648)." *Ecclesiastical Law Journal* 17.2: 215–220. https://doi.org/10.1017/S0956618X15000083

Helmholz, Richard. 2016. "Thomas Bever (1725–1791)." *Ecclesiastical Law Journal* 18.3: 336–342. https://doi.org/10.1017/S0956618X16000569

Heutger, Viola. Eltjo Schrage. 2006. "Legal history and comparative law." In *Elgar Encyclopedia of Comparative Law*. Edited by Jan M. Smits. 505–520. Cheltenham: Edward Elgar Publishing Limited. https://doi.org/10.4337/9781781006108.00046

Konopczyński, Władysław. 1947. "Anglia a Polska w XVIII wieku." *Pamiętniki Biblioteki Kórnickiej* 4: 93–129.

Korporowicz, Łukasz Jan. 2021. "George Harris and the Comparative Legal Background of the First English Translation of Justinian's Institutes." In *Common Law, Civil Law, and Colonial Law. Essays in Comparative Legal History from the Twelfth to the Twentieth Century*. Edited by William Eves, John Hudson, Ingrid Ivarsen, Sarah B. White. 120–139. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781108955195.005

Lukowski, Jerzy. 1999. *The Partitions of Poland. 1772, 1793, 1795*. London: Longman.

Marzec, Łukasz. 2015. *Między Rzymem, Dunajem a Murem Hadriana. Prawo rzymskie i Europa w De Usu et Authoritate Iuris civilis Romanorum in Dominiis Principum Christianorum (1653) Arthura Ducka.* Kraków: Księgarnia Akademicka.

Poser, Norman S. 2013. *Lord Mansfield. Justice in the Age of Reason*. Montreal & Kingston–London–Ithaca: McGill-Queen's University Press.

Prest, Wilfrid. 2008. *William Blackstone. Law and Letters in The Eighteenth Century*. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199550296.001.0001

Puffendorf, Samuel. 1719. *An Introduction to the History Of the Principal Kingdoms and States of Europe*. Eighth Edition. London: Printed for B. Took.

Sprigge, Timothy L.S. 2017. *The Correspondence of Jeremy Bentham*. Vol. 1. *1752–56*. London: UCL Press.

Squibb, George D. 1977. *Doctors' Commons. A History of the College of Advocates and Doctors of Law*. Oxford: Oxford University Press.

Stone, Daniel. 2001. *The Polish-Lithuanian State, 1386–1795*. Seattle and London: University of Washington Press.

Archival Sources

The Newberry, Case folio J 5454 .822 no. 20.

Trinity Hall, Old Library, MS 41.

University of Edinburgh Archive and Manuscript Collections, Dc. 4.25–4.29.

Other Sources

"Law Lectures: Object of Law, lectures 10–13 / Thomas Bever." Trinity Hall Cambridge. Accessed 7 October, 2020. https://www.trinhall.cam.ac.uk/manuscripts/law-lectures-object-lawlectures-10-13-thomas-bever/

"Personnel: Archbishops, Archdeacons, Officials and Registrars, 1560s–1894." University of Nottingham. Accessed 7 October, 2020. https://www.nottingham.ac.uk/manuscriptsandspecialcollections/collectionsindepth/archdeaconry/personnel.aspx

The Critical Review; or, Annals of Literature 21. 1766.

The Gentleman's Magazine: and Historical Chronicle 61, Second Part. 1791.

The New Present State of Great Britain. 1770. London: Printed for J. Almon.
The New Present State of Great Britain. 1776. Second Edition. London: Printed for J. Almon.
The Royal Kalendar; or Complete and Correct Annual Register for England, Scotland, Ireland, and America, For the Year 1779. London: Printed for J. Almon.
The Royal Kalendar; or Complete and Correct Annual Register for England, Scotland, Ireland and America, For the Year 1789. London: Printed for J. Debrett.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.10

COPE Member since 2018 JM13714

*Izabela Leraczyk**

https://orcid.org/0000-0003-4723-8545

POLISH AUXILIARY FORCES AND THEIR LAW ACADEMIC SCRIPTS AT THE UNIVERSITY CAMP IN GRANGENEUVE/FRIBOURG

Abstract. The soldiers of the 2nd Division of Rifle Infantry interned in Switzerland in the years 1940–1945 were offered an opportunity to undertake studies on the grounds of cooperation between war camps and Swiss academies. Among the study programs organized at the University Camp in Grangeneuve/Fribourg were studies in law. Their syllabus included subjects taught at the University of Fribourg and provided for lectures on Polish law. The aim of the article is to demonstrate the role that the law academic scripts (course materials) played in the camp. The article includes a brief explanation of what the scripts were and outlines the origin of the series entitled *Scripts of University Lectures in Grangeneuve*, later *Fribourg – La Chassotte* (*Skrypty wykładów uniwersyteckich w Grangeneuve*). They were authored, to a large degree, by soldiers themselves, together with pre-war academics based on Polish universities, graduates in law and practitioners of law. An excellent illustration of their involvement can be the script written in the winter of 1941 by Jan Świda, related to the basic institutions of Swiss inheritance law. The content of this work and the way it was prepared will be compared with the scripts created by Aleksander Mełeń and Wacław Petsch, printed in the same year.

Keywords: university camp, teaching law, studies in law, WWII, Polish Armed Forces, internment, Switzerland, academic scripts.

POLSKIE SIŁY POMOCNICZE I ICH SKRYPTY DO NAUKI PRAWA W OBOZIE UNIWERSYTECKIM W GRANGENEUVE/FRYBURGU

Streszczenie. Żołnierzom 2. Dywizji Strzelców Pieszych, internowanym w Szwajcarii w latach 1940–1945, stworzono możliwość podjęcia studiów w ramach współpracy obozów ze szwajcarskimi uczelniami. W Obozie Uniwersyteckim w Grangeneuve/Fryburgu jednym ze zorganizowanych kierunków były studia prawnicze. Ich program zawierał przedmioty wykładane na Uniwersytecie we Fryburgu, a także przewidywał wykłady z prawa polskiego. Celem artykułu jest ukazanie roli, jaką w dydaktyce prawa w obozie odegrały skrypty akademickie. Pokrótce wyjaśniono, czym były skrypty i przybliżono, w jaki sposób powstawała seria *Skryptów wykładów uniwersyteckich w Grangeneuve* (później *Fribourg – La Chasotte*). Ich twórcami, w przeważającej

* The John Paul II Catholic University of Lublin, Faculty of Law, Canon Law and Administration, Department of Roman Law, izabela.leraczyk@kul.pl

Received: 12.11.2021. Revised: 11.01.2022. Accepted: 15.03.2022.

mierze, byli sami żołnierze, przedwojenni pracownicy naukowi polskich uczelni lub absolwenci i praktycy prawa. Jako przykład ich zaangażowania posłuży skrypt przygotowany w zimie 1941 r. przez Jana Świdę, dotyczący podstawowych instytucji szwajcarskiego prawa spadkowego. Jego treść i sposób przygotowania porównana zostanie ze skryptami autorstwa Aleksandra Mełenia i Wacława Petscha, wydanymi w tym samym roku.

Słowa kluczowe: Obóz uniwersytecki, nauczanie prawa, studia prawnicze, II wojna światowa, polskie siły zbrojne, internowanie, Szwajcaria, skrypty akademickie.

I warn you against spiritual desertion, which would mean not using the whole time in your possession and failing to direct all your efforts towards acquiring the greatest amount of knowledge possible.

from the Division Commander, General Bronisław Prugar-Ketling's address, to the participants of the ceremony of opening university camps (Drobny 1973, 50)[1]

1. INTRODUCTION

Academic scripts (course materials) have a long tradition in the history of legal studies in Poland. Their popularity is especially underscored in the memories of law graduates and by the existing copies of scripts preserved in the family or institutional archives, as well as libraries. Their traces can also be found among the reference lists from various areas of legal sciences, especially with regard to the beginnings of the 20th century (Szczygielski 2020, 135–143).

The term "script" was used to refer to the materials prepared by the professors for teaching their subject, including their own notes, organized into the framework of the lecture. The authors of scripts also included professors' assistants, as well as students themselves. The content of such textbooks might have been verified and approved of by the lecturer, but it was not always the case. If they had the professor's endorsement, the distributed scripts included a note to the effect that their content was based on the lectures and that it was authorized by the lecturer (Szczygielski 2010, 359–360). A script could also be a translation of a textbook or its fragment written in a foreign language made by the lecturer. A script was perceived as a temporary, intermediate form, updated during the course of subsequent academic years and often providing a basis for a future textbook. It often happened that the only difference between scripts and regular academic textbooks lied in the way they were reproduced because instead of regular print, they were printed by means of various lithographic techniques.

The need to rely on the printed academic scripts for studying law in the first half of the 20th century was born out of the sheer lack of access to academic

[1] The official opening of the university camps took place at the turn of October and November 1940 (Matyja 2013a, 97).

textbooks. The latter were published in limited edition or it was impossible to purchase them due to financial or logistic reasons. The printing and distribution of the scripts was often organized by students belonging to academic societies active within law faculties or those belonging to "Brotherly Help" groups (Bratnia Pomoc), popular Polish students' mutual aid organizations. The profits obtained from the sale of such textbooks were then used by those organizations for financing their statutory activities.

Polish lecturers were well aware of the importance of scripts as a form of didactic aid. They also relied on it after the outbreak of WWII. Scripts were useful for studying law even when – or especially when the world around was in turmoil. They were written and read among the conflagration of war, among the realities of everyday occupation[2] or on a military bunk bed in the camp. The few preserved copies provide a testimony to those times, but they can also be seen as material for research and analysis. The aim of the present article is therefore to explore the circumstances in which the scripts originated, as they were written for special students – Polish soldiers of the 2nd Division of Rifle Infantry (2DRI), interned in Switzerland in the years 1940–1945. What is more, the content of one of those scripts entitled *An Outline of Swiss Inheritance Law* (*Zarys szwajcarskiego prawa spadkowego*) will be discussed in greater detail. The author of the script was Jan Świda[3], holding the function of research assistant in the camp.

2. THE INTERNMENT OF SOLDIERS

Upon the order of Commander-in-Chief, Gen. Władysław Sikorski of 11 November 1939, the 2DRI began to be formed[4]. Colonel Bronisław Prugar-Ketling was appointed as commander of the Division and, at the same time, he was promoted to the rank of Brigadier General. The division was sent to front lines as early as in the middle of June 1940, having been assigned just a few weeks prior to the 45th Army Corps of Gen. Marius Daillé. On 18–19 June the 2DRI fought

[2] Among the memories of people involved in conspiracy activity during WWII, one can find information about organizing underground education for the students of the Free Polish University (*Wolna Wszechnica Polska*). In 1943, People's Cooperative Publishing "Płomienie" was established in a small village of Wiśniew (at present County Siedlce), which published brochures and scripts for students of the Free University (Jońca 2020, 427). One of the publications included a study by Borys Łapicki on political systems of contemporary states. It was published as backdated to 1936. Most probably, Łapicki also published in this way scripts on Roman law and on democracy in ancient Athens (Jońca 2018, 68).

[3] Jan Świda, doctor of law, before the outbreak of WWII worked as senior assistant to Prof. Karol Lutostański at the Faculty of Law of the Józef Piłsudski University in Warsaw (Vetulani 1976, 116).

[4] The division functioned in accordance with the French organizational norms and was incorporated within the French army.

intense battles with the German forces on the hills of Clos du Doubs and although in those confrontations they managed to suppress the attacks of the enemy, Gen. Daillé ordered his forces to cross the border with Switzerland after they had run out of ammunition. A similar order was issued earlier by Gen. Sikorski, but Gen. Prugar-Ketling received it belatedly. Taking into account the above decisions, as well as the overall front situation, the Commander of the Corps and Polish Commander turned to the Swiss government asking for permission to cross the border with Switzerland by the army and to accept them for internment[5]. After the permission had been granted by the Federal Council of the Swiss Confederation, Gen. Prugar-Ketling ordered his units to cross the border (Matyja 2013a, 50–51). The situation was complicated for both the soldiers of the 2DRI and the Swiss authorities. Many years later, Aleksander Blum[6] would refer to the controversial decisions of the Swiss government in the first months after the crossing of the Swiss border by the army with a certain dose of understanding: "the first difficulties of the internment resulting from the inexperience on the side of both the interning and the internees, as well as from the strong influence of the German Embassy in Bern, were to be successfully solved with time" (Blum 1997, 93). The provisions of the Hague Convention of 1907 do not specify the rights and obligations of internees; hence a lot of the regulations were implemented analogously to the situation of prisoners of war[7]. Moreover, it was believed initially that the internment was to be merely a short, transitional state for the Polish forces.

3. STUDIES AS A REMEDY FOR BOREDOM

The policy of isolating the interned adhered to by the Swiss authorities (Matyja 2013a, 68–82; Thielmann 1998, 99–103) was soon to be faced with a very basic challenge:

[5] On behalf of the commanders, the request for internment was submitted at the Swiss border post by two officers from the 45AC and 2DRI on the grounds of the Convention of 18 October 1907 respecting the rights and duties of neutral powers and persons in case of war on land (so-called Convention V). See: Raczek (1965, 5).

[6] Captain Aleksander Blum arrived at the Fribourg camp in the second academic year of its functioning. Often described as a real hard worker, not only did he finish his doctoral dissertation under the supervision of Prof. Edward Cros and was the first internee soldier who obtained his doctoral degree in war-camp conditions, he also organized a clandestine school of infantry cadets with Gen. Prugar-Ketling's permission (Blum 1997, 113–117). A group of soldiers trained in this way decided to leave the internment camp and join the French partisans. Moreover, in 1944, Capt. Blum organized a secret training course for the French students from Fribourg for the leaders of *maquis* units – small resistance groups (Blum 1997, 136; Thielmann 1998, 117–118).

[7] Switzerland in its actions referred to the provisions of the Convention of 27 July 1929 on the Treatment of Prisoners of War, applying its articles *per analogiam* (Drobny 1973, 12–19).

> In the same way as during the internment in Romania or Hungary, also in Switzerland, it was inactivity of the soldiers that posed the greatest threat. It was followed by discouragement and weakening of the soldiers' morale, as well as conflicts and tensions in mutual relations. (Vetulani 1976, 38)

Initiatives concerning education of soldiers came from internees themselves. It was soon discovered that educational activity was one of tools with which it was possible to countermeasure the all-encompassing stagnation and resignation experienced by the interned soldiers. In this regard, Adam Vetulani's[8] determination in organizing educational opportunities for internees on both secondary school and academic[9] levels is not to be underestimated. His efforts won the approval of the 2DRI Command, Polish Embassy in Bern and the European Fund for Students' Aid (FESE). André de Blonay, secretary general of FESE, obtained permission from the Internment Commissariat (*Kommissariat für Internierung und Hospitalisierung*) to establish both the secondary school and university camps in September 1940 (Drobny 1973, 77–78). What also soon proved to be a challenge was the preparation of appropriate study curricula for different levels of education – soldiers represented a variety of educational levels, from illiterate persons, through low literacy and functional illiteracy to persons who had been pursuing academic careers at the level of doctorate or habilitation until the outbreak of the Second World War (Zaniewska 2004, 99).

Already in the autumn of 1940, three university camps were organized for the interned Polish soldiers of the 2DRI. In one of them, in Grangeneuve, operating under the patronage of the University of Fribourg[10], the faculties that started work included the humanities, law, theology, soon to be followed by natural sciences (Matyja 2013a, 97). The Internment Commissariat appointed Prof. Max Zeller as inspector of the higher education camps and his duties included military and academic supervision of the camps (Matyja 2013b, 87). The Senate of the supervising academy delegated the academic head of the camp, referred to as the rector by the soldiers. In Fribourg, it was Prof. Edward Cros, with Polish

[8] Adam Vetulani – Professor of the Jagiellonian University, Head of the Department of Canon Law in the years 1934–1939. After the outbreak of WWII at first, he was interned in Romania but he was able to get to France and together with the 2DRI remained interned in Switzerland. After the end of WWII, he returned to Poland and followed an academic career at the Jagiellonian University.

[9] Wacław Petsch and Bolesław Hupczyc undertook similar actions at the camp in Sumiswald in August 1940, where they petitioned the most important academic centres in Switzerland, representatives of Polish authorities and various organizations and academic institutions. They postulated organizing vocational courses for young people, as well as university camps in Zurich and Geneva (Petsch 1967, 118–119).

[10] The biggest university camp was the camp in Winterthur, whose activities were supported by the Federal Polytechnic School and University of Zurich. The second university camp under the patronage of the University of St. Gallen was initially located in Sirnach and then in Herisau and Gossau. The verification commission responsible for recruitment among soldiers was headed by Vetulani (Rucki 1993, 25, 28).

roots, who was appointed the first rector (Drobny 1985, 176–177). The Polish head of the camp was a dean who, together with his assistants, was responsible for the implementation of the didactic process and research work[11]. They created the pedagogical council, who was independent of the military commander of the camp in academic matters (Matyja 2013b, 90). Apart from that, the academic structure of the camp also consisted of faculty deans[12].

The beginning of the academic year was scheduled for 8 November. The lecturers starting work there were primarily Fribourg professors and assistant professors who worked at Polish higher education institutions before WWII. Student soldiers acquiring knowledge under the aegis of the University of Fribourg were allowed to participate in classes on the premises of the university only since the academic year 1941/1942 (Vetulani 1976, 133). Throughout the first year, the Swiss professors commuted to the camp to their students to deliver their lectures. They taught their subjects in French and German. The program of studies, especially prepared for the purpose of teaching law at the camp, was an amalgam of the Swiss model of studies in law and the Polish one. The authors decided on such an approach believing that the aim of the program should be primarily to educate future graduates for the purpose of serving Poland – soon, as hoped, to be free from the occupants. This is why the potential of the local professors was used, simultaneously providing students with education pertaining to Polish legal regulations[13].

The military drill was also obligatory during typically academic classes. Absence was not tolerated and treated as a violation of discipline. Notorious problems in this respect, especially combined with a lack of progress in learning were a basis for being removed from the list of the students. The program of studies

[11] Student soldiers answered to four authorities: Swiss and Polish military administration, Swiss university authorities, as well as Polish scientific authorities (Petsch 1967, 120).

[12] In the summer semester of 1941, the position of the Dean of the camp was abolished, dividing the competences between the deans of the faculties. Additionally, in August 1941, Gen. Prugar-Ketling moved Prof. Vetulani to the National Command Headquarters in Elgg. As the reason for his removal, Vetulani named exceeding the bounds of his powers (Vetulani 1976, 130). Other pointed out additionally to overwork and excessive burden of duties (Drobny 1985, 178), as well as mutual animosities and incompatibility of characters with Prof. Cros (Blum 1997, 110). He was replaced in the position of Dean of the Faculty of Law by Prof. Antoni Deryng (Drobny 1985, 179). Before the war, Deryng worked as Assistant Professor at the faculty of Law of the Jan Kazimeirz University in Lviv, and then as Professor at the Faculty of Law and Socio-Economic Sciences of the Catholic University of Lublin. He was also Member of Parliament of the Republic of Poland of the 5th term. Expert on international law. During WWII, as a civilian refugee, he settled with his family in Geneva (Staszewski 2006, 72).

[13] The subjects taught at the Faculty of Law included: history of Polish law, history of the Polish political system, Polish administrative law, local government law, criminal and substantive law, criminal procedure, Polish code of legal obligations, etc. It was assumed that the whole program of studies would last three years and would end with a degree of a Bachelor of Laws after taking appropriate examinations (Drobny 1985, 174–175).

stipulated an average of 8 hours a day of lecture and class time. During their leisure time, internees were expected to study on their own (Zaniewska 2004, 111).

Apart from gathering students, university camps brought together the intellectual elite of the 2DRI. A group of soldiers who were graduates of legal studies in Poland and who worked at Polish universities and at judiciary or governmental institutions were deployed to assist in the conducting of lectures and classes. Each of the Swiss professors was assigned an assistant, whose responsibility was to take notes during the lecture, translate them into Polish and then instruct students with the given material (Vetulani 1976, 115). For instance, Prof. Pierre Aeby, lecturing on Swiss civil law, was assigned Dr. Jan Śliwa to assist him with his work (Vetulani 1971, 3). Additionally, assistants conducted some of the classes themselves, including foreign language classes, and every fortnight they had to verify students' progress from the entire material covered, first in Polish and with time in the language of the lecture. In the military jargon they were referred to humorously as the *Polish Auxiliary Forces* (*Polskie Siły Pomocnicze*; see: Drobny 1985, 179).

4. SCRIPTS FOR TEACHING AND LEARNING LAW

Adam Vetulani, Dean of the university camp in Grageneuve in the academic year 1940/1941 wrote:

> we have soon realized that the notes taken by the students from the lectures, no matter whether delivered by the professors or assistant translators were not enough. Therefore, after a discussion with the professors, I decided that we need to start copying and distributing scripts from lectures in both Polish and lecture languages – even though as Professor of the University in Cracow, I was completely against such an approach.

In his reminiscences, Vetulani referred to the situation from the first semesters of the existence of the university, when the Swiss professors voiced their concern regarding the level of linguistic competence among the soldiers concerning the languages of the lectures. Students' linguistic problems translated into problems with understanding of the material and it consequently impacted their preparation for exams. In the opinion of internee students, "the scripts were especially useful at the time when they did not yet have direct access to Swiss academies" (Drobny 1985, 150). What is interesting, in the preface to his textbook *An Outline of Swiss Inheritance Law* (*Zarys szwajcarskiego prawa spadkowego*), Dr. Jan Świda pointed out that he undertook to prepare the script on the initiative of Vetulani himself.

The authors of scripts emphasized themselves that their content was merely didactic in their character and included notes to the effect that "this work has no pretension to be considered as scholarly study" of a problem, system or

subject. Such disclaimers would appear on the first pages of the manuscript or in the preface. Wacław Petsch[14], author of the script *International Private Law (Conflict-of-law Rules)* (*Międzynarodowe prawo prywatne [prawo kolizyjne]*), printed in 1941 under no. 24 of the series, emphasized such a clarification very adamantly. He also indicated that the script based on the lectures and studies conducted by Prof. Max Gutzwiller was written as a result of the lack of access of students to regular textbooks (Petsch 1941, I). Thus, the formula seems to be well-established, customary and it appears in almost identical words in other scripts, especially those written in the Polish language.

It is not only in the prefaces to scripts and published memoirs that the authors betray their unfavourable attitude towards such publications. Such opinions are also to be found among their private notes. The title page of a copy of the script entitled *An Introduction to Legal Studies* (*Wstęp do nauk prawnych*), written by Aleksander Mełeń[15], MA, which Wacław Petsch received as a gift on 8 July 1941, includes the following dedication:

> Dear Wacław, the world is at war… on the Swiss island of Peace, among the collapsing Europe, we are killing the emptiness of the interned life by, among others… writings scripts. Although necessary, it seems such a stupid preoccupation in the light of history taking place next to us, somewhere aside. If we happen to sit here much longer, perhaps I will be able to offer you a copy of my doctoral thesis… For the time being, please accept this "substitute," resembling a scientific study in as much as our life resembles that of a free man…

It seems clear that the assistants shared Dean's negative opinion as to this form of teaching materials[16].

The scripts were published under the title *Scripts of University Lectures in Grangeneuve* (*Skrypty wykładów uniwersyteckich w Grangeneuve*), and then *Scripts of University Lectures in Fribourg – La Chassotte* (*Skrypty wykładów*

[14] Wacław Petsch, specializing in public international law. In 1961 he received his doctoral degree at the Polish Academy of Sciences in Warsaw. In Fribourg, he assisted Prof. Max Gutzwiller in his lectures on private international law.

[15] Aleksander Czesław Mełeń-Korczyński, former assistant at the Jan Kazimierz University in Lviv. Apart from the degree in law, he also completed diplomatic studies at the Diplomatic School of the Jan Kazimierz University and received a Master's degree. After WWII, he was involved with the activities of the Polish University in Exile in London. In 1952, he became a political commentator in New York for the Radio Free Europe. He cooperated with the Józef Piłsudski Institute in America.

[16] An unfavourable attitude of the academic staff towards the scripts was clearly visible also at other camps. "It should also be noted that the Rector of the University of St. Gallen forbid the assistants to prepare scripts, taking the stance (quite justifiable, for that matter) that students of the 6th semester should already have a good command of the legal terminology to be able to take notes from the lectures on their own. In such a case, the students at the camp took it upon themselves to further work on the script" (Drobny 1985, 150). The above comment contains a somewhat inconspicuous message that contrary to the negative attitude of the staff, the students had an entirely different opinion concerning the scripts.

uniwersyteckich Fribourg – La Chassotte). Until 1943, 66 issues had been printed (Vetulani 1976, 115–116), consisting of combined 4394 pages (Drobny 1973, 54)[17]. Władysław Drobny divided them according to the following criteria: "in the Fribourg camp there were 27 individually prepared scripts, 29 scripts based on the lectures of Swiss professors, 2 publications of legal sources (codes) and 8 scripts of unknown authorship" (Drobny 1985, 150). Among the prepared materials, there was also a Polish-French-German dictionary of legal terms, written by vice-consul Dr. Tadeusz Stark, published in 1943 as no. 45 of the script series (Vetulani 1976, 118). Legal sources were also copied and distributed, among others, the Act of 2 August 1926 on the law applicable to private international law relations (Ustawa z dnia 2 sierpnia 1926 r. o prawie właściwym dla stosunków prywatnych międzynarodowych), available in the Polish, German and French language. There is no indication as to who prepared the text for printing. It is different in the case of the collection of historical and current acts, that is no. 34 in the script series, including the *Texts of Polish Constitutions* (*Teksty Polskich Konstytucji*), prepared by Jerzy Gawenda[18].

The number of the series was assigned when the script entered the circulation. It can be well observed in no. 2, that is, *An Outline of the Swiss Inheritance Law* by Jan Świda, which contains a short list of scripts after the preface. The first part concerns the issues that had already been made available – the script on the history of the sources of canon law by Adam Vetulani and the current script by Świda. The second part of the list focuses on the scripts being "in the works," such as an outline of marriage law in canon law, introduction to legal sciences, civil procedural rules, history of the sources of Roman law and an outline of Swiss family law. Further details concern the scripts "in preparation," that is, history of law in Western Europe, an outline of the history of Poland's political system and the material for the issue devoted to the relation between the state and Church (Świda 1941, 1). The phrase "in the works" seems to imply the author's work on the text itself, whereas the term "preparation" may suggest various editorial work, proofreading or the very printing of subsequent copies.

Necessarily, the process of preparing scripts for students had evolved. The first editions were drafted at express pace. As professor of the Jagellonian University, specializing in the history of canon law, Vetulani was not likely to have any problems with transferring his knowledge onto the pages of the scripts. As he remembers himself, he wrote his first works – on the history of the sources

[17] According to other calculations, the first 24 booklets totalled circa 1000 pages (Piekarski 2002, 102).

[18] Jerzy Gawenda finished studies in law at the Jan Kazimierz University in Lviv shortly before the outbreak of WWII. At the university camp in Fribourg, he worked as assistant to Prof. Max Gutzwiller. He was also president of the camp's Brotherly Help group. In 1945, he managed to obtain his doctoral degree in law. Since 1949, he served as Dean at the Faculty of Law at the Polish University in Exile in London (Mierzwa 2018, 90).

and on marital canon law – on a typewriter with as many carbon copies as he had students.

However, Świda's script was already reproduced with the use of a lithographic method and so were the subsequent issues of the booklets. Vetulani also remembered that at the beginning the whole process was to be financed exclusively by the National Culture Fund (Fundusz Kultury Narodowej)[19]; yet on the cover of *An Outline of Swiss Inheritance Law* there is a note: "printed by the Dean's Office and the Brotherly Help Committee of the University Camp in Grangeneuve"[20]. The preface to *An Introduction to Legal Studies. Part 1* is preceded by the information that the work is property of the said Committee. It suggests that the scripts might have been only lent to students for a limited period of time for studying, which would be perfectly understandable given the fact the Committee financed their printing[21]. On the other hand, the financial resources at the disposal of the Dean's Office of the camp might have come from the above-mentioned National Culture Fund.

5. AN OUTLINE OF SWISS INHERITANCE LAW

An Outline of Swiss Inheritance Law counts 30 pages. The work was written, as the author claims in the foreword, "out of the need to come to aid in the fastest possible way to our students who are preparing at the university camps to take an examination in civil law." The author refers here to the exam that students were required to pass already in February 1941. In response to the voices appearing among the Swiss professors expressing concern that the level of teaching in the camp was not on par with academic standards, the Dean of the camp, in cooperation with the lecturers, decided to organize an examination on the subject of civil law

[19] Modelled after the National Culture Fund existing in the Second Republic of Poland, an institution of the same name was established in 1939. It was Adam Vetulani who suggested such an initiative in Romania and similar activities were embarked on in France (Chmielewski 2017, 24). The main aim of the NCF was primarily to organize financial support for Polish academics and artists, working in Poland as well as outside the country's borders (Sulimirski 1961, 50). The support from the Fund played a crucial role in the shaping and functioning of Polish education in Great Britain (Radzik 1986, 43). Thanks to Vetulani's efforts, also university camps and the secondary school camp in Switzerland received small grants for scholarships for academics and literary people, as well as for other expenses connected with the educational process (Vetulani 1976, 273–276).

[20] One of the thirty copies of this work is to be currently found in the archives of the Polish Academy of Sciences. It arrived there following its owner, Wacław Petsch, for whom there are a few words of dedication from the author in the upper left-hand corner.

[21] Brotherly Help was active in each university camp. In the camp Grangeneuve/Fribourg, the group was established in 1941. The society's activities included, among others, development of intellectual and social life, mutual help between students regarding learning and financial issues. The author of the statute was Jan Świda (Vetulani 1976, 302–303).

and the history of law in Western Europe. The lectures on civil law were delivered by Prof. Alfred Siegwart in German and by Prof. Pierre Aeby in French. The areas of the subject not included in the lectures were covered by Świda. What is more, as an assistant and tutor, he took notes and translated for students the lectures on civil law. He was very conscientious in his work. Already before the decision to administer the examinations had been taken, from time to time he revised with the students the whole of the material discussed by the Fribourg lecturers in civil law, as he was fully aware of the need to maintain appropriate academic standards at the university camp. At present, he increased his efforts even more so and demanded even more from his students, who were just as well aware of the importance of the approaching examinations and day by day "crammed" the examination material that Dr. Śliwa assigned them (Vetulani 1976, 124). The script on inheritance law must have been therefore prepared as auxiliary material for preparation to the first, quite unexpectedly announced examination[22].

A certain haste in preparing the material is clearly visible. The work does not include a reference section, neither does it have the full text of the provisions, but merely references to the numbers of articles of the discussed legal acts. However, it did not have a significant impact on the quality of the material. Świda "stood out from the other Polish assistants in his in-depth knowledge of the Swiss civil law, which he had been intensely studying almost since the first days of our internment when we still remained in the soldiers' camp" (Vetulani 1976, 124). As a matter of fact, Świda prepared his habilitation dissertation in the camp on the subject of Swiss inheritance law.

Apart from an introduction containing an explanation of legal terms, the content of the script is divided into two main sections. Each of them is divided into parts and chapters. The first section, entitled "Who receives the inheritance," is devoted to the description of the group of statutory inheritors, with a detailed explanation of the parantelic system. Next, the essence of dispositions upon death is discussed. In Swiss succession law, it is regulated by two instruments – a will and an inheritance agreement. The author enumerates the provisions for the validity of such dispositions in great detail, as well as meticulously discusses the concepts of the compulsory portion and disposable portion. In the second section of the script the author moves to analyze the issues with regard to the opening of the succession and division of inheritance, further, to the obligation of "return," that is returning whatever the inheritor received from the testator during their life, as well as the contracting of an inheritance agreement.

The language used by Świda in his work is very matter of fact. He used legal terminology but did it in a way perfectly understood by the students at the

[22] In the article "Pro Memoriam," published after Jan Świda's death, Vetulani remembered that the satisfactory results from the examinations contributed to the decision to move the camp to the outskirts of Fribourg and also to a promise that if the end-of-year exams would bring similar results, the interned soldiers would be allowed to study within the walls of the university (Vetulani 1971, 3).

beginning of their education. The author focused on the most important issues that the students had to master, without unnecessary digressions. If in the text there are any references to the history of law or other contemporary legal systems, they are very laconic. There are only a few minor references to Roman law, among others, while discussing the methods of identifying the group of statutory inheritors (Świda 1941, 4) or the protection of financial interest of a spouse and children (p. 14). He compared Swiss regulations with the solutions from the French and German systems on numerous occasions and he also referred to the work of the Polish Codification Commission (p. 6). However, he did not mention the codification work of the Swiss, neither did he explain why a part of the innovative solutions was incorporated into their legal system. The discussed material is illustrated with case studies, as well as graphs, for instance with explanatory figures outlining succession in the parantelic system. While explaining the issues regarding inheritors' shares or the division of inheritance into the compulsory portion and disposable portion, the author did it on the basis of case studies with specific amounts of money in Swiss francs. In the discussed materials, he relied on the terminology in the Polish language, as well as in French and German.

This work does not make reference to the literature on the subject. It might be assumed that due to a lack of time and the necessity to explain legal institutions to students who had had little or no contact with law before and had taken no propaedeutic courses, Świda focused on the creation of a clear, succinct text. Another explanation for such brevity might lie in the fact that access to monographic studies and scholarly articles must have been very limited in their situation. However, it seems that as far as assistants were concerned, they had access to the most import works. It may be inferred from the reference lists in other editions of the scripts, for instance in the *Introduction to Legal Studies* by Mełeń. In the report for the first semester of the academic year 1940/1941, Edward Cros indicated that the camp library included over one thousand books. The number referred to the total number of items, including Swiss codes and textbooks. Moreover, it was possible to borrow books from both canton and university libraries, including the Roman station of the Polish Academy of Sciences (Drobny 1985, 151). Thus, the omittance of the subject literature in the script must have been dictated by other reasons than a mere lack of access to certain important publications. It is possible, however, that it was the result of the pressure of time or it was a purposeful decision with a view to focusing students' attention on the basic knowledge, sufficient to pass an examination.

Subsequent scripts issued as part of the series were in fact entirely different. It can be seen on the basis of the above-mentioned script written by Mełeń, whose first part was prepared in 1941 as script no. 5, with Grangeneuve as its place of publication. In the dedication quoted above, he wrote the date of 8 July, which means that it was written about half a year after Świda's script. *The Introduction to Legal Studies. Part 1* is more comprehensive, counting 53 pages. The last page

includes a list of bibliographical references, although it was not the full list of works the author referred to in the script[23]. Most certainly, the *Introduction* is written with a greater flair and its content must have been carefully considered and planned before the publication of the first booklet. The second part of the *Introduction* (Mełeń 1941b), issued as script no. 21 includes Fribourg as its place of publication, albeit with the date 1941. Its printing must have taken place already at the new quarters, when the students and assistants began the second academic year. Therefore, its author was not to be daunted by the fast-approaching examinations, which had a decisive impact on the future of legal studies at the camp.

Another interesting item written in the Polish language is a booklet written by Wacław Petsch. *International Private Law (Conflict-of-law Rules) part I and II* was printed as no. 24. The cover informs the reader that the script is based on Prof. Max Gutzwiller's lectures. In the introduction the author clarifies that the script contains the lectures from the winter and spring semesters of the academic year 1940/1941 and that the script is also based on the Professor's publications, including a lecture delivered in the Hague Academy of International Law (Petsch 1941, I)[24]. Apart from that, in the introduction Petsch (1941, II) expresses his gratitude to Gawenda, Hoffman and Laprocki for their help in the translation of Gutzwiller's publication from German. Therefore, the script is not an original work of the author. It served as a teaching aid for students, allowing them to learn the course material in Polish. And once again, there is a note that the work was intended as subsidiary material for students preparing for exams. What is interesting, in the copy of the script offered by the author to the Polish Academy of Sciences, one can find notes regarding text corrections and certain additions to the original text of the script. It begs the question whether there was a second, corrected version of the script, or whether those were just improvements added *post factum*. It is possible that those markings appeared during the regular hours of learning and revision of the material with the students.

6. CONCLUSION

It transpires that the scripts for teaching and learning law at the university camp were, in fact, treated as necessary evil. The internees themselves justify their existence in their memoirs and the authors emphasize – both in the texts and in dedications – that those works do not aspire to academic character. The content of the scripts does not provide any new insights into legal issues. They

[23] See: for instance, Mełeń (1941a, 13), where he lists the work by Savigny *Vom Beruf Unserer Zeit für Gesetzgebung und Rechtswissenschaft* of 1814, and which is missing from the final list.

[24] See: Gutzwiller (1929).

provide a solid synthesis of the required knowledge, describe Polish, foreign and international legal instruments in a clear and comprehensive way. Some of them were written with flair and great erudition, referring the reader not merely to the very subject they were meant to convey, but to the broadly-understood European legal culture. Others were rather succinct and economical with words, focusing merely on the explanation of the most important concepts, providing an emergency aid for students preparing for the end-of-semester examination session.

However, the existence of those modest booklets caused that, or rather was conducive to the realization of aims which might have seem unrealistic at the start. Out of approximately 240 students at the camp, 141 of them graduated with a degree in law (Matyja 2013)[25]. The organization of the whole system of the printing process, the careful division of work and tasks between Polish professors and assistants, as well as their enormous determination and commitment to maintain the functioning of the university camp in Grangeneuve proved beneficial in the end. The academic character of the camp was preserved and with time, it was possible to offer soldiers a chance to study under regular conditions.

An analysis of the circumstances in which the scripts for teaching legal subjects were written, as well as their content, offers an insight into history on a microscale. The source material contained on the pages of the subsequent issues of the scripts is just one of the numerous aspects of the history of university camps in Switzerland which still require exploration. Yet, it seems worth taking time to consider both the content of the scripts and the entangled fates of the authors of those textbooks. There are still some aspects of the activities conducted at the university camps, such as organizational matters or various aspects of the didactic process that await further research and analysis.

BIBLIOGRAPHY

Blum, Aleksander. 1997. *O broń i orły narodowe… Z Wilna przez Francję i Szwajcarię do Włoch*. Pruszków: Oficyna Wydawnicza "Ajaks."

Chmielewski, Witold. 2017. "Działalność Funduszu Kultury Narodowej na Obczyźnie w latach 1939–1947." *Przegląd Historyczno-Oświatowy* (3–4): 24–43.

[25] With reference to those accomplishments, Władysław Drobny declared: "The number of rejected students was in fact quite high. However, when we take into account the conditions in which the studies took place, psychological burdens, material deficiencies, an irresistible urge to fight the enemy and abandon the studies even in their final phase, in order to take part in partisan fights or to join the regular units of the Polish Army in France and then in Italy, we should honestly declare that the results are at least good. We have to bear in mind that a considerable group of Fribourg students, abandoning their studies, left with Capt. Blum for Sabaudia in order to fight with the Germans together with the French underground forces FFI (*Forces Francaises de l'Interieur*). Indeed, even the serious, the most hard-working and the most-friendly Dr. Jan Świda, who had completed all the arrangements with regard to his habilitation process, managed to get to France and did not deliver his habilitation lecture. Such were those strange times!" (Drobny 1985, 183).

Drobny, Władysław. 1973. *Karabin i książka. Polskie Liceum w Szwajcarii 1940–1944*. Warszawa: Wydawnictwo Ministerstwa Obrony Narodowej.

Drobny, Władysław. 1985. *Walka bez oręża: polskie obozy uniwersyteckie dla internowanych w Szwajcarii w latach 1940–1946*. Warszawa–Poznań: Polskie Wydawnictwo Naukowe.

Jońca, Maciej. 2018. "Działalność Borysa Łapickiego w latach okupacji hitlerowskiej." In *Ad laudem magistri nostri. Mistrzowie. Dzieła polskiej romanistyki*. Edited by Ewa Gajda. 59–73. Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa. Stowarzyszenie Wyższej Użyteczności "Dom Organizatora."

Jońca, Maciej. 2020. *Prawo rzymskie. Mirabilia*. Warszawa: C.H. Beck.

Matyja, Mirosław. 2013a. *Internowanie polskiej 2. Dywizji Strzelców Pieszych w Szwajcarii w latach 1940–1945 na podstawie V konwencji haskiej z 1907 roku*. Brzezia Łąka: Wydawnictwo Poligraf.

Matyja, Mirosław. 2013b. *Niespełnione nadzieje. Losy polskiej dywizji strzelców pieszych w latach 1940–1945*. Toruń: Wydawnictwo Adam Marszałek.

Mełeń, Aleksander. 1941a. *Wstęp do nauk prawnych*. Vol. 1. Grangeneuve: Komitet Bratniej Pomocy Studentów Obozu Uniwersyteckiego.

Mełeń, Aleksander. 1941b. *Wstęp do nauk prawnych*. Vol. 2. Fribourg: Komitet Bratniej Pomocy Studentów Obozu Uniwersyteckiego.

Mierzwa, Janusz. 2018. "Działalność Polskiego Wydziału Prawa w Oksfordzie oraz organizacji zrzeszających polskich prawników na terenie Zjednoczonego Królestwa w latach 1940–1947." *Niepodległość i Pamięć* 3(25): 77–94.

Petsch, Wacław. 1941. *Międzynarodowe prawo prywatne (prawo kolizyjne)*. Fribourg: Komitet Bratniej Pomocy Studentów Obozu Uniwersyteckiego.

Piekarski, Stanisław. 2002. *Polskie muzy w krajobrazie Szwajcarii: żołnierska scena 2 Dywizji Strzelców Pieszych w okresie internowania w Szwajcarii w latach 1940–1945*. Vol. 2. Warszawa: Departament Społeczno-Wychowawczy MON. Dom Wojska Polskiego.

Radzik, Tadeusz. 1986. *Szkolnictwo polskie w Wielkiej Brytanii po drugiej wojnie światowej*. Lublin: Wydawnictwo UMCS.

Rucki, Jerzy. 1993. *Na ziemi Wilhelma Tella*. Warszawa: Bellona.

Staszewski, Wojciech Szczepan. 2006. "Antoni Deryng (1901–1978)." In *Profesorowie Prawa Katolickiego Uniwersytetu Lubelskiego*. Edited by Antoni Dębiński, Wojciech Szczepan Staszewski, Monika Wójcik. 71–80. Lublin: Wydawnictwo KUL.

Sulimirski, Tadeusz. 1961. "Fundusz Kultury Narodowej." *Nauka Polska na Obczyźnie* 3: 50–58.

Szczygielski, Krzysztof. 2010. "Romanistyka polska w latach 1918–1945 (przegląd bibliografii)." *Zeszyty Prawnicze* 10.2: 355–411. https://doi.org/10.21697/zp.2010.10.2.22

Szczygielski, Krzysztof. 2020. *Prawa antyczne w piśmiennictwie polskim w latach 1900–1945*. Białystok: Wydawnictwo Temida 2.

Świda, Jan. 1941. *Zarys szwajcarskiego prawa spadkowego*. Grangeneuve: Dziekanat i Komitet Bratniej Pomocy Obozu Uniwersyteckiego w Grangeneuve.

Thielmann, Edmund. 1998. *Żołnierska odyseja*. Pruszków: Ulmak.

Vetulani, Adam. 1971. "Jan Świda: żołnierz II Dywizji Strzelców Pieszych." *Tygodnik Powszechny* 32(1176): 5.

Vetulani, Adam. 1976. *Poza płomieniami wojny: internowani w Szwajcarii 1940–1945*. Warszawa: Wydawnictwo Ministerstwa Obrony Narodowej.

Zaniewska, Teresa. 2004. "Szkolnictwo polskie w Szwajcarii w czasie II wojny światowej." *Prace Komisji Historii Nauki Polskiej Akademii Umiejętności* 6: 95–117.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.11

COPE Member since 2018 JM13714

*Grzegorz Nancka**

https://orcid.org/0000-0002-9911-7473

TOWARDS A NEW METHODOLOGICAL APPROACH. ROMAN LAW COMMUNITY IN LVIV SINCE MID-19TH CENTURY UNTIL EARLY 20TH CENTURY

Abstract. The aim of this article is to present the methodological views of Lviv-based scholars such as: Józafat Zielonacki, Ferdynand Źródłowski, Leonard Piętak, Leon Piniński, Marceli Chlamtacz and Ignacy Koschembahr-Łyskowski. In the 19th century German science of law, a special role was played by the so-called Pandectism. In the second half of the 19th century, the Pandectist thought permeated to other countries, including Austria. It also reached the Lviv Roman law community and found its representatives there. As time went by, before the end of the 19th century, it turned out that Pandectism was gradually exhausting its possibilities, and so the search for new research methods began. This article is intended to illustrate until which point in time the Roman law community in Lviv presented the Pandectist point of view and when it started to depart from it.

Keywords: Roman law, methodology, Lviv, Pandectism.

KU NOWEMU UJĘCIU METODOLOGICZNEMU. LWOWSKA ROMANISTYKA PRAWNICZA OD POŁOWY XIX WIEKU DO POCZĄTKÓW WIEKU XX

Streszczenie. Niniejszy artykuł ukazuje, jakie metodologiczne poglądy prezentowali lwowscy uczeni, tacy jak: Józefat Zielonacki, Ferdynand Źródłowski, Leonard Piętak, Leon Piniński, Marceli Chlamtacz oraz Ignacy Koschembahr-Łyskowski. W XIX-wiecznej niemieckiej nauce prawa szczególne znaczenie zyskał nurt określany jako pandektystyka. W drugiej połowie XIX wieku myśl pandektystyczna przedostała się do innych krajów, w tym na grunt austriacki. Dotarła również do lwowskiego środowiska romanistycznego, w którym można było znaleźć jej przedstawicieli. Z biegiem czasu, jeszcze w XIX wieku, okazało się że ten nurt badawczy wyczerpuje swoje możliwości, przez co rozpoczęły się poszukiwanie nowych dróg naukowych dociekań. Artykuł ma na celu ukazanie, do jakiego momentu lwowska romanistyka prawnicza prezentowała pandektystyczny punkt widzenia, a od kiedy zaczęła od niego odchodzić.

Słowa kluczowe: prawo rzymskie, metodologia, Lwów, pandektystyka.

* University of Silesia in Katowice, Faculty of Law and Administration, grzegorz.nancka@us.edu.pl

Received: 12.11.2021. Revised: 11.01.2022. Accepted: 15.03.2022.

1. INTRODUCTION

In the mid-19th century, German positivism took on criticism of the historic school although its links with the school were very strong (Sójka-Zielińska 2009, 284), for it was due to Friedrich Carl von Savigny and Georg Friedrich Puchta that the research trend known as *usus modernus Pandectarum* transformed into Pandectism, whose objective was to present the Roman law norms that were still in place (Skrzywanek-Jaworska 2019, 19; Wojciechowski 2004, 33–37). Pandectism, which is referred to as "Europe's most constructive legal doctrine" (Kuryłowicz 2013, 104), developed a dogmatically coherent and uniform system of private law that was fit for use in the economic conditions of that time, but not in the socio-economic conditions (Kuryłowicz 2013, 23; Skrzywanek-Jaworska 2019, 19–20). Some of the most prominent Pandectists were Bernhard Windscheid, Ludwig Arndts von Arnesberg, Alois Ritter von Brinz, or Karl Philipp Adolph von Vangerow (Zięba 2007, 91–92). In the second half of the 19th century, the Pandectist thought permeated to other countries, including Austria. This was largely due to Joseph Unger who, in liaison with other scholars who formed his inner circle – Adolf Exner, Antonin Randa, Franciszek Hofmann, and Leopold Pfaff – strived to romanise Austrian civil law and "force ABGB [Austrian Civil Code] into the Pandectist corset" (Kupiszewski 2013, 145). This had an impact on the Austrian science of law, which was developing, among others, at the University of Lviv, which was perceived as a strong Pandectist centre (Zięba 2007, 91). As time went by, however, it turned out that Pandectism had exhausted its possibilities, not just in the German countries, but also elsewhere. It was then that the search for new research methods began, accompanied by a gradual departure from the Pandectist thought. A question can consequently be asked as to how the study of Roman law in Lviv was doing, until which moment in time did it present the Pandectist point of view and when did it start its search for new scholarly opportunities.

2. PANDECTIST COMMUNITY IN LVIV

The founding father of the Pandectist community in Lviv was Józafat Zielonacki, who also happened to be the first Pole to lecture in Roman law at the University of Lviv. In 1857 he replaced Franciszek Kotter who had been working there until that time (Kodrębski 1990, 231; Zięba 2004, 129–147; Zięba 2006, 15). In fact, the doctoral dissertation of J. Zielonacki, written and published in Berlin, was indicative of his scholarly potential, but turned out to be insufficiently original to trigger a scholarly discussion (Piętak 1884, 161; Zięba 2006, 64–65). Even before his arrival in Lviv, J. Zielonacki had concentrated his research on the issue

of possession, and had contributed to the discussion on the character of possession. He subscribed to the opinion of F.C. von Savigny, who viewed possession as a state of affairs. He devoted several of his scholarly works to this issues, including a monograph published in German and – in an extended version – in Polish (see Zielonacki 1852a, 1852b, 1854, 1862a; Kodrębski 1990, 234). The scholarly output of J. Zielonacki proves that he was predominantly interested in property law (see Zielonacki 1863b, 1864, 1877). His most important work was *Pandekta,* the first Polish-language textbook that utilised the German model of teaching of Roman law (Zielonacki 1862b, 1863a; Kodrębski 1990, 237). The textbook was a-historic in its character, and its content was a purely dogmatic presentation of the law of Justinian (Kodrębski 1990, 238). Looking at scholarly accomplishments of J. Zielonacki leaves no doubts that the methodology of his research was greatly influenced by his education. As an alumnus of the Berlin University, where he had attended lectures of F.C. von Savigny, he was moulded by the German science of law of that era, in which the Pandectist doctrine played a major role (Zięba 2007, 94; 2006, 32). Although Zielonacki did not explicitly talk in any of his works on the method he was using, it appears that J. Kodrębski was right in his opinion that J. Zielonacki was the type of German Pandectist who treated Roman law not as historical discipline, but rather as a prototype for contemporary law (Kodrębski 1990, 238; Zięba 2007, 94). This is further evidenced by the subject matter of his works, which can be considered as typical for that era and in line with research trends of his times.

A model of scholarly work similar to that of Józafat Zielonacki's was also adopted by Ferdynand Źródłowski, Zielonacki's successor in Lviv. Unlike J. Zielonacki, Źródłowski also taught civil law (Kodrębski 1990, 238). As regards Roman law, he authored textbooks, including a two-volume *Das römische Privatrecht,* published in the years 1887–1880, and less than a decade later – the first volume of *Pandekta prawa rzymskiego* [*Pandect of Roman law*], a Polish-language publication that was an alteration of an older book (cf. Źródłowski 1877, 1880, 1889). Said textbook was suspiciously similar to J. Zielonacki's *Pandekta* and, what is more, was already outdated when it first came out (Kodrębski 1990, 239). That said, *Pandekta* include a unique methodological manifesto of F. Źródłowski's, who far more explicitly than J. Zielonacki argued in favour of the up-to-dateness of the Pandectist law (Źródłowski 1889, 4; Kodrębski 1990, 239). F. Źródłowski associated the Pandectist law, i.e. contemporary Roman law (*heutiges römisches Recht*), with common German law (Kodrębski 1990, 239–240). He actually went on to say that "this part of the common German law which relies on Roman law is called pandects" (Źródłowski 1889, 4). F. Źródłowski was also strongly influenced by F.C. Savigny. He maintained that it was "Savigny [who] best combined the historical and practical aspect in his works. His works are and will continue to be a model to follow for those who will embark on scholarly work" (Źródłowski 1889, 25; Jędrejek 2000, 274).

Other scholars who greatly impacted him were G.F. Puchta and B. Windscheid (Źródłowski 1889, 25). He therefore should be regarded as a consistent promoter of the German Pandectist thought in Lviv. His methodological credo proves that the impact of the German science of law permeated as far as Galicia-based universities (Kodrębski 1990, 241).

3. LVIV'S FIRST POST-PANDECTIST

F. Źródłowski's tenure at the University of Lviv partly coincided with that of Leonard Piętak's, who – in addition to Roman law – also lectured in commercial law (Kodrębski 1990, 241; cf. Szczygielski 2009, 59–72). However, Piętak worked at the University of Lviv far longer than F. Źródłowski did, for he did not stop lecturing until the year 1900, when he left the department of Roman law to become minister for Galicia (Kodrębski 1990, 242). Piętak authored several works on Roman law, including a Roman inheritance law textbook – the only such publication in Polish literature on Roman law (Piętak 1882, 1888). This two-volume work, which actually never got finished, was a significant point in the history of Roman law study in Lviv, for it broke from the tradition of publishing Pandectist law textbooks (Kodrębski 1990, 242). This was pointed out by Piętak himself, who in the introduction to the work argued that the subject matter of systematic lectures on Roman law "should be solely the pure Roman law, that (…) these lectures should provide an exact and image of Roman law and its structure and, should not be limited merely to the main principles and tenets, but instead should go deep down into details and combine dogmatics with theory" (Piętak 1882, IX). With this in mind, L. Piętak devoted his work to "a systematic lecture on one part of Roman law, which was in itself a separate whole (…), [presenting – G.N.] pure Roman inheritance law, delivered from a dogmatic and historical perspective" (Piętak 1882, IX; Kodrębski 1990, 243). The textbook is very detailed, but – as J. Kodrębski stressed – the focus was more on dogmatics than on history (Kodrębski 1990, 243). While L. Piętak did reject in his work the Pandectist concepts, his lack of proper methodological training was more than evident, which is why he had not studied the genesis or determinants behind the particular norms (Kodrębski 1990, 243). Notwithstanding these flaws, L. Piętak was Lviv's first post-Pandectist Roman law scholar, albeit one with a modest output (Giaro 1994, 94). An attempt to finish L. Piętak's breakthrough work was made by S. Szachowski, although he did not have any major scholarly in the area of Roman law, and little is known on his methodology (cf. Szachowski 1902).

4. GREATLY INFLUENCED BY IHERNIG

The most recognized Lviv-based Roman law scholar today is Leon Piniński (cf. Czech-Jezierska 2011; Jońca 2012; Wiaderna-Kuśnierz 2008). Compared to other experts in Roman law, what made him stand out was that he was also an art enthusiast and a politician. As a junior researcher, Piniński had spent time abroad as a visiting researcher at a number of different universities, where he had trained under the supervision of e.g. R. von Ihering, B. Windscheid, or H. Dernburg, which without a doubt had a major impact on his subsequent intellectual formation (Wiaderna-Kuśnierz 2015, 194). Piniński's most voluminous work is a two-volume dissertation *Der Thatbestand des Sachbesitzerwerbs nach gemeinem Recht* published in the 1880s (Piniński 1885, 1888). The work received accolades from none other than R. von Ihering, who argued the second volume was one of the greatest scholarly accomplishments of the 19th century science (Ihering 1889, XIV–XV; Pikulska-Radomska, Skrzywanek-Jaworska 2020, 676). Piniński's views formulated therein, e.g. treating possession as an economic link between a man and an object, attracted considerable interest among his contemporaries, however the reception thereof varied among different representatives of the doctrine (Piniński 1885, 25; Pikulska-Radomska, Skrzywanek-Jaworska 2020, 675). The scholar engaged in polemics with some of the most renowned scholars of that era, including F.C. von Savigny or the already-mentioned R. von Ihering. Piniński did not conceal his views on the historical school. While analysing the output of R. von Inhering, he came to the realisation that while the German scholar as a young researcher had been influenced by representatives of the historical school, "slowly and gradually his mind would break from the vicious circle of rigid views of Savigny's and Puchta" (Piniński 1892, 520). L. Piniński did not question the importance of this school, but thought that one major error in the direction followed by F.C. von Savigny and G. F. Puchta was to "overestimate Roman law, not just in terms of the form, but also in terms of the substantive content of the respective Roman law institutions" (Piniński 1892, 520–521; Nancka 2020, 607). An inadvertence on their part was not adapting Roman law to the changing socio-economic realities. R. von Ihering – in the opinion of L. Piniński – significantly contributed to "liberation" from these errors. As Piniński put it, "in almost every single major work authored by Ihering one can clearly see breaking from the former ossified routine and unknown to his predecessors evaluation of the practical side of legal relationships (Piniński 1892, 521–522; Nancka 2020, 607). Meanwhile, in his analysis of the output of B. Windscheid, Piniński did not hesitate to accuse him of representing in his views "a certain conservative current, a tendency to not move away from principles that had already been in place" (Piniński 1892, 534; Nancka 2019b, 403). Furthermore, he believed that Windscheid could have achieved more in his research work if he had had the

courage to break free from dated views (Piniński 1892, 534). These observations could be indicative of Piniński's awareness of methodological malfunctions, combined with a need for change. Thus, on the one hand, Leon Piniński was embedded in the Pandectist reality, but on the other one, he tried to dissociate himself from it. His work on possession should be considered as not just a typical for German literature, but also as more a civil law publication than a Roman law one (Kodrębski 1990, 245). There is furthermore no doubt that the Lviv-based scholar was greatly influenced by R. Ihering, as illustrated by his views expressed in his work *Pojęcie i granice prawa własności według prawa rzymskiego* [*The concept and limits of ownership according to Roman law*] (Piniński 1900). The dissertation, in which Piniński formulated the definition of ownership as "ensured by provisions of the law ability to exclusively use some physical object" (Piniński 1900, 9), alongside his work on possession, is a typical product of the late 19th century science.

5. BREAK THE WIDESPREAD STEREOTYPES?

L. Piniński's and L. Piętak's decision to concentrate on political career meant that at the beginning of the 20th M. Chlamtacz and I. Koschembahr-Łyskowski started to play leading roles at the University of Lviv. The former focused in his academic career predominantly on Roman law, although he did publish works on local government as well (Nancka 2019a). What needs to be stressed is that M. Chlamtacz, like L. Piniński, had spent time abroad as a scholarship holder. During these research visits, which shaped his methodological toolkit, he had met e.g. Adolf Exner and Franciszek Hofmann, both of whom he later posthumously portrayed in the obituaries that he wrote. Marceli Chlamtacz not only derived his scholarly interests from Exner and Hofmann, but he also adopted some of his research premises from them (Nancka 2017, 47–59). His research interests originally concentrated on property law, as reflected in his habilitation dissertation *Die rechtliche Natur der Uebereignungsart durch Tradition im römischen Recht* (Chlamtacz 1897), in which he sought to demonstrate lack of grounds for the adoption of "the real agreement for the transfer of ownership through tradition" in Roman law (Chlamtacz 1897, III). The dissertation, as M. Chlamtacz recalled, had been written during his research visit in Berlin and under the supervision of Alfred Pernice, to whom the author expressed gratitude for his help in its creation in the introduction (Chlamtacz 1897, IV). Undoubtedly, assistance and tutorship of this German scholar had an impact on the overall shape of the dissertation, whose style was representative of the 19th century. However, Chlamtacz believed that a change was needed as regards research methodology. In his study entitled *O nabyciu owoców przez posiadacza w dobrej wierze w klasycznem prawie rzymskiem z uwzględnieniem prawa cywilnego austryackiego i niemieckiego*

[*On the acquisition of the fruit by the holder in good faith in classical Roman law in the light of Austrian and German civil law*] he stressed that "existing literature – obviously, with some exceptions – was largely about 'systematic reconciliation of contradictions'," and the various institutions had been presented "in a rounded form" (Chlamtacz 1903, 2). He was of the opinion that along the changes that resulted from the introduction of BGB [German Civil Code], one should resort to historical research focusing on "classical Roman law, an endless repository of legal thought, and Justinian's 'Corpus iuris,' as a one of a kind container of source material, should be treated not as a goal for itself, but as a means through which one can recreate Roman law as it was in its classical era" (Chlamtacz 1903, 2). Several years later, he went on to add that

> today's investigation of Roman law, instead of reconciling at all cost Roman lawyers and their divergent views, has a different role to play! It should, in fact, bring to the surface differences in opinions that have thus far often been covered by so-called systematic interpretation, examine the reasons behind and provide motives and arguments for these opinions. In this way one can significantly multiply the resources of Roman law thought, and can often back up decisions of modern legislatures, not in line with the Pandectist law and theory, by establishing their coherence with the views of key representatives of Roman law thought. *De lege ferenda,* to the benefit of the legislature, one can in this way retrieve from the monuments of Roman law many new thoughts. The existing interpretation, serving the needs of common law and used to seeing *Corpus Iuris* as a closed code, in its strive for a practically useful explanation, often hides this interesting and informative discrepancy in the views of Roman lawyers. (Chlamtacz 1910, 255)

These views of M. Chlamtacz's indicate that he saw the need for changes in research on Roman law. What is more, in his works he actually attempted – with more or less success – to break from the widespread stereotypes that prevailed in the second half of the 19th century. In a way he therefore attempted to follow the direction previously shown by L. Piętak.

6. METHODOLOGICAL CHANGES

The year 1900 marked the arrival of Ignacy Koschembahr-Łyskowski in Lviv, where he came from Freiburg, Switzerland (cf. Grebieniow 2015; Wołodkiewicz 2009; Koredczuk 2004). As he was taking over the department of Roman law, he delivered an opening lecture entitled *Prolegomena do historyi prawa rzymskiego* [*Introduction to the history of Roman law*], in which he firmly expressed his opinion on the science and teaching of Roman law (Koschembahr-Łyskowski 1900; Vesper 2019, 69–70). He opposed the German historical school, claiming e.g. that "the historical school is following a false […] path, maintaining that all we are to do is establish what the final form of legal norms and institutions was as they developed over time, and that we should disregard any and all demands of practical life"

(Koschembahr-Łyskowski 1900, 854). At the same time, he believed that criticism of the school was over the top, thus leading to condemnation of the entire Roman law (Koschembahr-Łyskowski 1900, 855). In his lecture, he also formulated research postulates for the local science of Roman law, including one concerning e.g. "the creation of Polish monographic literature" (Koschembahr-Łyskowski 1900, 861; Vesper 2019, 74). The scholar furthermore believed that there are two groups of researchers – one, which slavishly sticks to Roman law institutions, and the other one which does not recognise these institutions at all (Koschembahr-Łyskowski 1900, 856). He approved of this faction of the historical school that he referred to as the transitional path. Among its representatives, in addition to himself, he saw Ernst Emanuel Bekker, Moriz Wlassak, Paul Frédéric Girard, and Alfred Pernice (Koschembahr-Łyskowski 1900, 856). The transitional path, according to I. Koschembahr-Łyskowski, involved two tasks. The first one was the need to get to know classical Roman law, understood as the Roman law of its heyday. He emphasised that during the Justinian era numerous interpolations were introduced into the texts, which distorted the classical, perfect wording of his regulations. As a result, only the analysis of classical Roman law could lead to actual and proper experience of the law of Justinian (Koschembahr-Łyskowski 1900, 856–857). The other task was critique of Roman law (Koschembahr-Łyskowski 1900, 858). Roman lawyers created law by factoring in the existing conditions, as result of which the regulations provided for thus-shaped law will in some cases be insufficient. This is, however, a consequence of the relationships existing at the time of creation of Roman law, and not its fault. It is in such situations that one should break from the wording of Roman and adopt a critical stance (Koschembahr-Łyskowski 1900, 858). Several year later, I. Koschembahr-Łyskowski added that reconstruction of Roman law should be based on the entire scholarly material available (Łyskowski 1908, 443). A fragmentary analysis was an error on the part of glossers and other subsequent authors, who selected from source materials only those elements that could be used to support their hypotheses (Łyskowski 1908, 443). The scholar claimed that classical Roman law should be examined and described using historical and philological methods. He observed that some authors, wrongly in his view, wanted to do this merely on the basis of analysis of Roman economic relations, and overlooked other important factors (Łyskowski 1908, 444–445). I. Koschembahr-Łyskowski argued that the stance adopted by R. Ihering, who considered law "merely as an expression of economic relations and who explicitly defines subjective right as an economic interest subject to legal protection (*rechtliche geschütztes Interesse*)," is far-fetched and one-sided (Łyskowski 1908, 445–446).

Ignacy Koschembahr-Łyskowski in one of his subsequent works, entitled *O stanowisku prawa rzymskiego w powszechnej ustawie cywilnej dla cesarstwa austriackiego* [*On the position of Roman law in the General Civil Code for the Austrian Empire*] moreover considered how classical Roman law should be used in the study of civil law (Koschembahr-Łyskowski 1911, 692; Vesper 2019, 71). He

argued that "classical Roman law is a comparative measure used for interpretation of ABGB [Austrian Civil Code] in those cases where ABGB has adopted keynotes from Roman law" (Koschembahr-Łyskowski 1911; Giaro 1994, 94). He also explained why the reference point for comparison should be the classical Roman law and not the law of Justinian (Koschembahr-Łyskowski 1911, 694; Vesper 2019, 71). In his view, the Code of Justinian "rather encompasses classical law stained by interpolations than the law that was actually in place during the Justinian era" (Koschembahr-Łyskowski 1911, 697).

Ignacy Koschembahr-Łyskowski made it clear that he was neither a fan of the hypotheses of F.C. Savigny's concerning modern Roman law, nor of the slogan "through Roman law above Roman law" promoted by R. Ihering. Instead, he believed that a more suitable way to put it would be "alongside Roman law and with an ongoing comparison of modern law, including ABGB [Austrian Civil Code], with Roman law" (Koschembahr-Łyskowski 1911, 708; Vesper 2019, 71). In his opinion, "this way modern law will gain the independence it deserved, and Roman law will be our compass and road sign in the process of explanation and development of modern law" (Koschembahr-Łyskowski 1911, 708; Vesper 2019, 71).

7. CONCLUSIONS

It can therefore be said that while Józafat Zielonacki and Ferdynand Źródłowski were typical representatives of Pandectism, the first Lviv-based Roman law scholar to break from this methodology in Lviv was Leonard Piętak. However, as his scholarly output was rather modest, his pioneer take on research methodology is insufficiently acknowledged. The need for methodological changes was also acknowledged by L. Piniński and M. Chlamtacz. While the former openly criticised the views of F.C. von Savigny and G. F. Puchta, it was M. Chlamtacz who strongly distinguished between classical law and the law of Justinian. Nevertheless, their position on the issue was not as unambiguous as the manifesto of I. Koschembahr-Łyskowski. This scholar, who arrived in Lviv in 1900, argued in favour of the value of classical Roman law and the need for a critical and comprehensive analysis of source material, and saw Roman law as an interpretive measure in the study of civil law (Giaro 1994, 94). His hypotheses were important not just from the point of view of the realities in Lviv, but also from the perspective of subsequent research on Roman law carried out in the 20th century. What is important, I. Koschembahr-Łyskowski developed his methodology also after he had left Lviv and started work in Warsaw (Vesper 2019, 72; cf. Koschembahr-Łyskowski 1925, 1938). It needs to be stressed that the approach adopted by I. Koschembahr-Łyskowski was in line with the European tendencies. Given the introduction of BGB [German Civil Code], it was indeed necessary to break from the old methodology. The waning of Pandectism at that

time naturally forced modifications in the conducting of research. Nevertheless, it is beyond any doubt that major methodological changes in the Lviv Roman Law community were effected by I. Koschembahr-Łyskowski – changes which also left their stamp on the subsequent study of Roman law in Poland.

BIBLIOGRAPHY

Chlamtacz, Marceli. 1897. *Die rechtliche Natur der Uebereignungsart durch Tradition im römischen Recht*. Leipzig: Verlag von Franz Wagner.

Chlamtacz, Marceli. 1903. *O nabyciu owoców przez posiadacza w dobrej wierze w klasycznem prawie rzymskiem z uwzględnieniem prawa cywilnego austryackiego i niemieckiego*. Lwów: Gubrynowicz i Schmidt.

Chlamtacz, Marceli, 1910. "O ekstensji prawa zastawu na owoce rzeczy w prawie rzymskiem i cywilnem prawie niemieckiem." *Przegląd Prawa i Administracyi* 35(4/5): 255–331.

Czech-Jezierska, Bożena. 2011. "Profesor Leon Piniński – wybitny lwowski uczony przełomu XIX i XX wieku." In *Ius et Historia. Księga pamiątkowa dedykowana Profesorowi Jerzemu Markiewiczowi*. Edited by Tadeusz Guz, Waldemar Bednaruk, Maria R. Pałubska. 169–192. Lublin: Wydawnictwo KUL.

Giaro, Tomasz. 1994. "Dogmatyka a historia prawa w polskiej tradycji romanistycznej." *Prawo Kanoniczne* 37(3–4): 85–99. https://doi.org/10.21697/pk.1994.37.3-4.06

Grebieniow, Aleksander. 2015. "Ignacy Koschembahr-Łyskowski – profesor Uniwersytetu Fryburskiego (1895–1900)." *Kwartalnik Prawa Prywatnego* 24(2): 249–284.

Jędrejek, Grzegorz. 2000. "Wpływ Fryderyka C. von Savigny'ego na prawo rzymskie w Polsce w XIX wieku." *Czasopismo Prawno-Historyczne* 52(1–2): 259–275.

Jońca, Maciej. 2012. "Leon Piniński – historyk sztuki stworzony przez podróże." In *Aksjologia podróży*. Edited by Zbigniew Krawczyk, Ewa Lewandowska-Tarasiuk, Jan Wiktor Sienkiewicz. 176–198. Warszawa: AlmaMer Szkoła Wyższa.

Kodrębski, Jan. 1990. *Prawo rzymskie w Polsce XIX wieku*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Koredczuk, Józef. 2004. "Przyczynek do sprawy habilitacji Ignacego Koschembahr-Łyskowskiego we Wrocławiu." *Studia historycznoprawne. Tom dedykowany Profesorowi Doktorowi Alfredowi Koniecznemu*. Edited by Tomasz Kruszewski, Jacek Przygodzki. 191–207. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Koschembahr-Łyskowski, Ignacy. 1900. "Prolegomena do historyi prawa rzymskiego (Wykład wstępny przy objęciu katedry prawa rzymskiego w uniwersytecie lwowskim dnia 23. paźdź 1900)." *Przegląd Prawa i Administracyi* 25(11): 849–861.

Koschembahr-Łyskowski, Ignacy. 1911. "O stanowisku prawa rzymskiego w powszechnej ustawie cywilnej dla cesarstwa austriackiego." *Przegląd Prawa i Administracyi* 36(7/8): 659–725.

Koschembahr-Łyskowski, Ignacy. 1925. *Prawo rzymskie a czasy dzisiejsze. Mowa wygłoszona podczas uroczystej inauguracji roku akademickiego 1923/1924 w dniu 28 października 1923*. Warszawa: Książnica-Atlas.

Koschembahr-Łyskowski, Ignacy. 1938. "Le rôle du droit romain pour le droit compare." In *Introduction à l'étude du droit compare. Recueil d'études en l'honneur d'Edouard Lambert*. Vol. 1. Edited by Pierre Garraud. 257–260. Paris: Sirey, LGDJ.

Kupiszewski, Henryk. 2013. *Prawo rzymskie a współczesność*. Kraków: Wydawnictwo OD.NOWA.

Kuryłowicz, Marek. 2013. *Prawo rzymskie. Historia tradycja współczesność*. Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej.

Łyskowski, Ignacy. 1908a. "Dwa nowe opracowania rzymskiego prawa prywatnego." *Przegląd Prawa i Administracyi* 33(5): 329–353.

Łyskowski, Ignacy. 1908b. "Dwa nowe opracowania rzymskiego prawa prywatnego." *Przegląd Prawa i Administracyi* 33(6): 443–456.

Łyskowski, Ignacy. 1909. "Dwa nowe opracowania rzymskiego prawa prywatnego." *Przegląd Prawa i Administracyi* 34(1): 53–77.

Nancka, Grzegorz. 2017. "Trzej romaniści we wspomnieniach Marcelego Chlamtacza." *Studia Prawno-Ekonomiczne* 105: 45–66. https://doi.org/10.26485/SPE/2017/105/3

Nancka, Grzegorz. 2019a. *Prawo rzymskie w pracach Marcelego Chlamtacza*. Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Nancka, Grzegorz. 2019b. "Bernhard Windscheid we wspomnieniach polskich uczonych z końca XIX wieku." *Almanach. Słowacy w Polsce* XX: 399–410.

Nancka, Grzegorz. 2020. "O znaczeniu poglądów Rudolfa Iheringa dla nauki prawa rzymskiego. Uwagi poczynione na podstawie wspomnień pośmiertnych polskich romanistów z końca XIX wieku." In *Verus amicus rara avis est. Studia poświęcone pamięci Wojciecha Organiściaka*. Edited by Adam Lityński, Marian Mikołajczyk, Andrzej Matan, Dariusz Nawrot, Grzegorz Nancka. 603–614. Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Piętak, Leonard. 1882. *Prawo spadkowe rzymskie*. Vol. 1. Lwów: I Związkowa Drukarnia.

Piętak, Leonard. 1888. *Prawo spadkowe rzymskie*. Vol. 2. I. *Dziedziczenie beztestamentowe*. Lwów: I Związkowa Drukarnia.

Piętak, Leonard. 1884. "Józefat Zielonacki (wspomnienie pośmiertne)." *Przegląd Sądowy i Administracyjny* 9(20): 161–162.

Pikulska-Radomska, Anna. Dagmara Skrzywanek-Jaworska. 2020. "Leona hr. Pinińskiego Wprowadzenie do teorii posiadania." In *Verus amicus rara avis est. Studia poświęcone pamięci Wojciecha Organiściaka*. Edited by Adam Lityński, Andrzej Matan, Marian Mikołajczyk, Dariusz Nawrot, Grzegorz Nancka. 664–676. Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Piniński, Leon. 1885. *Der Thatbestand des Sachbesitzerwerbs nach gemeinem Recht. Eine zivilistische Untersuchung*. Vol. I. Leipzig: Verlag von Duncker und Humblot.

Piniński, Leon. 1888. *Der Thatbestand des Sachbesitzerwerbs nach gemeinem Recht. Eine zivilistische Untersuchung*. Vol. II. *Sukzession in den Besitz, Besitzerwerb animo solo, Besitzwille, Lehre von den juristischen Willenserklärungen*. Leipzig: Verlag von Duncker und Humblot.

Piniński, Leon. 1892. „Dwaj wielcy prawnicy Niemiec. Ihering i Windscheid." *Przegląd Polski* 27(6): 516–538.

Piniński, Leon. 1900. *Pojęcie i granice prawa własności według prawa rzymskiego*. Lwów: Drukarnia E. Winiarza.

Skrzywanek-Jaworska. Dagmara. 2019. *Darowizna remuneratoryjna w rzymskim prawie pandektowym i XIX-wiecznym ustawodawstwie niemieckim*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Sójka-Zielińska, Katarzyna. 2009. *Wielkie kodyfikacje cywilne. Historia i współczesność*. Warszawa: Liber.

Szachowski, Stanisław. 1902. *Dziedziczenie przeciw-testamentowe w prawie rzymskiem*. Lwów: Związkowa Drukarnia.

Szczygielski, Krzysztof. 2009. "Leonard Piętak – wspomnienie w setną rocznicę śmierci." *Miscellanea Historico-Iuridica* 8: 59–72. https://doi.org/10.15290/mhi.2009.08.04

Vesper, Ewa. 2019. *Ignacy Koschembahr-Łyskowski Polski romanista przełomu XIX i XX wieku*. Unpublished PhD Dissertation. Uniwersytet w Białymstoku.

Wiaderna-Kuśnierz, Renata. 2008. "Leon Piniński – profesor prawa rzymskiego na Uniwersytecie Lwowskim." In *Historia, mentalność, tożsamość*. Edited by Joanna Pisulińska, Paweł Sierżęga, Leonid Zaszkilniak. 471–479. Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego.

Wiaderna-Kuśnierz, Renata. 2015. "Zagraniczne studia i stypendia naukowe romanistów Uniwersytetu Jana Kazimierza we Lwowie." *Zeszyty Prawnicze* 15(4): 189–218. https://doi.org/10.21697/zp.2015.15.4.10

Wojciechowski, Rafał. 2004. "O pojęciu pandektystyki." *Acta Universitatis Wratislaviensis*. *Prawo* 290: 33–37.

Wołodkiewicz, Witold. 2009. "Ignacy Koschembahr-Łyskowski (1864–1945)." In *Europa i prawo rzymskie. Szkice z historii europejskiej kultury prawnej*. Edited by Witold Wołodkiewicz. 616–626. Warszawa: Wolters Kluwer Poland.

Zięba, Agnieszka. 2004. "Józefat Zielonacki zapomniany Polski romanista XIX w. Szkic do biografii." *Zeszyty Prawnicze UKSW* 4(1): 129–147. https://doi.org/10.21697/zp.2004.4.1.07

Zięba, Agnieszka. 2006. *Józefat Zielonacki – polski uczony XIX w. i jego miejsce w historii romanistyki polskiej*. Unpublished PhD Dissertation. Uniwersytet Jagielloński.

Zięba, Agnieszka. 2007. "Profesor Józefat Zielonacki (1818–1884) na tle XIX-wiecznej pandektystyki." *Zeszyty Prawnicze UKSW* 7(1): 77–100. https://doi.org/10.21697/zp.2007.7.1.04

Zielonacki, Józefat. 1852a. "Dwa szczegóły w przedmiocie nauki o posiadaniu." *Rocznik Towarzystwa Naukowego z Uniwersytetem Jagiellońskim złączonego. Oddział Nauk Moralnych* I: 103–117.

Zielonacki, Józefat. 1852b. "Jakie ma znaczenie w prawie rzymskim podział posiadania na possessio civilis i naturalis?" *Rocznik Towarzystwa Naukowego z Uniwersytetem Jagiellońskim złączonego. Oddział Nauk Moralnych* I: 257–272.

Zielonacki, Józefat. 1854. *Der Besitz nach dem römischen Rechte. Hie und da mit Berücksichtigung der neueren Gesetzbücher*. Berlin: Mittler & Sohn.

Zielonacki, Józefat. 1862a. *Nauka o posiadaniu i o zasiedzeniu własności według prawa rzymskiego*. Lwów: Drukarnia E. Winiarza.

Zielonacki, Józefat. 1862b. *Pandekta czyli wykład prawa rzymskiego o ile jest ono podstawą prawodawstw nowszych. Część pierwsza obejmująca ogólne zasady prawne i naukę o stosunkach rzeczowych*. Kraków: Drukarnia C. K. Uniwersytetu Jagiellońskiego.

Zielonacki, Józefat. 1863a. *Pandekta czyli wykład prawa rzymskiego o ile jest ono podstawą prawodawstw nowszych. Część druga obejmująca naukę o stosunkach obowiązkowych, prawo zastawu, prawo familijne i prawo spadkowe*. Kraków: Drukarnia C. K. Uniwersytetu Jagiellońskiego.

Zielonacki, Józefat. 1863b. "O zasiedzeniu dziedzictwa według dawnego prawa rzymskiego." *Czasopismo Poświęcone Prawu i Umiejętnościom Politycznym* XII: 711–729.

Zielonacki, Józefat. 1864. "O przyczynie posiadania (*causa possessionis*) i o posiadaniu słusznym wedle prawa rzymskiego." *Czasopismo Poświęcone Prawu i Umiejętnościom Politycznym* XII: 675–686.

Zielonacki, Józefat. 1877. "Czy według prawa rzymskiego można było zasiedzieć na mocy wyroku? A w ogólności jak prawo rzymskie pojmowało tytuł zasiedzenia?" *Rozprawy i Sprawozdania z posiedzeń Wydziału Historyczno-Filozoficznego Akademii Umiejętności* IV: 1–20.

Źródłowski, Ferdynand. 1877. *Das römische Privatrecht*. Vol. I. *Das Recht im Objektiven sinn und die Personen*. Prag: Verlag von H. Dominicus.

Źródłowski, Ferdynand. 1880. *Das römische Privatrecht*. Vol. II. *Die Sahen und ein Theil der Lehre von den Rechten überhaupt*. Prag: Verlag von H. Dominicus.

Źródłowski, Ferdynand. 1889. *Pandekta prywatnego prawa rzymskiego*. Vol. 1. *Wstęp i część ogólna*. Lwów: Drukarnia Ludowa.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.12

Paul du Plessis[*]
https://orcid.org/0000-0003-2272-6905

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 prawno-społeczne.

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

[*] University of Edinburgh, Edinburgh School of Law, p.duplessis@ed.ac.uk

Received: 12.11.2021. Revised: 11.01.2022. Accepted: 15.03.2022.

– 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 be 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 obtriverat: dominus pueri consulebat, cum quo se agere oporteret. respondi in causa ius esse positum: nam ^eam^ si muliones, qui superius plostrum sustinuissent, 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 sustinuissent, 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, Repgen 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.[1] 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).[2] 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

[1] 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.

[2] The phrase "socially nested" is that of Calavita.

have a substantial impact in earlier periods (Hoeflich 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.

BIBLIOGRAPHY

Babusiaux, Ulrike. 2016. "The Future of Legal History: Roman Law." *The American Journal of Legal History* 56(1): 6–11. https://doi.org/10.1093/ajlh/njv008

Beiser, Frederick C. 2015. *The German Historicist Tradition*. Oxford: Oxford University Press.

Bryen, Ari Z. 2014. "Law in Many Pieces." *Classical Philology Classical Philology* 109(4): 346–365. https://doi.org/10.1086/677860

Calavita, Kitty. 2010. *Invitation to Law & Society: An Introduction to the Study of Real Law*. Chicago: University of Chicago Press. https://doi.org/10.7208/chicago/9780226089980.001.0001

Coing, Helmut. 1973. "Roman law as *ius-commune* on continent." *Law Quarterly Review* 89(356): 505–517.

Dubber, Markus D. Christopher Tomlins. Eds. 2018. *The Oxford Handbook of Legal History*. New York: Oxford University Press. https://doi.org/10.1093/oxfordhb/9780198794356.001.0001

Frier, Bruce W. 1989–1990. "Autonomy of Law and the Origins of the Legal Profession." *Cardozo Law Review* 11(2): 259–286.

Giaro, Tomasz. 1993. "Europa und das Pandektenrecht." *Rechtshistorisches Journal* 12: 326–345.

Haferkamp, Hans-Peter. Klaus Luig. Tilman Repgen. 2017. *Wie pandektistisch war die Pandektistik? Symposium aus Anlass des 80. Geburtstags von Klaus Luig am 11. September 2015.* Tübingen: Mohr Siebeck. https://doi.org/10.1628/978-3-16-155459-9

Hoeflich, Michael H. 1984. "Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey A Symposium in Legal History: American Legal History: Revisionist Viewpoints." *University of Illinois Law Review* 3: 719–738.

Jhering, Rudolf von. 1985. "In the Heaven for Legal Concepts: A Fantasy." *Temple Law Quarterly* 58: 799–842.

Letwin, Shirley Robin. 2009. *On the History of the Idea of Law*. Cambridge: Cambridge University Press.

Osler, Douglas J. 2007. "The Fantasy Men." *Rechtsgeschichte – Legal History* 10: 169–192. https://doi.org/10.12946/rg10/169-192

Plessis, Paul du. 2019. "A Festschrift for Bruce Frier on Ancient Law and Society." *Journal of Roman Archaeology* 32: 648–655. https://doi.org/10.1017/S1047759419000485

Pölönen, Janne. 2006. "The Case for a Sociology of Roman Law." In *Law and Sociology*. Edited by Michael Freeman. 398–408. Oxford: Oxford University Press.

Schiller, A. Arthur. 1978. *Roman Law Mechanisms of Development*. The Hague–New York: Mouton. https://doi.org/10.1515/9783110807196

Stein, Peter. 1999. *Roman Law in European History*. New York: Cambridge University Press. https://doi.org/10.1017/CBO9780511814723

Stein, Peter G. 2007. "The Roman Jurists' Conception of Law." In *A Treatise of Legal Philosophy and General Jurisprudence*. Edited by Andrea Errera, Andrea Padovani, Kenneth Pennington, Peter Stein. Vol. 7: 1–30. Dordrecht: Springer Netherlands. https://doi.org/10.1007/978-94-017-9880-8_1

Van Hoecke, M. François Ost. 1998. "Legal Doctrine in Crisis: Towards a European Legal Science." *Legal Studies: The Journal of the Society of Public Teachers of Law* 18(2): 197–215. https://doi.org/10.1111/j.1748-121X.1998.tb00013.x

Watson, Alan. 1977. *Society and Legal Change*. Edinburgh: Scottish Academic Press.

Watson, Alan. 1983. "Legal Change: Sources of Law and Legal Culture." *University of Pennsylvania Law Review* 131(5): 1121–1157. https://doi.org/10.2307/3311936

Winkel, Laurens. 2015. "Roman Law and Its Intellectual Context." In *The Cambridge Companion to Roman Law*. Edited by David Johnston. 9–22. New York: Cambridge University Press. https://doi.org/10.1017/CCO9781139034401.003

Zimmermann, Reinhard. 1996. "Savigny's Legacy. Legal History, Comparative Law, and the Emergence of a European Legal Science." *The Law Quarterly Review* 112: 576–605.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.13

*Dorota Wiśniewska**
https://orcid.org/0000-0003-1545-4569

THE TEACHING OF PRE-EXISTING NATIONAL POLISH LAW IN THE NEW KINGDOM OF POLAND

Abstract. The changes in the social and economic system taking place in the Kingdom of Poland prompted the need for legal education at the university level. The functioning of universities dealing with teaching in this area, however, met various obstacles, mainly due to the reluctance of the central authorities of the Russian Empire.

At the universities established in the following years, the aim was not only to prepare future lawyers in practice, but also to implement a broader model of education. Therefore, among other fields, the old Polish law was tutored, which gradually ceased to be binding, and finally became a historical law.

Keywords: The Kingdom of Poland, the old Polish law, Polish law teaching, law studies, higher schools.

NAUCZANIE DAWNEGO PRAWA POLSKIEGO W KRÓLESTWIE POLSKIM

Streszczenie. Zachodzące w Królestwie Polskim zmiany w systemie społecznym i gospodarczym rodziły potrzebę kształcenia prawniczego na poziomie uniwersyteckim. Funkcjonowanie uczelni wyższych, które zajmowałyby się nauczaniem w tym obszarze, napotykało jednak liczne trudności, przede wszystkim wynikające z niechęci centralnych władz Cesarstwa Rosyjskiego.

Na uczelniach tworzonych pomimo tego w kolejnych latach, dążono nie tylko do przygotowania praktycznego przyszłych prawników, ale starano się realizować szerszy model kształcenia. W związku z tym wykładano między innymi dawne prawo polskie, które z biegiem czasu przestawało być prawem obowiązującym, a stawało się prawem historycznym.

Słowa kluczowe: Królestwo Polskie, dawne prawo polskie, nauczanie, studia prawnicze, szkoły wyższe.

* University of Lodz, Faculty of Law and Administration, Department of the Studies in the Development of State and Law, dwisniewska@wpia.uni.lodz.pl

Received: 12.11.2021. Revised: 11.01.2022. Accepted: 15.03.2022.

1. INTRODUCTION

The old national Polish law did not lose its binding force with the fall of the First Polish Republic. It was still valid and was widely used in judicial decisions. During the times of the Duchy of Warsaw, part of the legal institutions resulting from its provisions continued to function, mainly in the field of the social system. Basically it was customary, but sometimes it was regulated in the legislation of the Duchy (Sobociński 1964, 41).

On the other hand, the issue of the relation of the former Polish law to new regulations in the field of judicial law was regulated in subsequent legal acts. These include the temporary instruction of the Minister of Justice of 23 May 1808, the decree of 10 October 1809 and the decree of 16 January 1811 (Sobociński 1964, 42).

On the basis of the second of these acts, the old Polish law was to apply to the extent that the Napoleonic Code referred to "local customs and devices," as well as with regard to activities and events arising under the rule of this law – therefore in cases not subject to regulation introduced by the Prussian legislator (Zawadzki 1860, 3–12).

Similar rules were adopted in the decree of 16 January 1811, issued in connection with the annexation of the lands of the third Austrian partition to the Duchy of Warsaw. This act extended the scope of application of the former law to, *inter alia*, the Statute of Lithuania, Magdeburg and Chełmno laws (Zawadzki 1860, 13–16).

What is more, in the area of substantive criminal law the application of the old Polish law was adopted, as well as the codes of the partitioning states, as an auxiliary. However, due to the fact that Polish law was uncoded, partition codes were generally applied (Sobociński 1964, 43).

The proclamation of the Kingdom of Poland did not bring about any radical changes in this respect. Article 165 of the constitution of 27 November 1815, stipulated only that "all laws and predecessor laws, contrary to this constitutional act, are abolished" – Constitutional Act of the Kingdom of Poland of 27 November 1815 (Dziennik Praw Królestwa Polskiego, t. I, no 1: 2–103). This meant that all legal acts issued before the partitions (with the exception of the acts adopted by the Four-Year Sejm) would remain in force, as long as they were not inconsistent with the constitution. As a consequence, for example, royal privileges and grants, inspections, inventories and others were respected. The previous customary law continued to apply, including the obligations of peasants and townspeople, the dimension of serfdom and the inheritance of settlements (Bartel et al. 1981, 230).

This tendency began to change in the second half of the nineteenth century, but the old Polish law continued to apply, in particular, to property rights (Grzybowski 1982, 227). Gradually, however, it lost the value of the binding law and became historical.

The proclamation of the Duchy of Warsaw and the construction of its structures created a demand for professional clerical staff and qualified lawyers. They could have been educated by universities where the applicable law would be taught. Old Polish law was also to be among the subjects to be taught. This idea was realized and continued in the times of the Kingdom of Poland; nevertheless, a number of obstacles was met. First of all, the authorities of the Russian Empire were reluctant to study law in the territory of the Kingdom. Moreover, it should be emphasized that basically the old Polish law was not taught at pre-partition universities, so there was no experience in teaching it (see: Matuszewski 2015, 215–228).

2. YEARS 1816–1831

The teaching of the former national Polish law began in the Law School in Warsaw, established on the basis of Frederick August's decree of 18 March 1808 (Dziennik Praw Księstwa Warszawskiego, I, no 11, 296–297). The newly established School of Administrative Sciences was incorporated into this university by the decree of 22 May 1811 (Dziennik Praw Księstwa Warszawskiego, III, no 32, 323–327), and it was referred to as the School of Law and Administration. Finally, a three-year study program and a practical profile were adopted (Grochulska et al. 1981, 14, 18–19; Witkowski 2015, 42; Bałtruszajtys et al. 2016, 21).

The former national Polish law was taught by Jan Wincenty Bandtkie-Stężyński, who undertook research on its history and was one of the precursors of this field of science (Grochulska et al. 1981, 25; Bałtruszajtys et al. 2016, 19). While giving lectures on the history of law, he used to begin them with world history and ancient Roman law, and then presented the history of Polish public and private law (Bałtruszajtys et al. 2016, 22).

In the times of the Kingdom of Poland, the School of Law and Administration was transformed into the Faculty of Law and Administration, established on 19 November 1816, at the Warsaw School (the Main School). The university was renamed the Royal University of Warsaw two years later (Grochulska et al. 1981, 66; Witkowski 2015, 42. Bałtruszajtys et al. 2016, 27; Mycielski 2016, 61), and on 30 March 1830, its name was changed again – this time to the Imperial University of Alexander (Bartel et al. 1981, 398).

In the general understanding of the authorities of the Kingdom of Poland, the university was to be of a practical profile. However, the professors took a different position. In their opinion, it was necessary not only to educate lawyers and deal with the doctrinal aspects of law, but also to conduct research in the field of the history and theory of law. Therefore, as part of wider education, old Polish law and its history was one of the subjects taught (Bartel et al. 1981, 217–218). These classes were conducted for both second-year law students and second-year students of administration (Grochulska et al. 1981, 94; Bałtruszajtys et al. 2016, 36; Mycielski

2016, 153). They were led by Jan Wincenty Bandtkie-Stężyński, already experienced in this field, who also lectured on ancient Roman law and held the position of the dean of the Faculty. His lectures on old Polish law were assessed as thoroughly prepared ("Sprawa o stanie Królewskiego – Warszawskiego Uniwersytetu z roku 1824/5 zdana przez Rektora X. W. Szweykowskiego za posiedzeniu pamiątce założenia tegoż Uniwersytetu poświęconem" 1825. *Posiedzenie publiczne Królewsko-Warszawskiego Uniwersytetu na pamiętnienia jego przy rozpoczęciu nowego kursu nauk odbyte dnia 15 września 1825*, 2; Bałtruszajtys et al. 2016, 31–32; Mycielski 2016, 154), although the textbooks prepared by him and published after his death were widely criticized. The 1850's work entitled: *Historya prawa polskiego napisana i wykładana przed r. 1830 w b. warszawskim Aleksandryjskim uniwersytecie przez J. W. Bandtkie-Stężyńskiego, dzieło pogrobowe* was accused of dealing not only with the history of law, but history in general. Moreover, it was indicated that it described certain legal institutions without giving a complete picture, nor did it present their historical development. Similarly, it presented systemic issues, without a deeper consideration. However, another textbook, published in 1851, entitled *Prawo prywatne polskie napisane i wykładane przed r. 1830 w byłym warszawskim Aleksandryjskim uniwersytecie przez J. W. Bandtkie-Stężyńskiego, dzieło pogrobowe* discussed private law in more detail. This time, the book was criticized as containing factual errors and relying solely on *Volumina legum* and the Lithuanian Statutes, without mentioning the sources of common law (Bobrzyński 1874, 44).

J. W. Bandtkie-Stężyński conducted classes until 1830, when he was replaced by Józef Hube (Romuald's brother), appointed to the position of professor of the history of law (Mycielski 2016, 157).

3. THE KINGDOM WITHOUT A UNIVERSITY

The Royal University of Alexander was closed after the fall of the November Uprising, pursuant to the decision of Nicholas I of 22 October 1831 (Grochulska et al. 1981, 206; Bardach 2001a, 237; Szwarc 2016b, 363). At that time, the basics of law were taught in junior high schools, but there were no classes on old Polish law and its history (Grochulska et al. 1981, 221). The exception were the Legal Courses at the Warsaw governorate's gymnasium. They were launched on the basis of the Act of 10th (22nd) April 1840 on the teaching of law for young people in the Kingdom of Poland, in relation to the growing demand for legal knowledge. Generally, they were intended to educate middle-level court officials. They covered, *inter alia*, the history of Polish legislation (including the former Polish law). The classes were conducted by Wacław Aleksander Maciejowski (Grochulska et al. 1981, 222; Bardach 2001a, 238; Bałtruszajtys et al. 2016, 60; Szwarc 2016b, 388–390), who already during the time of the existence of the university had lectured

ancient Roman law. On the other hand, from 1829 he was also involved in scientific research in the field of historical and comparative research in the field of Slavic rights. In the years 1832–1835 he published *The History of Slavic Legislation* (Bartel et al. 1981, 219), but this work was subject to extensive criticism in particular by Walenty Dutkiewicz (Bardach 1971). Legal Courses lasted only six years, until 19 June 1846, when they were finally closed (Szwarc 2016b, 390).

Due to the lack of a university in the Kingdom of Poland, the Imperial authorities allowed young people to study at Russian universities. By virtue of the decree of 23 April (5 May) 1840, chairs of law in the Kingdom of Poland, including the history of Polish law, were established at universities in Moscow and in St. Petersburg (Bartel et al. 1981, 222).

Initially, in the years 1841–1845, Romuald Hube gave lectures on the history of Polish law (including old Polish law) at the University of St. Petersburg. Then Antoni Czajkowski took his place. The problem that both he and the students faced, was the lack of a textbook. This lecturer had started preparing an appropriate textbook, but was unable to finish it. The classes conducted by A. Czajkowski enjoyed great interest among students, although they were criticized by other academics. Adam Niemirowski pointed to their disorder and focus by the lecturer on historical topics, and the postponement of legal issues to the background. Then, lectures on this subject were given by Włodzimierz Spasowicz, but there is no information about them (Bardach 2001a, 241–242, 246, 258).

On the other hand, at the University of Moscow, from the academic year 1840/1841, lectures on the history of Polish law (and thus the old Polish law) were conducted by Aleksander Korowicki. Then, after completing his teaching in the academic year 1855/1856, classes on this subject were conducted by Jan Pawłowski. In the presentation of the lecture on the history of Polish law, which, according to Juliusz Bardach, had been prepared by J. Pawłowski himself, it was indicated that the lecture was written on the basis of the works of Tadeusz Czacki, W.A. Maciejowski, Joachim Lelewel and Antoni Zygmunt Helcel. The reason for this was the lack of studies on the history of Polish law. As an exception, the work of J.W. Bandtki was indicated (*History of Polish law written and lectured before 1830 at the former Aleksandryj University of Warsaw by JW Bandtkie-Stężyński, post-grave work*), which was neither exhaustive nor a systematic study (Bardach 2001a, 248–249).

4. THE MAIN SCHOOL

Many years of efforts to establish a university dealing with the training of lawyers resulted in the issue of the Act on Public Education in the Kingdom of Poland on 20 May (1 June) 1862. On its basis, the Main School was established two days later, with the Faculty of Law and Administration as one of its branches. The official

opening of the university took place on November 25th of the same year (Grochulska et al. 1981, 255; Bardach 2001b, 260; Witkowski 2015, 42; Bąbiak 2019, 252ff; Szwarc 2016a, 425).

Law studies at the Main School lasted for 4 years, but did not include the division into two fields – law and administration. Such a choice could be made upon passing the master exams (Borowski 1937, 3, 29–30; Bałtruszajtys et al. 2016, 63, 81; Szwarc 2016a, 425).

The study program focused mostly on the dogma of the applicable law. There were also lectures on the history of Polish law (including old Polish law), but in 1864 they were shortened to one semester. Then these issues were presented within the history of the laws of the Slavic nations (Bartel et al. 1981, 223; Grochulska et al. 1981, 290).

Initially, classes in the former Polish law were conducted by a very skilled lawyer – Walenty Dutkiewicz. However, he did not specialise in the history of law, but civil law, which could be easily deduced form the content of his lectures (Borowski 1937, 65; Bardach 2001b, 254; Bałtruszajtys et al. 2016, 72; Szwarc 2016a, 484). He even prepared a textbook, originally published under the title: *Program do egzaminu z historii praw, które w Polsce przed wprowadzeniem Kodeksu Napoleona obowiązywały*, and then changed into: *Prawa cywilne jakie w Polsce od roku 1374 do wprowadzenia Kodeksu Napoleona obowiązywały*. Nonetheless, this text contained specific formulations. It mentioned particular issues in the form of questions and answers. As a consequence, individual legal institutions were discussed separately, without their historical context and in the legislation. Additionally, what should be highlighted and what has become the subject of criticism in the scientific community, W. Dutkiewicz maintained that after the statutes of Casimir the Great were issued, customary law was no longer in force in Poland (Bardach 2001b, 254–257). This concept was also reflected in the textbook. This lecturer conducted classes until the end of 1867, i.e. until his retirement (Borowski 1937, 68).

In the following academic year (1867/1868), this subject was not taught. In the next, its area included in a lecture on the History of Polish, Ruthenian and other Slavic nations, which was conducted by Henryk Hoffman. However, there is no information on the content of this lecture (Borowski 1937, 68, 70–72; Bąbiak 2019, 252). What is more, The Main School operated only until 1869.

5. IMPERIAL UNIVERSITY OF WARSAW

The notice of 8 June 8 (20) 1869, transformed the Main School into the Imperial University of Warsaw. One of the faculties established there was the Faculty of Law (Grochulska et al. 1981, 373, 391; Witkowski et al. 2015, 46; Schiller-Walicka 2016, 65).

According to the program, law studies lasted for 4 years. In addition to the classes in applicable law, they also covered the history of Russian law – taught in the second year – and the history of Slavic legislation – in the third year (Grzybowski 198, 194). Despite the postulates to introduce the history and dogmatics of Polish law into the curriculum of the former Polish law, this subject was not included (Askenazy 1905, 39; Schiller-Walicka 2016, 593).

Moreover, a visible russification of the university staff could be noted. Initially, the Polish scientists constituted the majority at the Imperial University of Warsaw. However, the tendency changed at the end of the 1880s, when the Russians began to take their place. Therefore, Polish lawyers conducted scientific activities outside the University (Witkowski 2015, 46).

6. CONCLUSIONS

Teaching the old Polish law in the Kingdom of Poland encountered a number of obstacles. First of all, the circumstances did not favor the functioning of higher education in general, and legal studies in particular. These included, among others, the reluctance and opposition from the central authorities of the Russian Empire, and, consequently, the efforts to suppress resistance and build pro-Russian attitudes among the inhabitants of the Kingdom.

Additional difficulties, specific to the teaching of old Polish law, resulted from the fact that research within this scientific discipline was just beginning to develop. The first scientific works on it were written, and the lack of foundations was reflected in their substantive level. Moreover, it should be emphasized that, as a rule, the former Polish law was not taught at universities of the First Republic. Consequently, there was a lack of didactic experience and appropriate textbooks.

The lecturers who conducted classes in this matter in the times of the Kingdom of Poland tried to prepare their own didactic materials. The textbooks by J.W. Bandtke, W. Dutkiewicz and W.A. Maciejowski, however, were characterized by numerous factual errors. This was mainly the result of a small number of monographs on the former Polish private law. Therefore, their authors, wanting to describe certain issues, had to conduct research on their own. Consequently, they described the issues that they studied in more detail. Moreover, they ignored problems not described in the available literature, which they were unable to analyze (Balzer 1887, 8–12).

Nonetheless, while the former Polish law was taught as a separate subject within the framework of legal studies conducted until the 1870s, there was no place for it in university education of the later period.

BIBLIOGRAPHY

Askenazy, Szymon. 1905. *Uniwersytet Warszawski.* Warszawa: G. Gebethner i Sp.

Balzer, Oswald. 1887. *O obecnym stanie nauki prywatnego prawa polskiego i jej potrzebach.* Lwów: W. Łoziński.

Bałtruszajtys, Grażyna. Adam Bosiacki. Hubert Izdebski. Marzenna Paszkowska. Anna Rosner. 2016. *Zarys dziejów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego.* Warszawa: Wolters Kluwer SA.

Bardach, Juliusz. 1971. *Wacław Aleksander Maciejowski i jego współcześni.* Wrocław: Zakład Narodowy im. Ossolińskich.

Bardach, Juliusz. 2001. *Themis a clio czyli prawo a historia*. Warszawa: Liber.

Bartel, Wojciech. Władysław Ćwik. Stanisław Grodziski. Artur Korobowicz. Kazimierz Orzechowski. Stanisław Salmonowicz. Monika Senkowska-Gluck. Władysław Sobociński. Katarzyna Sójka-Zielińska. Zbigniew Stankiewicz. Jan Wąsicki. 1981. *Historia państwa i prawa Polski.* Vol. III. *Od rozbiorów do uwłaszczenia*. Warszawa: Państwowe Wydawnictwo Naukowe.

Bąbiak, Grzegorz P. 2019. *Szkoła rozumu i charakteru. Szkoła Główna Warszawska (1862–1869). Materiały do dziejów*. Warszawa: Wydział Polonistyki UW and Dom Wydawniczy ELIPSA.

Bobrzyński, Michał. 1874. *O dawnym prawie polskim, jego nauce i umiejętnym badaniu.* Warszawa.

Borowski, Stanisław. 1937. *Szkoła Główna Warszawska 1862–1869. Wydział Prawa i Administracji.* Warszawa: Wydawnictwo Kasy im. Mianowskiego – Instytutu Popierania Nauki.

Grochulska, Barbara. Ireneusz Ihnatowicz. Stefan Kieniewicz. Halina Kiepurska. Jerzy Skowronek. Maria Wawrykowa. 1981. *Dzieje Uniwersytetu Warszawskiego 1807–1915*. Warszawa: Państwowe Wydawnictwo Naukowe.

Grzybowski, Konstanty. 1982. *Historia państwa i prawa Polski.* Vol. IV. *Od uwłaszczenia do odrodzenia państwa*. Warszawa: Państwowe Wydawnictwo Naukowe.

Matuszewski, Jacek. 2015. "Dlaczego nie uczono prawa polskiego na akademii? Prawo zwyczajowe w kulturze oralnej i w kulturze pisma." *Krakowskie Studia z Historii Państwa i Prawa* 8(3): 215–228.

Mycielski, Maciej. 2016. "Uniwersytet Królewski 1816–1831." In *Dzieje Uniwersytetu Warszawskiego 1816–1915.* Edited by Tomasz Kitzwalter. 53–362. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego. https://doi.org/10.31338/uw.9788323523765.pp.53-362

Schiller-Walicka, Joanna. 2016. "Cesarski Uniwersytet Warszawski: między edukacją a polityką 1869–1917." In *Dzieje Uniwersytetu Warszawskiego 1816–1915.* Edited by Tomasz Kitzwalter. 557–704. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego. https://doi.org/10.31338/uw.9788323523765.pp.557-704

Sobociński, Władysław. 1964. *Historia ustroju i prawa Księstwa Warszawskiego.* Toruń: Państwowe Wydawnictwo Naukowe.

Szwarc, Andrzej. 2016a. "Akademia Medyko-Chirurgiczna i Szkoła Główna 1857–1869." In *Dzieje Uniwersytetu Warszawskiego 1816–1915.* Edited by Tomasz Kitzwalter. 415–556. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego. https://doi.org/10.31338/uw.9788323523765.pp.415-556

Szwarc, Andrzej. 2016b. "Warszawa bez uniwersytetu 1831–1857." In *Dzieje Uniwersytetu Warszawskiego 1816–1915.* Edited by Tomasz Kitzwalter. 363–414. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego. https://doi.org/10.31338/uw.9788323523765.pp.363-414

Witkowski, Wojciech. 2015. „Warszawa jako ośrodek polskiej nauki prawa w dobie zaborów." *Krakowskie Studia z Historii Państwa i Prawa* 8(1): 41–55.

Zawadzki, Stanisław. 1860. *Prawo cywilne obowiązujące w Królestwie Polskiem*. T. I. Warszawa: Drukarnia Karola Kowalewskiego.

Sources

Dekret z dnia 18 marca 1808 r. o utworzeniu Szkoły Prawa w Warszawie (Dziennik Praw Księstwa Warszawskiego, I, no 11, 296–297).

Dekret z dnia 22 maja 1811 r. o przyłączeniu do Szkoły Prawa Szkoły Nauk Administracyjnych (Dziennik Praw Księstwa Warszawskiego, III, no 32, 323–327.

"Sprawa o stanie Królewskiego – Warszawskiego Uniwersytetu z roku 1824/5 zdana przez Rektora X. W. Szweykowskiego za posiedzeniu pamiątce założenia tegoż Uniwersytetu poświęconem." 1825. *Posiedzenie publiczne Królewsko-Warszawskiego Uniwersytetu na pamiątkę założenia jego przy rozpoczęciu nowego kursu nauk odbyte dnia 15 września 1825.* Warszawa.

Ustawa konstytucyjna Królestwa Polskiego z 27 listopada 1815 r. (Dziennik Praw Królestwa Polskiego, t. I, no 1: 2–103).

Ustawa przechodnia wydana przez Króla Saskiego Ks. Warszawskiego pod d. 16 Stycznia 1811 r.

Ustawa wydana przez Króla Saskiego Ks. Warszawskiego pod d. 10 Października 1809 r.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.14

*Kathryn Birks Harvey**
https://orcid.org/0000-0001-6602-8688

DEO, E. MEERA. 2019. *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 235. STANFORD: STANFORD UNIVERSITY PRESS

In the United States, the law, both as a profession and in the academy, are well-known for being resistant to change. However, as American law schools attempt to become more committed to diversity in their student makeup, it is only natural that they would want to strive for the same changes in their legal faculty. Meera Deo, a sociologist and law professor at Southwestern Law School in Los Angeles, California, elucidates the state of the legal academy in the United States, including what law schools have done and also what they have not done to address the lack of diversity among their faculty in America, and, in particular, the overwhelmingly disparate impact that female faculty of color experience. The recently published *Unequal Profession: Race and Gender in Legal Academia* is the first empirical and qualitative study to examine the experiences and trajectories of law school faculty in the United States.

The book contains six chapters, as well as an appendix that describes Deo's methodological approach. Chapter 1, entitled "Barriers to Entry," demonstrates how women and women of color often face multiple obstacles when attempting to enter the field of legal academia. Chapter 2, "Ugly Truths Behind the Mask of Collegiality," details the various women of color face when interacting with their colleagues, including resistance to opinions from those who are of a different race or gender. Chapter 3, "Connections and Confrontations with Students," expands on the various issues often experienced by Deo's subjects, and outlines the conflicts female faculty and female faculty of color have with their students, which is demonstrated to be more than the conflict experienced by a white male professor. Chapter 4, "Tenure and Promotion Challenges," demonstrates how

* PhD candidate in the history department at Northwestern University, Evanston, IL. She has a law degree from Vanderbilt University, Nashville, TN, and was a practicing lawyer for six years before returning to academia. She is licensed to practice law in seven American jurisdictions, kathrynharvey2023@u.northwestern.edu

Received: 8.12.2021. Revised: 18.01.2022. Accepted: 17.03.2022.

female faculty in general, and female faculty of color in particular, tend to receive lower marks on student evaluations than male professors. The challenges of obtaining tenure are also outlined, as women faculty are often tapped for more service positions at their school, leaving them little time to accomplish projects that are actually evaluated for tenure. Chapters 5 and 6, "Leading the Charge" and "In Pursuit of Work/Life Balance," discuss how women are often thwarted when it comes to pursuing positions of leadership, such as a dean role, and also how women are the ones who end up taking on the responsibilities at home, as well as at work, leading many into two full-time jobs. Deo's appendix includes a detailed explanation of the women who made up her sample, the questionnaire the subjects received and the interview script they were subject to, and the statistical methods employed.

Now, Deo's book is only addressing the experience of law faculty in the United States. But, in America, women of color are quite underrepresented in legal academia, while white men generally make up the bulk of the professoriate, and Deo's book illuminates some of the reasons for this. Women of color are more likely to take a job in a law firm because of the high salaries, and are often trying to use that money to support themselves, as well as many other members of their extended family. Not only is the money a powerful incentive, many of the women in the book stated that they had never considered entering academia because it was never presented to them as a possible profession while they were in law school. However, the white men in the sample often entered law school planning to go into academia and were often encouraged to do so once arriving at school. This is yet another example of the disadvantage faced by women of color when striving to become a member of a law school's faculty. However, this also presents some encouraging ideas about how to improve upon the diversity of law faculty. If women of color were encouraged to consider academia early on in their careers, and afforded opportunities to work with mentors who support those goals, law schools may receive a more diverse pool of applicants.

Not only does the book provide a unique mixed method approach to studying the hiring process and the experience of law professors, it also illuminates the effects that race, gender, and the interaction she terms "raceXgender" can play in hiring, advancement, publications, teaching, and the overall law school experience for both faculty and students. Deo's book highlights where American law schools often fall short in their efforts to meet benchmarks for diversity on their faculty, but she also presents suggestions for how to mitigate the deleterious effects that many women faculty of color experience.

Relying on her mixed-method approach, the book uses raw numerical data as well as extensive interviews with both male and female law faculty of all races and backgrounds. Not only does this give the reader the opportunity to hear the voices of the faculty members, but it also reveals how intersectionality can result in oppression and different experiences. Through the interviews with faculty, the

reader learns the state of the American law academy as it currently stands, as well as insights into the progress that has been made and the long road that still lies ahead.

The qualitative aspect of the book makes it extremely relatable, particularly for those who are members of traditionally underrepresented groups in the legal academy. Interviews with both white women and women of color detail instances of "mansplaining" and "hepeating." Female readers will most definitely be able to nod their heads and think of a time when a similar instance has happened to them, and, hopefully, the male readers of Deo's book will read the stories and be able to put a stop to such instances on their own faculty.

While the book indeed demonstrates the clear inequality that has existed in the legal academy, particularly for women of color, the reader also leaves with the uplifting news that underrepresented members often detail instances of support, as well. Several stories highlight valuable mentoring from fellow faculty members about how to handle the challenges presented by the interaction of raceXgender, as well as administrators making some overall progress in recognizing the need for diversity and the evolution not only in legal faculty, but in legal pedagogy. These small steps that are noted provide hope that not only will we start to see more women of color retained as faculty, but also an environment that makes them want to stay. More women of color in leadership positions within American universities could also help drive the changes to occur at a more accelerated rate.

Deo's book is a must-read for anyone in legal academia, and even academia in general. Not only does it call attention to issues that are real and important for diversity in the legal academy and the legal profession, it provides suggestions for how members of all groups can work to correct the issue. Men, and white men in particular, can recognize that both white women and women of color are often uncomfortable and left out in law school administration as a whole, and often face barriers in teaching that others may not. Women in the academy can recognize that the next generation of law faculty may need some special encouragement to pursue academia and they can provide advice and mentoring on how to do so. If pieces of Deo's book are slowly implemented in law schools, we will gradually begin to see the faculty look more like the tapestry that law schools often want to portray in their student guides, but are unable to.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 99, 2022

https://doi.org/10.18778/0208-6069.99.15

*Łukasz Jan Korporowicz**
https://orcid.org/0000-0002-5725-5018

SANDBERG, RUSSELL. 2021. *SUBVERSIVE LEGAL HISTORY. A MANIFESTO FOR THE FUTURE OF LEGAL EDUCATION* 242. LONDON AND NEW YORK: ROUTLEDGE TAYLOR & FRANCIS GROUP

Russel Sandberg, a prolific legal scholar from Cardiff, is known for his many valuable works related to broadly understood Church and State relations, including its modern and historical dimensions. His latest book, published in Summer 2021, deals with different aspects of legal scholarship.

Legal history is almost always associated with the past. It is important, however, to also ask a question about its future. In the modern world, which is increasingly focused on the practicality of life, science, and the development of social institutions, legal history is often associated with interesting, but very often useless or unpractical deliberations. Gradual sidelining of legal history studies from law schools' curricula has been well observed in the western world. Is it possible that legal history studies may regain their importance? Is it possible that legal history can again be (if we accept the fact that it ever had) an important approach to the science of law? Some answers to this and many other questions regarding the importance of legal history in modern academia can be found in Sandberg's new book, which bears the provocative title *Subversive Legal History. A Manifesto for the Future of Legal Education*.

The book is composed of eight chapters in which Sandberg tries to explain what he understands as a subversive legal history to his readers. He starts with a semi-introductory chapter where he attempts to define the problems of modern legal academia (Chapter 1: "The Trouble with Law Schools"). Then, he swiftly refocuses the attention of the readers to an anachronic understanding of the role of legal history in the modern academic world (Chapter 2: "The Problem with Legal History"). In the following chapters, Sandberg deals with his key theme of the book. First, he introduces the idea of subversiveness in legal history and

* University of Lodz, Faculty of Law and Administration, Department of Roman Law, Lkorporowicz@wpia.uni.lodz.pl

Received: 20.12.2021. Revised: 29.01.2022. Accepted: 29.03.2022.

simultaneously he deals with the concept of Critical Legal Studies (Chapter 3: "Subversive Legal History"), which is slightly worn out in the legal academia today. Then he talks about different forms of subversiveness already known in academic discourse but were not directly labelled as such. He talks about the feminist approach (Chapter 4: "The F is Feminist Legal History"), the issue of an evolutionary approach to historical discourse (Chapter 5: "The Perils of Periodisation"), he refers to asking a question "what if" by recognized researchers (Chapter 6: "Counterfactual Legal History") and finally Sandberg introduces questions related to space and time in the legal academic debate (Chapter 7: "The Parallel World of Legal Geography"). The book is topped off with another provocative statement (Chapter 8) that "We Are All Legal Historians Now."

Although it is hard to define what subversive legal history is in just a few words (to understand this, it is required to read the entire book), it seems necessary to at least sketch the most important elements of this idea. According to Sandberg, legal history is much more than just a subdiscipline of legal scholarship. He notes that modern law students are taught how to be an appellate judge and how to deal with important doctrinal problems. For this reason, in Sandberg's opinion, law schools predominantly teach their students only one way of approaching the problem, the doctrinal. Sandberg admits that the doctrinal method is important and maybe even fundamental; however, there is no need to marginalise different methods of legal scholarship. He believes that within legal scholarship it is possible to enumerate other methods that are integral to the doctrinal one. The legal history method is one of them. As a consequence, Sandberg hopes that legal history (as method) will be seen as an element of the toolkit that graduating legal students will take with them.

Why should legal history be treated as a method? And why should this be subversive? Sandberg believes that legal history has subversive potential, that is, a potential to force students and law scholars to question commonly accepted truths about the law. It also has the potential to look at jurisprudence from a different angle. As Sandberg points out, a subversive legal history "challenges the orthodox approaches." For this reason, Sandberg is happy to see an even larger development of trends such as Critical Legal Studies, Feminist Legal History, Counterfactual and Legal History, and Legal Geography. Not to mention the entire movement of "law and…," which has been evolving predominantly in US law schools for almost one hundred years (law and economics, law and sociology, law and politics, law and history, law and anthropology, law and psychology).

The most pivotal problem, however, is that legal academia is "being torn between two masters (the profession and the university), the Law School ultimately chooses to satisfy neither." The vocational element of legal education emphasizes the need for practical knowledge. The academic element of legal education emphasizes the need for research. Law schools straddle between them.

It should be emphasised that Sandberg's vision is very tempting: everyone in legal academia should treat legal history as an important research factor. I believe that there is no legal historian who would not passionately nod upon reading this statement. However, as soon as the nodding would begin, more questions would be asked. Already the subtitle of the book reveals the secret that Sandberg is, in fact, not only talking about legal history. He is proclaiming a plan to revolutionise legal academia in general. Subversiveness is a new revolution. Frankly speaking, he is not alone. Several publications and podcasts have appeared in recent years and even months (since the start of the COVID-19 pandemic) where their authors discuss modern problems of legal education and how they should be cured (an example of that can be a series of podcasts recorded in 2020 by the UC Barkley's law professor Orin Kerr titled "The Legal Academy with Orin Kerr, a show about law professors"). It is interesting that Kerr talks about the American experience, Sandberg is focusing on English and Welsh legal education, and the author of this review represents a model of continental legal education. But all of our observations are similar in many respects. This, undoubtedly, proves the universality of Sandberg's postulates.

Despite said universality, one thing should be emphasized here. Sandberg's vision is tempting. Sandberg's vision is probably a dream of many legal historians around the world. I have no doubt, however, that a comprehensive application of his vision would be very hard, if even possible to apply at all. Transforming doctrinal lawyers into history-oriented and history-aware academic lawyers would require an enormous reshaping of legal academia. Furthermore, there are great differences in legal history awareness between the Anglo-American legal world and lawyers who are part of the continental legal tradition. Even if many Anglo-American legal academics would say that they are not particularly interested in the development of the law, the way how Anglo-American legal systems work forces them to be legal historians, at least on a small scale. The threshold between the area of legal history and modern law is not as visible as it is in civil law countries where the codification process occurred. And here I mean not only private law or criminal law but also constitutional issues. Let us think about the importance of the American constitutional discourse at the early stage of the American path to independence. These discussions are still relevant for modern US constitutionalism. In the case of the continental legal systems, the number of constitutions that were issued in most continental countries, as well as the introduction of the codified law brings a split between the "law before" and the "law after." The codification creates an enormous gulf between legal history and modern law doctrine. On the other hand, maybe this discrepancy between old and new as well as between past and present hides the subversive potential of continental legal history.

Sandberg's book is an amazing discussion of numerous methodological and more theoretical approaches to conducting research. However, this is not

a simple enumeration of different, established courses of research, but rather a deliberate narrative that eventually leads the author to introduce a new vision of the importance of legal history studies. Even if Sandberg's vision can never be fully introduced in law schools, I hope some big elements of his theory will find some use.

May the legal academia boldly sally forth into the legal history awareness path!

TABLE OF CONTENTS

Łukasz Jan Korporowicz, Teaching Legal History – History of Legal Teaching: Introductory Remarks 5
– Nauczenie historii prawa – historia nauczania prawa: uwagi wprowadzające 5

David Barker, Australian Legal Education – A Short History 9
– Australijska edukacja prawnicza – krótka historia 9

Frederik Dhondt, John Gilissen and the Teaching of Legal History in Brussels 19
– John Gilissen i nauczanie historii prawa w Brukseli 19

Lena Fijałkowska, At the Dawn of Legal History: Teaching Law in Ancient Mesopotamia 51
– U zarania historii prawa: nauczanie prawa w starożytnej Mezopotamii 51

Michał Gałędek, Remarks on the Methodology of Comparative Legal Research in the Context of the History of Law in Poland 65
– Uwagi o metodologii badań prawno-porównawczych w kontekście historii prawa w Polsce 65

Tomoyoshi Hayashi, The Education of Roman Law from 1874 to 1894 in Japan. The Transition of Contemporary Model of Legal Systems in the West and the Intellectual Backgrounds of Professors in Charge of Roman Law 83
– Nauczanie prawa rzymskiego w Japonii od 1874 do 1894 roku. Przejęcie współczesnego modelu zachodnich systemów prawnych oraz intelektualne pochodzenie profesorów prawa rzymskiego. 83

Richard W. Ireland, A Legal History of Legal History in England and Wales 99
– Historia prawa historii prawa w Anglii i Walii 99

Philipp Klausberger, *Is iniuria autem occidere intellegitur, cuius dolo aut culpa id acciderit.* Some Remarks on Gaius Teaching Tort Law 113
– *Is Iniuria autem occidere intellegitur, cuius dolo aut culpa id acciderit.* Kilka uwag o Gaiusie uczącym prawa deliktowego 113

Łukasz Jan Korporowicz, Teaching Comparative Law in Eighteenth-Century England: Thomas Bever as a Comparative Lawyer as Exemplified by his Lectures on Polish Law and the Constitution 123
– Nauczanie prawa porównawczego w osiemnastowiecznej Anglii. Thomas Bever jako prawnik komparatysta na przykładzie jego wykładu o polskim prawie i ustroju 124

Izabela Leraczyk, *Polish Auxiliary Forces* and their Law Academic Scripts at the University Camp in Grangeneuve/Fribourg 137
– *Polskie siły pomocnicze* i ich skrypty do nauki prawa w obozie uniwersyteckim w Grangeneuve/Fryburgu 137

Grzegorz Nancka, Towards a new Methodological Approach. Roman Law Community in Lviv Since Mid-19th Century until Early 20th Century 153
– Ku nowemu ujęciu metodologicznemu. Lwowska romanistyka prawnicza od połowy XIX wieku do początków wieku XX 153

Paul du Plessis, Thinking Like a Lawyer: The Case for Roman Law..... 165
– Myśleć jak prawnik: przypadek prawa rzymskiego 165

Dorota Wiśniewska, The Teaching of Pre-Existing National Polish Law in the New Kingdom of Poland..... 173
– Nauczanie dawnego prawa polskiego w Królestwie Polskim 173

BOOK REVIEWS

Kathryn Birks Harvey, Deo, E. Meera. 2019. *Unequal Profession: Race and Gender in Legal Acadamia*. 235. Stanford: Stanford University Press.. 183

Łukasz Jan Korporowicz, Sandberg, Russell. 2021. *Subversive Legal History a Manifesto for the Future of Legal Education*. 242. London and New York: Routledge Taylor & Francis Group..... 187