

# THE STATUS OF A BEARER OF RIGHTS WITHIN THE EUROPEAN LEGAL TRADITION: THE TRADITION OF ROME AND JERUSALEM – A CASE STUDY

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## 1 The three cities

In an increasingly united Europe, we can take pleasure in quoting Paul Koschaker and Henryk Kupiszewski, who said that the spiritual and cultural image of our continent has been significantly affected by Greek philosophy as understood in its widest sense, Christianity and Roman law.<sup>1</sup> We call these three manifestations of ancient culture “pillars”; they support everything Europe is today, and underline the importance of Roman law and the specific nature of the European legal tradition. We do, however, still have to remind ourselves of the importance of Roman law, and constantly convince law faculties that it must be included in the *curriculum studiorum* of future lawyers, and that there is still a need for academic research into it. It is not only lawyers who are aware of the historical and contemporary role of Roman law and the Romanist tradition. In his speech at the Bundestag in autumn 2011, Pope Benedict XVI said that it is obvious that

in the first half of [the second century BC], the social natural law developed by the Stoic philosophers came into contact with leading teachers of Roman law. Through this encounter, the juridical culture of the West was born, which was and is of key significance for the juridical culture of mankind. This pre-Christian marriage between law and philosophy opened up the path that led via the Christian Middle Ages and the juridical developments of the Age of Enlightenment all the way to the Declaration of Human Rights.<sup>2</sup>

1 P Koschaker *Europa und das römische Recht* (München-Berlin, 1953) at 2-7; H Kupiszewski *Prawo rzymskie a współczesność (Roman Law and the Contemporary World)* (Warszawa, 1988) at 16-17.

2 Benedict XVI *The Listening Heart. Reflections on the Foundations of Law* (speech, Bundestag, 22 Sep 2011).

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The Pope concluded his speech by returning to Roman law:

The conviction that there is a Creator God is what gave rise to the idea of human rights, the idea of the equality of all people before the law, the recognition of the inviolability of human dignity in every single person and the awareness of people's responsibility for their actions. Our cultural memory is shaped by these rational insights. To ignore it or dismiss it as a thing of the past would be to dismember our culture totally and to rob it of its completeness. The culture of Europe arose from the encounter between Jerusalem, Athens and Rome – from the encounter between Israel's monotheism, the philosophical reason of the Greeks and Roman law. This three-way encounter has shaped the inner identity of Europe.<sup>3</sup>

Today, ancient Greek ideas, which are fundamental and invariably inspiring, are not only studied in departments of philosophy. Although faced with new waves of persecution, Christianity is still doing quite well in Europe. It is chiefly only law students who have the opportunity to become acquainted with Roman jurisprudence, however; while the usual apology for lecturing on the ideas underlying the classical law of pagan Rome seems neither true nor convincing to anyone except those teaching it. European legal tradition is not based on Roman law alone, but intermingled with other aspects of ancient culture. The interaction of the heritage of the Greek and Roman empires and Judaeo-Christian tradition should also be remembered when we discuss legal tradition. This was observed as early as the fourth century AD by the author of *Mosaicarum et Romanarum legum collatio*, who compared the Roman laws with their Jewish counterparts. The absence of a coherent overview of the traditions of Jerusalem, Athens and Rome may not be a problem when obligations, property or inheritance law or even some aspects of public law are being considered; it could, however, prove a serious obstacle to researching what the Pandectists included in the so-called "general part". This includes issues pertaining to what Gottfried Wilhelm Leibniz called *subiectum iuris* (the subject of rights), namely the bearer of rights. The terms used to define a bearer of rights vary, being sometimes descriptive or intuitive, at other times strictly technical, for instance in the contemporary language of the law and legal language. The definition of a bearer of rights and the subject of a right was problematic in antiquity, when the principle of the personality of the law prevailed, and is still problematic today, when the principle of territoriality dominates.

## 2 Possible bearers of rights<sup>4</sup>

In the context of the questions posed about legal subjectivity in the Roman law tradition, the statement *nasciturus pro iam nato habetur quotiens de commodis eius agitur* ("the unborn is deemed to have been born to the extent that its own benefits are concerned")

3 *Ibid.*

4 The text has already been published in F Longchamps de Brier *Law of Succession. Roman Legal Framework and Comparative Law Perspective* (Warszawa, 2011) at 83-86.

gains special meaning. It relates to the ideas of classical Roman jurists.<sup>5</sup> In Rome, a free man's legal capacity began at birth, but the *nasciturus* could gain benefits or rights retrospectively upon being born alive. The condition of live birth was dictated by practical reasons. The fiction of early birth is to be noted here, although in truth the Romans did not decide on the status of a conceived child. Likewise, general thinking was probably foreign to them; however, they regulated the legal status of a conceived human being to the extent they found useful. A testator, known from the famous *causa Curiana* of 93 BC, used the right to make the *nasciturus* his heir. In addition, including a posthumous child (*postumus*) in succession was a common practice. It is also known that a custodian, *curator ventris*,<sup>6</sup> was appointed to protect the property rights of an unborn human being. The *cura* he exercised was of a permanent nature and extended scope, and served the purpose of protecting all the interests of the ward, even if a specific matter required attention. The custodian of an unborn child took care of its property rights, mainly rights to inheritance. Despite the rights being conditional on live birth, the issue was not future rights but the present ones, which the child would access fully after being born. Because when the *nasciturus* was granted *missio in possessionem* as security, that is to say was awarded inheritance by the praetor, it exercised this right through the agency of the custodian.

The Roman principle of *nasciturus pro iam nato habetur quotiens de commodis eius agitur* was accepted by the Pandectists, although modern codifications did not follow it entirely.<sup>7</sup> Nevertheless, regardless of its reception, the Roman concept is to be found in the laws of many countries.<sup>8</sup> It appears in the common law, Scandinavian law and in mixed jurisdictions, for example Israel.<sup>9</sup> Continental law approaches the issue in two ways. In some legal systems this principle is stated to be applicable in the whole of civil law, for example in Austria, Spain, Switzerland, Italy, Greece and the Netherlands,<sup>10</sup> while for the sake of clarity, it is sometimes repeated in the provisions governing inheritance.<sup>11</sup> Sometimes, however, it appears in the provisions of inheritance law, as is the case in French, German, Polish and Russian law.<sup>12</sup> In the French civil code it is mentioned in a provision on inheritance law,<sup>13</sup> but is also relevant in *inter vivos*<sup>14</sup> donations that are

5 D 1 5 26, *Julianus libro sexagesimo nono digestorum*; D 1 5 7, *Paulus libro singulari de portionibus*; D 50 16 231, *Paulus libro singulari ad senatus consultum Tertullianum*.

6 D 37 9 1 17, *Ulpianus libro quadragensimo primo ad edictum*.

7 H Coing *Europäisches Privatrecht* vol 2 (München, 1989) at 287.

8 A Heldrich & A Steiner sv "Legal personality" in *International Encyclopedia of Comparative Law* vol 4 ch 2 (Tübingen, 2004) at 4.

9 Article 3 c Succession Law, 5725-1965. Cf KH Neumayer sv "Intestate succession" in *International Encyclopedia of Comparative Law* vol 4 (see n 8) at 23.

10 §22 ABGB; §22 ABGBlLicht; arts 29, 30 CCE; art 31, s 2 ZGB; art 1, s 2 CCI; art 36 CCG; art 1:2 NNBW. Cf J Blanch Nougés "Der Ungeborene (*nasciturus*) im römischen, spanischen und iberamerikanischen Recht" (2000) 6 *Orbis Iuris Romani* (Brno) 109-113.

11 For example, art 544 ZGB; art 462, s 1 CCI.

12 § 1923 s 2 BGB; art 927 §2, art 994 §2 KC; art 1116 GKRF.

13 Article 725 CC; art 725 CCB; art 725 CCLux.

14 Article 906 CC; cf art 906 CCB; art 906 CCLux.

also considered benefits, for example *commoda*. Under these legal systems, the principle stipulates that the donation, share in inheritance or legacy is not lost just because the recipient is an unborn child. This narrower regulation is characteristic of the trend of adopting individual solutions for the benefit of the *nasciturus* by way of analogy.

Apart from Roman law, comparative legal studies also confirm that to allow a child to become its parents' successor if born after their death seems to be in keeping with a deeply rooted feeling of justice.<sup>15</sup> In both Roman and modern law, for practical reasons, the condition is that there must be a live birth. Today the *nasciturus pro iam nato habetur quotiens de commodis eius agitur*-principle can give rise to some controversies unrelated to succession, which are discernible in the discussion on its scope. In Poland this is exemplified by the provision: "A child has legal capacity from the moment of its conception; however it shall only have rights and obligations in respect of property if it is born alive", which was introduced by paragraph 2 of article 8 of the Civil Code in 1993 and deleted three years later. Irrespective, however, of any doubts and discussions, today the *nasciturus pro iam nato habetur, quotiens de commodis eius agitur*-principle is valid – at least in inheritance law.

In the light of the history of Roman law and of comparative legal studies, the principle may be discussed and adopted in various contexts. In the first instance, the *nasciturus pro iam nato habetur, quotiens de commodis eius agitur*-principle is a commonly accepted principle in the law of inheritance. The People's Republic of China, which cannot be regarded as a leader in the protection of prenatal children, did not hesitate to adopt the principle that an unborn child may have a right to succession.<sup>16</sup> This is not only because the Chinese admire European law; in the tradition of the Middle Kingdom, irrespective of the legal policy of the time and of adopted laws, it was believed that a person's life begins at conception. The second context is that of awarding legal subjectivity to a conceived child, or at least recognising it in other branches of law than inheritance law, usually in the law of tort. The third context is that of abortion and concerns the legislator's decision to prohibit or permit abortion or to allow it in certain circumstances, for example if the mother's life is threatened.

To take into account the legal concept of what a human being is, and that the *nasciturus* is a human being takes the matter much further. It makes another step possible: protecting an unborn child in the same way as any other person, whether one thinks of a neighbour, in the meaning given to that term in the Gospels, or of the post-revolutionary principle of *fraternité*. The aforementioned levels of legal protection may, in fact, be treated and considered separately. The common practice in legal systems of distinguishing them could, however, be criticised on the ground of inconsistency. As far as laws are concerned, it is but a technical issue. Problems arise when a question concerning legal principles is asked, and the issue becomes even more important when identifying values that are enforced by law.

15 Heldrich & Steiner (n 8) at 5.

16 Article 28 of the Law of Succession of The People's Republic of China of 1985. Cf arts 1863, 1899.2, 1940.2 of the Draft of the Civil Code of the People's Republic of China.

Incidentally, it is also worth mentioning that when discussing the legal capacity of a conceived child, the issue arises of a person before its conception, the so-called *nondum conceptus*. In this case, legal subjectivity is difficult to envisage largely because the subject in question does not exist – the human being has not yet been created. For the Romans, it was obvious that this was a *persona non existens* and that benefits and rights could only be acquired by a *persona existens*: a human being, even if only conceived and not yet born. However, Chilean law is far-reaching in that it recognises the inheritance rights of a child born within ten years after the death of the ascendant, if he could have had a legitimate hope of having such a child.<sup>17</sup> It is interesting that a similar idea evolved in the Roman law of family *fideicommissa* – a branch of the law of inheritance that developed more rapidly than any other. In the course of the development of classical law, it became possible for even first-degree descendants of beneficiaries who were alive, in the sense of having been at least conceived, at the moment of death of the person who created the *fideicommissa* on their behalf, to be appointed subsequent beneficiaries.<sup>18</sup> The Emperor Justinian extended this possibility to descendants in the fourth degree. A testator's decision could be binding for more than one hundred years. And there was no doubt that *nondum conceptus*<sup>19</sup> was also taken into account in Roman law.

### 3 Slaves in Rome

In Rome, the mere fact of being human was of no consequence. Slavery had existed throughout antiquity, and in the middle of the second century AD Roman jurists such as Gaius were able to make statements such as the following: “et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi” (“the principal division of the law of persons is the following, namely, that all men are either free or slaves”).<sup>20</sup> Even free men had no legal claims and were not owed anything. Basically, only adult males, citizens who were *patres familias*, could feel secure: they were strong, wealthy and influential enough to defend and claim what was theirs. Others, however, were unconcerned, because each *pater familias* assured the security of the members of his extended family (including slaves) as well as citizens under clientele relations. The terms *status libertatis*, *status civitatis* or *status familiae* often mentioned in literature on Roman law mean only membership of a certain community: that of freemen, or of citizens, or of members of a family.<sup>21</sup> However, it is futile to search for a uniform definition of the bearer of rights in Roman law.

17 Article 962, s 3 in relation to art 953, s 2 CCCh. Cf P Rodriguez Grez *Instituciones de derecho sucesorio de los cinco tipos de sucesión en el código civil chileno* (Santiago de Chile, 1993) at 37; M Somarriva Undurraga *Derecho sucesorio* vol 1, 6 ed (Santiago de Chile, 2003) at 102-103.

18 D 31 32 6, *Modestinus libro nono regularum*. Cf F Longchamps de Bérier *Fedecommeso universale nel diritto romano classico* (Warszawa, 1997) at 176-177.

19 Nov 159 2.

20 G 1 9; D 1 5 3, *Gaius libro primo institutionum*.

21 W Dajczak, T Giaro & F Longchamps de Bérier *Prawo rzymskie. U podstaw prawa prywatnego (Roman Law. At the Foundations of Private Law)* (Warszawa, 2009) at 179-180.

The ethical values of Roman law contributed to the development of a better grasp of a reality that was ostensibly already known. *Humanitas*, which played a vital role in their approach to people, gained importance under the influence of Greek stoicism. Among free Romans “it became one of the factors which steadily extended the subjective property rights of various people, apart from the *pater familias*”.<sup>22</sup> It contributed to a shift in mentality that caused people to become aware of the drastic inequalities of the then legal institution of slavery. *Humanitas* led to the appreciation of human personality. It elevated man above all other living creatures, from which he could be distinguished because of reason. It added dignity and respectability (*humanitas, dignitas*) to human nature that remained in harmony with the Cosmos. The stoic anthropocentrism contained in *humanitas* was reflected in the law where we encounter general statements such as “according to natural law *omnes homines aequales sunt*”.<sup>23</sup> The Latin quotation is from Ulpian, but the Justinian compilers incorporated this fragment of the jurist’s work in the last title of the Digest, which incorporated the principles of ancient law. The entire fragment reads as follows: “quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quo ad ius naturale attinet omnes homines aequales sunt”.<sup>24</sup> The fact that Ulpian noticed this distinction appealed to Christian lawyers: “as far as civil law is concerned, slaves are regarded as non-existent, as against natural law, because as far as the natural law is concerned, all men are equal.”

Research into the laws promulgated by the Roman emperor Antoninus Pius, which prohibited unduly harsh treatment of slaves, reveals that it was not *humanitas* that was of primary importance, but *utilitas*, that is efficiency and pure pragmatism. Blatant immoderation in exercising property rights disturbed the social order and proved irrational from the economic perspective. *Humanitas* was certainly not an insignificant factor among those influencing the laws of the middle of the second century AD. Its influence is not to be denied, but detailed analysis of the imperial constitutions simply does not allow it to be treated as a primary factor.<sup>25</sup> Therefore, I must emphasise that the limited protection of slaves in the first and second centuries AD does not resemble modern legislation on the protection of animals.<sup>26</sup> In curbing blatant abuse by slave owners, the Romans were not being compassionate so much as addressing private and public interests.<sup>27</sup> *Humanitas* should not be discounted. It used to be an ethical and aesthetic term, and as a postulate or principle was considered a quality of human beings.

22 Kupiszewski (n 1) at 188.

23 *Idem* at 187.

24 D 50 17 32, *Ulpianus libro quadragesimo tertio ad Sabinum*.

25 F Longchamps de Bériet *L'abuso del diritto nell'esperienza del diritto privato romano* (Giappichelli, 2013) at 62-63. See, also, the discussion in K Amiełańczyk *Rzymskie prawo karne w reskryptach cesarza Hadriana (Roman Criminal Law in the Emperor Hadrian's Rescripts)* (Lublin, 2006) at 163 n 111.

26 Cf, eg, E Volterra *Istituzioni di diritto privato romano* (Roma, 1961) at 57; B Nicholas *Introduction to Roman Law* (Oxford, 1975) at 69; K Kolańczyk *Prawo rzymskie (Roman Law)* 4 ed (Warszawa, 1986) at 186-187; P Birks “An unacceptable face of human property” in P Birks (ed) *New Perspectives in the Roman Law of Property. Essays for B Nicholas* (Oxford, 1989) 61-74 at 61.

27 Longchamps de Bériet (n 25) at 63.

One would expect *humanitas* to have been mentioned in the laws relating to slavery. However, it proved unable to change the social order, at least with regard to slavery.

The division made by Gaius' division of people into free persons and slaves, repeated by Justinian's compilers who were eager to quote him, was not limited to the theoretical, technical dimension. It was reflected in people's lifestyle and everyday choices, as well as their treatment and perception of others. It was present in their personal convictions, which translated into everyday practice, thus targeting what the Bible called the heart. Florentinus, a lawyer of the second century AD, reminded that "libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur" ("freedom is one's natural power of doing what one pleases, save insofar as it is prohibited by either coercion or by law"), thus indicating a universal criterion.<sup>28</sup> It is also valid as a description of contemporary social reality: even today it distinguishes a free man from a slave. As in Rome, the law permits a free man to divide his time between work (*negotia*) and rest (*otia*). Although slaves do not have the right to free time, proprietors obviously permit a moment of rest. Freedom is determined by legal guarantees, not just by the will of another person.

Non-Christian antiquity would agree with the following statement: the other person may be a man, but surely not the man I am. However, jurists reflecting on the law, its nature and divisions, at the turn of the second and third centuries AD began pointing out that slavery was the creation of humankind. In his legal handbook, Florentinus went on to say: "servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur" ("slavery is an institution of the *ius gentium*, whereby someone is unnaturally made subject to the ownership of another").<sup>29</sup> This is confirmed, for instance, by Ulpian, a second century lawyer:

nam quamdiu quis in servitute est, manui et potestati suppositus est, manumissus liberatur potestate. quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis ("For whereas one who is in slavery is subjected to the hand and power of another, on being sent out of hand he is freed of that power. All of which originated from the *ius gentium*, since, of course, everyone would be born free under natural law, and manumission would not be known when slavery was unknown. But after slavery was introduced by the *ius gentium*, there followed the boon of manumission").<sup>30</sup>

The need for manumission, and slavery itself, resulted from the *ius gentium*, or what one would today call international law. The phrase *contra naturam* used by Florentinus is promising and is corroborated by Ulpian in the words cited above: "iure naturali omnes liberi nascerentur". Ulpian thus repeated Gaius' division of people and added a characteristic introductory note: "et cum uno naturali nomine homines appellamur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi" ("and thenceforth, we all being called by the

28 D 1 5 4pr, *Florentinus libro nono institutionum*.

29 D 1 5 4 1, *Florentinus libro nono institutionum*.

30 D 1 1 4, *Ulpianus libro primo institutionum*.

one natural name men, in the *ius gentium* there came to be three classes: free men, their opposites – slaves and the third class, freedmen, that is, those who had ceased to be slaves”).<sup>31</sup> Ulpian’s note shows that the idea of natural equality was not foreign to jurists of late classical times, and that they seemed to be aware of historical changes. Nevertheless, phrases such as *contra naturam* or *iure naturali omnes liberi nascerentur* must not be taken out of context nor should too far-reaching consequences be ascribed to them because of they were mentioned in legal writings. Many matters are determined in terms of what is understood as *ius naturale* or *naturalis ratio*.<sup>32</sup> Individual Roman lawyers had varying views about this, but it would be too simplistic to say that only the Judaeo-Christian tradition gave a better understanding of the full meaning of the term “natural law”. Even the *Decalogue*, a statement of the law that is intelligible through the use of reason, required an answer to the question who is one’s neighbour if one was to comply with the commandments. And today, when the meaning of *ius naturale* and *naturalis ratio* is still the subject of heated discussions, much depends on personal academic and philosophical choices.

Since, according to the jurists of late classical times, slavery was the creation of humankind, the ancients were close to concluding that man was capable of abolishing it. The law made provision for manumission, but only through an owner’s decision in an individual case. The thought that slavery could be abolished altogether was still remote. Pragmatism in the face of economic crisis and the inefficiency of an economy based on slavery, caused owners to set up poorly performing slaves and freedmen as *coloni*.

We have become used to thinking about slavery in Rome in a very schematic manner: a slave was an *instrumentum vocale* and a subject of ownership on the same level as animals and inanimate nature. This vision was close to the heart of Marxist historiography, fascinated with slave rebellions, which tried to find antagonistic classes even in antiquity. It would be wrong to think that a slave in Rome was simply an object of rights. The division in the law regarding persons, as indicated by Gaius shows that a slave was also considered to be a “person”, and this is confirmed by other fragments of his works as well as those of other jurists.<sup>33</sup> Besides, in Roman sacral law, slaves had always been regarded subjectively. Imperial law granted slaves at least partial legal capacity,<sup>34</sup> that is, a certain scope of subjectivity. Christianity did not demand any radical changes in this respect, although it did itself make changes to the religious and social order, which is exemplified in the First Letter of St Peter and in the Letters of St Paul.<sup>35</sup> It respected the current order and, “[u]nlike other great religions, Christianity has never

31 *Ibid.*

32 G 1 1; D 1 1 9, *Gaius libro primo institutionum*.

33 G 1 121, 2 187, 3 189; *Fragmenta Vaticana* 75 2.

34 T Giaro “Rzymski zakaz nadużycia praw podmiotowych w świetle nowej jurysprudencji pojęciowej” (“The prohibition of the abuse of subjective rights in the light of the new Begriffjurisprudenz”) (2006) 6(1) *Uniwersytet Kardynała Stefana Wyszyńskiego. Zeszyty Prawnicze* at 292: “[A]ll in all, one should absolutely support the view of recent Roman law studies which summarized said reforms as granting slaves partial legal capacity under imperial law.”

35 1 Peter 2:18; 1 Corinthians 7:21; Ephesians 6:5-9; Colossians 3:22; 1 Timothy 6:1-2; Titus 2:9-10; Philemon 15-18.



proposed a revealed law to the State and to society, that is to say a juridical order derived from revelation. Instead, it has pointed to nature and reason as the true sources of law – and to the harmony of objective and subjective reason”.<sup>36</sup> Since faith and deeds were largely interdependent, as was heatedly discussed especially during the Reformation, rejecting their coherence in all areas of life would have been heresy for Christianity. In each of these areas, both adopting and living by the Gospel had to be visible.

#### 4 Gnats and camels

We are used to conceding that the legal aspect of our culture has been considerably influenced by Rome, although the laws of Moses had already been discussed in Jerusalem long before Rome was founded. Intellectual life in Jerusalem seems to have concentrated on the interpretation of these laws until Jesus Christ gave his own interpretation. An interpretative dispute about Jesus as Christ the Messiah then arose between the Christians and representatives of Rabbinic Judaism, that is, between the two groups relying on Biblical Judaism.

In Cicero’s times, the saying *summum ius summa iniuria* adequately expressed the common conviction that the law was becoming the exact opposite of itself when the rigorous execution of authority failed to take the social context into account. The saying *summum ius summa iniuria* sounds like a legal rule, although it conveys no normative content. On the other hand, it reflects the valuable experience of a society acquainted with the law. The saying is universal and timeless, indicating a familiarity with the law and its interpretation, as does the interjection found in the Gospels: “ὄδηγοὶ τυφλοὶ, οἱ διῦλίζοντες τὸν κώνωπα, τὴν δὲ κάμηλον καταπίνοντες” (“you blind guides, straining out gnats and swallowing camels!”).<sup>37</sup> This saying amounted to a severe criticism of distortions in interpretation, and the soundness of the criticism demonstrated an exceptional knowledge of legal mechanisms. Alas, it has not lost any of its relevance or harshness. It expresses an objection to the juggling of rules to circumvent the law, to abusing, bending or instrumentalising the law, which was as common in ancient Israel as it is now in Poland. Both in Israel and Poland, such practices could have dangerous consequences for the pragmatic, if not ethical, organisation of social reality.

The interjection was not unfounded. It was preceded by numerous instances of such interpretation, which had become a caricature of itself. The line preceding the interjection, however, contained a positive interpretation: “ἀποδεκατοῦτε τὸ ἡδύοσμον καὶ τὸ ἄνηθον καὶ τὸ κύμινον καὶ ἀφήκατε τὰ βαρύτερα τοῦ νόμου, τὴν κρίσιν καὶ τὸ ἔλεος καὶ τὴν πίστιν· ταῦτα [δὲ] ἔδει ποιῆσαι κάκεῖνα μὴ ἀφιέναι” (“you pay your tithe of mint and dill and cumin and have neglected the weightier matters of the Law – justice, mercy, good faith! These you should have practised, those not neglected”).<sup>38</sup> The phrase “you blind guides, straining out gnats and swallowing camels” comes from the four ominous “woe

36 Benedict XVI (n 2).

37 Matthew 23:24. All the English translations are taken from *The New Jerusalem Bible. Standard Edition* (London, 1985).

38 Matthew 23:23.

unto you” speeches of Jesus in the twenty-third chapter of the Gospel of St Matthew. In the Gospels of St Mark and St Luke, this chapter corresponds to brief warnings against the scribes and Pharisees.<sup>39</sup> These texts relate to scandalous behaviour, to taking advantage of the weak, the defenceless and the gullible, but they do not mention any perversity in interpreting the law. The apostle Matthew clearly collected a number of Jesus Christ’s speeches, some of which are known from other fragments of the Gospel of St Luke,<sup>40</sup> and then arranged them into the seven woes – οὐαὶ.<sup>41</sup> The number seven is no accident. The inclusion of the whole of the great speech against the scribes and Pharisees in the Gospel of St Matthew after the account of Jesus Christ’s public activities, that is, while St Matthew correspondingly placed the so-called Sermon on the Mount before recounting these activities, seems to be an intentional editorial measure. The sermon also contains a number of independent speeches by the Master of Nazareth, but this allowed the inclusion of the entire sermon on the fulfilment of the law. The sermon starts with eight blessings, which according to St Luke was given on a plain, not a mountain: “καὶ καταβὰς μετ’ αὐτῶν ἔστη ἐπὶ τόπου πεδινῷ” (“he then came down with them and stopped at a piece of level ground”).<sup>42</sup> This account seems more historically accurate. Few people cared about the historical details as much as St Luke, but St Matthew’s editing was subordinated to the theological content of the text. Besides, each Evangelist’s unique approach is indicated by the words “according to” in the title of each of the Gospels. The text does not comprise mere words; editorial measures ensured more depth of meaning. In the Gospel of St Matthew, these measures leave no doubt that Jesus is like a new Moses and is, therefore, the legislator of the New Covenant. The blessings are an expansion of the Decalogue Moses received at Mount Sinai. In the same chapter, they are immediately followed by an interpretation of the Decalogue, introduced mnemonically by the following phrase: “ἠκούσατε ὅτι ἐρρέθη, ἐγὼ δὲ λέγω ὑμῖν” (“you have heard ..., but I say this to you”).<sup>43</sup> At this point, the statement condemning abuse, immediately preceding the interjection about gnats and camels, is explained, namely “τὰ βαρύτερα τοῦ νόμου, τὴν κρίσιν καὶ τὸ ἔλεος καὶ τὴν πίστιν” (“the weightier matters of the Law: justice, mercy, good faith”). When referring to them, Jesus Christ was probably referring to the prophet Micah.<sup>44</sup> And the new Moses is he who gives the following interpretation: “ἀπ’ ἀρχῆς δὲ οὐ γέγονεν οὕτως” (“it was not like this from the beginning”).<sup>45</sup> The continuous depth of legal experience is visible in all of this because in the Old Covenant the scribe was indeed a lawyer.

39 Mark 12:38-40; Luke 20:45-47.

40 Luke 11:39-52; Luke 13:34-35.

41 Matthew 23:13-21.

42 Luke 6:17.

43 Matthew 5:21-22, 27-28, 31-32, 33-34, 38-39, 43-44.

44 Micah 6:8. In the Septuagint this verse was translated as: “εἰ ἀνηγγέλι σοι, ἄνθρωπε, τί καλόν; ἢ τί κύριος ἐκζητεῖ παρὰ σοῦ ἀλλ’ ἢ τοῦ ποιεῖν κρίμα καὶ ἀγαπᾶν ἔλεον καὶ ἔτοιμον εἶναι τοῦ πορεύεσθαι μετὰ κυρίου θεοῦ σου”, and in the Vulgata: “indicabo tibi, o homo, quid sit bonum et quid Dominus quaerat a te utique facere iudicium et diligere misericordiam et sollicitum ambulare cum Deo tuo.”

45 Matthew 19:8.

The phrase “woe unto you”, repeated seven times in chapter 23, targets perversity in interpretation, as does the definition of the interpreters: ὑποκριταί – hypocrites. They add to the number of laws, thus making people’s lives harder, but themselves do not need to adhere to them. The witty remark about “straining out gnats and swallowing camels” does not overcome a sense of menace. Instead, it emphasises the severity of uncompromising warnings. Moreover, it is excellent rhetoric, as is the saying *summum ius summa iniuria*. The Aramaic play on words cannot be rendered in Greek, Latin or English. It can only be understood if we know that “*gamlā*” means “camel” and “*qamlā*” means “gnat”. In any case, the gnat aspect may not have been abstract at all: people used to strain their drinks for fear of tiny insects that were believed to be “unclean”.<sup>46</sup> The camel, also an “unclean” animal,<sup>47</sup> was probably a hyperbole, and corresponded to the exaggeration of the interpreters of the Law.

The relevant tithe had to be paid in the form of animals and farm produce: grain from the soil and fruit from the trees.<sup>48</sup> “Ἐποκριταί” were so meticulous that they deducted a tithe from herbs grown in home gardens: mint, dill and cumin. But they should also have taken care of three others: “τὴν κρίσιν καὶ τὸ ἔλεος καὶ τὴν πίστιν” (“judgement, namely assessment and skilful distinction, made out of love for people, with confidence and faith in God’s promises”). Justice, mercy and good faith, being the most important pillars of law and life, lead to the fundamental question regarding subjectivity in law. The question was put very simply in Jerusalem: “καὶ τίς ἐστὶν μου πλησίον” (“who is my neighbour?”) It is also included in the Gospel of St Luke 10:29. In the Gospel of St Matthew, it corresponds to a fragment that comes immediately before chapter 23 concerning the scribes and Pharisees.

## 5 Subjective and objective standards

In the Gospel according to St Luke, the man who asked “and who is my neighbour?” was dubbed “νομικός”. In a non-Judaic context, this word means simply “a lawyer”. However, in this case it was an expert on the written Torah and oral tradition, that is a scholar of the law of Moses.<sup>49</sup> The term νομικός contrasts with the phrases applied to scholars of the Scriptures in the twenty-third chapter of the Gospel according to St Matthew. The negative assessment does not apply to lawyers, but to the “οἱ γραμματεῖς καὶ οἱ Φαρισαῖοι” – scribes and Pharisees. The latter occupy the place of the teacher, namely the seat of Moses the Lawgiver, but they do not teach well. They actually defile the law through their perversity, and so when they are described as scribes and Pharisees, the term ὑποκριταί – hypocrites is used. In the parts of the Gospels according to St

46 A Leske “Ewangelia według św. Mateusza” (tr B Widła “Gospel of St Matthew”) in *Międzynarodowy komentarz do Pisma Świętego (The International Commentary to the Bible)* (Warszawa, 2000) at 1193.

47 Leviticus 11.4.

48 Leviticus 27:30-33; Deuteronomy 14:22f.

49 Leviticus 11:20-23. D Stern *Komentarz żydowski do Nowego Testamentu* (tr A Czwojdrak *Jewish Commentary to the New Testament* 2 ed, Warszawa, 2005) at 210.

Mark and St Luke which are the equivalent of chapter 23 of the Gospel according to St Matthew, the term “γραμματεῖς”<sup>50</sup> is also encountered, which obviously means scholars of the Scriptures and experts in law; this has a technical and not exactly flattering ring to it. The term “νομικός” used by St Luke raises the question of how the command to treat one’s neighbour as one’s own self must be interpreted. The command is a natural one: although going back to the foundations of the Old Covenant, human understanding, which ponders over the most permanent and practical structuring of human relations, recognises it. Moreover, it is not a Christian command, since in the New Covenant the most important interpretation of the commandment on neighbourly love was that of Jesus Christ at the Last Supper: “ἐντολὴν καινὴν δίδωμι ὑμῖν, ἵνα ἀγαπᾶτε ἀλλήλους, καθὼς ἠγάπησα ὑμᾶς ἵνα καὶ ὑμεῖς ἀγαπᾶτε ἀλλήλους” (“I give you a new commandment: love one another; you must love one another just as I have loved you”).<sup>51</sup> Consequently, interpretation of the commandment referred to the cross, which became the symbol of treating other people better, that is, sacrificing oneself. Thanks to the cross, Christianity gained an objective standard of how to treat one’s neighbour. The command “love thy neighbour as yourself,” although subjective, is clear to everyone (provided that self-love, acceptance of one’s self and aversion to auto-aggression is normal). If this standard is understandable, all that remains is to determine to whom it should apply. This was a serious issue for experts in the Torah, according to whom neighbours included Israelites and those who had adopted the law of Moses, but excluded pagans and Samaritans. The scribes exonerated people from having to show the latter any favour.

Jesus Christ replied to the question about neighbours in the parable of the good Samaritan, which is only mentioned by St. Luke. It ends with the following dialogue by Christ: “τίς τούτων τῶν τριῶν πλησίον δοκεῖ σοι γεγονέναι τοῦ ἐμπεσόντος εἰς τοὺς ληστὰς; ὁ δὲ εἶπεν· ὁ ποιήσας τὸ ἔλεος μετ’ αὐτοῦ. εἶπεν δὲ αὐτῷ ὁ Ἰησοῦς· πορεύου καὶ σὺ ποιεῖ ὁμοίως” (“Which of these three, do you think, proved himself neighbour to the man who fell into the bandits’ hands?” He replied, ‘The one who showed compassion towards him’. Jesus said to him, ‘Go, and do the same yourself.’”).<sup>52</sup> Therefore, showing compassion towards others means treating them like neighbours. So, if there is a duty to treat others like one’s self, these others have the right to be seen and cared for, which in modern words would be termed: being treated subjectively, namely as a bearer of rights.

What Jerusalem and Rome have in common is the universal nature of the legal experience that became the foundation of the European legal tradition. As to the fundamental question on the bearer of rights, the experience of both Jerusalem and Rome leads to the question “καὶ τίς ἐστὶν μου πλησίον” (“who is my neighbour?”). The answers to the question are not unanimous: they differ, although the phrasing of the fundamental and shared question proves that universalism may extend beyond one legal tradition. It also points to the basic yet difficult problem in any society, who may be considered a neighbour? This problem was known in ancient times: in Rome it related to slaves and foreigners, and in Israel to pagans and Samaritans. Today the problem still exists, but now relates to immigrants or embryos. In theory, the problem should be easier for us to

50 Mark 12:28-32; Luke 20:1-19.

51 John 13:34.

52 Luke 10:36-37.

solve, since everyone has been or could become an immigrant and, undoubtedly, was an embryo. The universalism of the legal experience is expressed in the development of understanding, in discovering reality in terms of what can be created, undertaken and regulated in a socially acceptable and efficient manner. This development may have nothing to do with relativism, as proven by the teachings of the Old Testament and the shaping of the People of the Covenant and most of all, the growth in the understanding of who God is, that is the deeper revelation of God. This evolutionary character is visible in the letters of St Paul, in particular his Letter to Philemon and also in the entire Christian outlook on slavery. It may also be seen in changing attitudes to the death penalty in the last decades of the twentieth century. In studying people as part of human society, linking Rome with Jerusalem, and the Judaeo-Christian heritage with Roman jurisprudence can still be inspiring.

## 6 Neighbour or brother?

The answer to the question who is my neighbour seems pivotal, but not only from the legal perspective. The word “neighbour” (πλησίον, *proximus*) has religious connotations and some may claim it is incomprehensible. It should therefore be translated into the language of the Enlightenment and of the French revolution, which gave rise to the slogan: *Liberté, Égalité, Fraternité*. Article 2 of the Constitution of the Fifth French Republic states that *La France est une République indivisible, laïque, démocratique et sociale*. Therefore no one suspects this lay republic of any religious subtext concerning *fraternité*. The concept might be derived from Stoic philosophy. In fact “brotherhood” defines relationships with neighbours. But who is a brother in a civil society? As far as the law is concerned, any revolution is a time of “swallowing camels”.

*Liberté* is perhaps an illusion of modern times – an enormous achievement in theory, which requires constant affirmation in everyday life, both private and public, and which is discussed in more detail below. The beautiful dream of *égalité* reminds us of what we should strive for in the era of globalisation, in particular against a background of legal systems and societies that are increasingly powerful in economic and political terms. In such societies, the power of truth itself does not assure human rights and the equality of people. “Brotherhood” is not only a prudent equilibrium between *liberté* and *égalité*, which constantly obstruct one another, since the more freedom there is, the less equality, and the more equality the less freedom. Today it is clear that *fraternité*, if bracketed with *liberté* and *égalité*, creates not only a foundation for reconciliation but also for understanding those two terms. The question of “brotherhood” boils down to: “brotherhood” with whom? Who is one’s neighbour? Every person? And who is a person: a slave, a foreigner, a pagan, a Samaritan, an immigrant, or an embryo? Whom do we consider to be persons in the pragmatism of social life?

Surprisingly, the concept of the neighbour is to be found in Lord Atkin’s consideration of liability for negligence. Contending that one person owes another person a duty of care, he argued in *Donoghue v Stevenson* that “[t]he rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or

omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”<sup>53</sup> The concept of the neighbour was, therefore, not just rhetoric. It was considered to be of legal relevance, even if it had a restricted meaning.

We consider Roman law to be above all an achievement of the thought and authority of legal experts. The question of brotherhood, of who is one’s neighbour, can be posed in the context of Roman law, particularly since it forms part of the European legal tradition. Roman law is a status-determined legal system. This system was a dominant until the bourgeois revolutions and codification. It ruled out the fixed social divides of feudalism through the concept of the uniform bearer of rights.<sup>54</sup> Since the revolution, symbolised by the guillotine, and its heirs had to determine the meaning of *fraternité* (a concept which entered the triad some time later) it is worth researching the concept of a neighbour in Roman law in order to gain a deeper understanding of its meaning even before it was infiltrated by Christianity with its view of humanity.

Today, anthropological heresy, being fundamental, is really dangerous. It is no paradox that the fundamental dispute with Marxism, which dominated political life for decades in the twentieth century, also pertained to the vision of humankind. Therefore, when studying who is a bearer of rights in a specific normative order, one cannot limit oneself to words only. The phrase “*hominum causa omne ius constitutum sit*” (“all law is established for men’s sake”)<sup>55</sup> is full of beauty and pathos, but in Hermogenian’s legal handbook justified only the methodics of the work. The third century jurist, who may have been one of the people who initiated the persecution of Christians under Diocletian, stated simply that he first intended to focus on the law concerning people and only later on other matters. Because Justinian’s compilers included this remark in their work of the sixth century, it helped promote the conviction that the law should be made for men’s sake and that man should be pivotal to it. This statement thus formed part of the European legal tradition and of humanist trends. The reference to it in a speech addressed to lawmakers by John Paul II, a statesman and philosopher of personalism, is both an appeal and an incentive. It serves to recollect the Roman heritage in order to emphasise the need to see the human dimension of laws.<sup>56</sup>

When it is asked who is a bearer of rights, the reply a “person” is not an adequate answer. One must constantly study whom society, and therefore the legal order, considers to be a “person”. In analysing laws, we are seeking an answer to this question in society’s convictions and in the practical sphere, because, axiologically, the law is not neutral, even if it is declared to be so. Adopting and protecting values is the heritage of civilisation, legal traditions or, as defined nowadays, the recognised concept of

53 *Donoghue v Stevenson* [1932] All ER Rep 1; [1932] AC 562 at 580.

54 Dajczak, Giaro & Longchamps de Bériar (n 21) at 177.

55 D 1 5 2, *Hermogenianus libro primo iuris epitomarum*.

56 John Paul II “Address to the Polish Parliament” (11 Jun 1999); John Paul II “Address to the Italian Parliament” (14 Nov 2002).

fundamental rights. Sometimes the role of values is limited to the axiological minimum. However, as Marek Safjan – who proposed this limitation – noticed, “recognising the axiological minimum and fundamental rights as a common and universal element of the legal order in constitutional democracies does not *per se* resolve the fundamental ethical and legal conflicts which pose challenges to the modern legal systems”.<sup>57</sup> Indeed, their existence proves that the said “minimum” is a key word. The real disputes that fire hearts and minds pertain to what belongs to the axiology of society, that is to say, what the axiological minimum includes. The fundamental and seemingly simple question “who is your neighbour?” still remains the focus of these disputes. The answer to this question determines both the respondent’s and the legal order’s level of humanity.<sup>58</sup>

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## Abstract

The interaction of the heritage of the Greek and Roman empires and Judaeo-Christian tradition should be kept in mind when we discuss legal tradition. This article gives an example when discussing what Gottfried Wilhelm Leibniz called *subiectum iuris* (the subject of rights), namely the bearer of rights. The terms used to define a bearer of rights vary, sometimes descriptive or intuitive, at other times strictly technical. The experience of both Jerusalem and Rome leads to the question: “Who is my neighbour?” or “Who is my brother?” Although the phrasing of the fundamental and shared question proves that universalism may extend beyond one legal tradition, the answers to these questions are not unanimous. The basic yet difficult problem in any society is who may be considered a neighbour? The question of “brotherhood” boils down to “brotherhood” with whom? Who is one’s neighbour? Every person? And who is a person: a slave, a foreigner, a pagan, a Samaritan, an immigrant, or an embryo? Whom do we consider to be persons in the pragmatism of social life? The answers to these questions determine both the respondent’s and the legal order’s level of humanity.

57 M Safjan “Prawo, wartości i demokracja (Law, Values, and Democracy)” (2008) 1(5) *Chrześcijaństwo – świat – polityka* at 14.

58 The text was first published in Polish in essays commemorating Andrzej Kremer: F Longchamps de Bérier, R Sarkowicz & M Szpunar (eds) *Consul est iuris et patriae defensor* (Warszawa, 2012) 115-130.