THE HISTORICAL LAWYER AND THE GOALS OF LEGAL EDUCATION

*Prof. Dr. Franciszek Longchamps de Bérier**

UDK: 34(37)(091)
378.4.096:34>(091)
DOI: 10.3935/zpfz.72.3.01
Izvorni znanstveni rad
Primljeno: ožujak 2022.

In blessed memory of my dear friend Professor Marko Petrak,
who knew and loved Roman law and canon law

Sloppy education results in misdirected graduates. We need to see legal education as a matter of shaping in adepts something that can be called caliber of intellect. It is referring to the university formation of a way of thinking and of perceiving the world that distinguishes legal studies from any other intellectual or scientific preparation. The author argues that legal education in the main must ensure that graduates are historical lawyers. There are two occupational paths open to law graduates, that of practitioners and that of scholars. The vast majority choose to be practitioners. Law adopts not only a dogmatic or comparative legal perspective, but also a historical perspective of discourse and argumentation. The users of this argumentation — and, one might say, everyone who appreciates it — are, on the strength of this fact, historical lawyers. Law is in a constant process of historical development, therefore a historical lawyer is a realist lawyer. The historical lawyer, with his awareness of the inevitable successive changes in the law, has no illusions as to the immutability of specific regulations, and is consequently more able to estimate the spectrum of such changes and what future amendments might entail.

* Franciszek Longchamps de Bérier, Ph. D., Professor, Faculty of Law and Administration, Jagiellonian University, Gołębia 9, 31-007 Kraków, Poland; f.lb@uj.edu.pl; ORCID ID: orcid.org/0000-0002-1485-0976

He is aware of the mistakes of the past and can thus take care to avoid them in the future — and, hopefully, help others to avoid them, too.

Keywords: legal education, graduate's profile, educational innovation, comparative studies, efficacy and efficiency of law, Roman law, legal history

1. PROFILE OF A LAW GRADUATE

In order to define the goals of legal education, it is essential that we have at least a sketch of what we expect a graduate's profile to look like. Are there common understandings, perhaps even a consensus, in this regard? Nationwide, certainly not. But can we agree on the issue at least within our own law faculties? It would be worth making an effort to achieve this, both as a worthwhile goal in itself as well as to give others the chance of benefitting from our experience, even if they make choices different from our own. Moreover, when planning a *curriculum studiorum* for our students, we must ask whether we also take into account opportunities for our own development, or if we are content to just continue what we have done previously, risking the boredom of routine, increasing from year to year?

It seems a worthwhile task, then, for us to consider the profile of the graduate, a profile which, however, does not have to be identical in every university, and this for at least two reasons. First, university units may wish to refer to themselves as faculties, or — as an expression of the belief that their graduates need to be prepared primarily for the practical exercise of their subject — they may call themselves law schools. This has already been mentioned elsewhere.[1] Secondly, the candidates for law studies may vary considerably. Their previous preparation, their abilities (of various kinds), and, of course, their dreams, ambitions and expectations with regard to higher education, may be widely divergent. In the background of this question, lies, of course, the mass character of law studies in modern times. When I started my university adventure at the Faculty of Law and Administration of the University of Warsaw in 1988, there were 250 of us and when I graduated there were 350 first-year students. But when I began working as an academic teacher in October 1993, the number of initial students had risen to 2,000 (three-quarters of them admitted to fee-paying studies called 'evening' or 'extramural' classes).[2]

---

1 Longchamps de Bérier, F., *Roman Law and Legal Knowledge – Law Faculties versus Law Schools*, in: Giaro, T. (ed.), *Roman Law and Legal Knowledge. Studies in Memory of H. Kupiszewski*, Stowarzyszenie Absolwentów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, Warszawa, 2011, pp. 13 – 19.

2 The 1997 Constitution of the Republic of Poland, art. 70 §2: "Education in public

Our hypothetical graduate will be aiming to make a career either as a law practitioner or as a scholar. The latter choice, i.e. the undertaking of an academic career, cannot be left out of account since the teaching of law takes place at a university. Universities have always given legal education. A university is a corporation of scholars and learners, where (ideally) the scholars are in a process of constant learning and development, and the learners endeavor to gain qualifications and possibly acquire higher and higher diplomas and degrees. The two groups intermingle with each other and interpenetrate. However, we need to be aware that those who graduate in law will overwhelmingly end up not as scholars but as practitioners.

In this matter the professional life of Nicolaus Copernicus can provide much food for thought. In the preparation of a study on this figure as part of the project on law and Christianity as seen in the life of Christian jurists[3], many questions of a more general nature arose. At the very beginning, the need to choose specific figures forced the editors to ask a preliminary question: which individuals should be considered to be the truly outstanding lawyers? And even before this, another question is yet more basic, formulated especially with regard to persons better known for achievements in fields other than law: who can be considered to really be a lawyer at all? Copernicus himself was indeed a practicing lawyer—a typical in-house counsel, in fact. He worked for the Warmian episcopal duchy and was, indeed, a Catholic clergyman, though he did not receive major orders—not even the diaconate, let alone the presbyterate or bishopric—so he neither celebrated the sacraments nor performed any pastoral ministry. However, as a canon his duties involved him in constantly advising two entities that administered the Duchy of Warmia at that time: the Cathedral Chapter and the Diocesan Bishop. More than once he performed highly responsible administrative functions. And yet almost everyone is surprised to learn that Copernicus was a lawyer. After all, Copernicus is known and celebrated as an astronomer, mathematician and economist, and to a lesser degree as a cartographer or medical doctor. But we have a different picture if we look at his university career, in which he completed a quadrivium; his initial studies were in Kraków, and then he studied law in Bologna and medicine in Padua. But the sole degree which our great astronomer and polymath obtained in his whole life was the degree of doctor in canon law on May 31, 1503 in Ferrara. And likewise, Pierre de Fermat (1607–65), often considered the founder of the mo-

schools shall be without payment. Statutes may allow for payments for certain services provided by public institutions of higher education."

3 Domingo Osle, R.; Longchamps de Bérier, F. (eds.), *Law and Christianity in Poland: The Legacy of the Great Jurists*, Routledge, London, 2022.

dern theory of numbers and whose works laid the foundations for the calculus of probability, actually had most of his works published posthumously. He was known in his lifetime only as a simple, working lawyer, and though celebrated today as a great mathematician, Fermat in fact, like Copernicus, earned his daily bread by practicing his profession as a lawyer and a judge.

It is not surprising, however, that it is not through their achievements in law that these great scholars are celebrated today. Achievements in the legal field would not have given them anything like the fame they have, nor the gratitude of posterity. For what could they have discovered or created new in the field of law? In private law everything except intellectual property and the capital company was invented by the Romans. Similarly, one may wonder about the chances of innovation in legal philosophy or legal theory. Ever since this now-flourishing field was established, it has been introducing students of law to the arcana of the fundamentals of legal theory, which they then explore in detail during their law studies. Until the philosophy of law emerged as a separate university subject, its function was performed by the teaching of Roman law, a subject which by its nature created an environment for meta-legal and philosophical considerations. It is well known that until the eighteenth century, only two subjects were taught in law faculties: Roman law and canon law. Of course, philosophers of law dealt not only with the introduction to jurisprudence (eagerly following within the Anglo-Saxon tradition in this respect); they also devoted much attention to the history of interpretation, succumbing to more than one fashion for particular approaches to interpretive solutions, approaches with greater or lesser degrees of relativization. They became interested in ethics and to this day will volunteer for committees evaluating various sorts of projects and solutions (as well as the persons associated with them). With great hope they joined the law and economy trend, and even the law and finance trend, and finally the ever-so-popular vogue for neuroscience and the like. One can, of course, respond to this extraordinary wealth in different ways. It is important, however, not to limit the scope of research, whether with regard to new inquiries or in connection with previous investigations, including in the field of the psychology of law, the sociology of law, and, above all, legal history. And such research should not just be a matter of basic or fundamental research. This research must always be carried out in various directions, since we never know what will really prove useful in the future. Even in legal sciences, therefore, one should not limit the spectrum of possibilities that such research may create. And it is worth educating people that they should not deny these opportunities to others — there may be a new Copernicus working nearby. It seems appropriate, in this regard, to look for any common ground that may

exist across the different legal sciences — after all, the world is not divided according to the academic chairs or departments of our university faculties. And if common ground is to be sought, it is better to seek it together and with as far-reaching an understanding as possible.

2. IN SEARCH OF ONGOING WEAK POINTS IN CURRENT LEGAL EDUCATION

Law did not belong to the traditional higher-education category of *artes liberales*, neither in Copernicus' own time nor before. But the great post-medieval astronomer did nevertheless devote himself to *artes liberales* as an introduction to further education during his first university studies at the Academy in Kraków. This was because, though Law, being socially useful, has always been a faculty within the university, it was studied only at a later stage of the university program, i.e. after an acquaintance with the basic arts and sciences. This model has left its mark — for example, in the American system, where the three-year law-studies course, leading to the JD (*juris doctor*) degree, belongs to postgraduate studies, and thus is available only to graduates of the university's four-year general undergraduate program. All this reminds us that not only the results of the study of law but also the manner in which these studies were conducted have been considered socially significant. This general issue therefore requires a more serious level of care and attention than that called for by any particular faculty or school of law.

With regard to this issue, a great number of detailed comments are needed. After all, the devil is in the details. Let us provide a few observations of our own by way of example and to encourage you, the reader, to add further comments. We would not in any case be able to amass all possible pertinent remarks in these few pages.

One question that arises concerns the justification for leaving it to the *first-year students* to choose the subjects they are to study. It is true, of course, that some degree of freedom should be given to individuals so that the adepts have a chance to profile themselves — and consequently their studies — in terms of the future work they aspire to. And in fact it has always been the case (sometimes idealized as 'the good old times') that a certain choice was given the student, even if very limited when it came to it. However, the idea that students should make their choices at the very earliest stage seems patently misguided, for in this way of doing things it is up to individuals who, theoretically, have no familiarity at all with the law to determine the program of their first year of studies. In practice, this idea does not work and for obvious reasons

that are predictable from the outset. Students newly admitted to law faculties normally know nothing about the specifics of studying law and necessarily require guidance by another. These specifics are, in practice, usually formulated with the help of slightly older students, who still may not be considered mature lawyers. Moreover, the advice of these students does not always reflect the merits or even substance of the actual lectures and courses themselves, or the practical usefulness of particular subjects. The reality is, of course, that for many students the main aim is simply to "pass" the material or get a high grade or score rather than attain a good understanding of the subject. The real disaster is when such students also select only those classes which serve primarily to acquire a limited set of specific legal skills, for, having missed the classes at the time, it is nigh-on impossible to catch up later with what is lacking — for instance, by attending a couple of evening classes.

While it is true that freedom of choice is very much a value in its own right, it often turns against the possessor at that point where students have to decide what subjects to take. As a particular, real example, there was a case of a graduate with an average of 4.22 who was unable to adequately answer (i.e. to achieve a mark of at least 3.0) any of the questions on defense of the master's thesis, i.e. the master's exam to which the entire degree program leads. Let me add that not a single one of the questions was difficult or detailed, and the graduate student should have expected at least two-thirds of these questions in advance. A chance or accidental result? An isolated case? Let us hope so; however, it does set off a red check light. The high average this individual attained was most likely the result of having chosen many "trivia" — easy courses in which almost all participants attain the maximum mark.

It is necessary that the choice of subjects should be limited in such a way that students come perforce into contact with the most important legal topics. At the beginning, a solid foundation for subsequent electives should be provided by a set first-year program that includes subjects that prepare students for the study not only of public law but also of private law (in the latter area of studies, Roman law is the most important subject). At all events, the university can create nothing more than the preliminary foundations of legal education. Much will depend on the applications — apprenticeships — which will later prepare the budding lawyer for the actuality of the legal profession, becoming an introduction for many years of future legal practice. It would be good if we could create a firm academic basis for these professional foundations—starting from the first year, whose curriculum should be determined and prepared by those who are qualified to do so, i.e. the professors, not the students.

Another problem that needs to be addressed is that of parroting or mindlessly repeating, which is a peculiarly pretentious syndrome. Students will readily use clever-sounding terms or phrases that in law sound expertly professional. Those who utter them, however, may begin to realize at some point that they do not really know what the terms or phrases actually mean. Related to this is the issue of a proper understanding of the material that our students have to deal with. Very often certain words and phrases or even entire sentences are mechanically repeated over and over again. Some verbs are commonly overused because they have recently become very popular — they are in fashion (while other words that are perhaps more apt for certain contexts are neglected or simply remain unknown). Even worse is when the concepts pertaining to the particular subjects taught in law school are transferred from one delimited subject area to another in which they no longer have the same meaning and they all get mixed up, so that there is no terminological or substantive coherence between the concepts being used. Here the blame lies squarely with the teachers. Those taught are, unfortunately, left to flounder in yet another semantic confusion of misunderstood or conflicting meanings, which often turns into turmoil or a free-for-all or — even worse — a comedy of errors. And this but urges our return to the supposition of common points that must be sought between the subjects taught, with the need for deepened cooperation and mutual listening within any given faculty of law.

The substantive coordination of didactics seems indispensable, and yet it can in practice be terribly lame. It is sufficient to mention the American court case *Riggs* v. *Palmer* from 1889[4], which is still often cited as a model example of a serious dilemma in the face of seemingly divergent legal regulations. The case received much publicity when Ronald Dworkin[5] used it in his criticism of the legal positivism of Herbert L.A. Hart.[6] The court ruling concerned a problematic but significant issue: the daughters of the testator sought to invalidate the appointment of the testator's grandson as heir — the grandson, knowing about his grandfather's last will, had in fact poisoned him for fear that he would change his testamentary provisions. The plaintiffs argued that by allowing the will to be executed, the murderer would be profiting from his crime. More than 1700 years previous to this common law dilemma, which led to the "discovery" by the judges concerned of a just decision based on universal law, Roman law

4 115 N.Y. 506 (1889).

5 Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge, MA, 1978; *idem*, *Law's Empire*, The Belknap Press of Harvard University Press, Cambridge, MA, 1995.

6 Hart, H. L. A., *The Concept of Law*, Clarendon Press, Oxford, 1985.

had already developed — as part of shaping the subjective criterion for succession *mortis causa* — the concept of *indignitas*, i.e. unworthiness resulting in impossibility, that is to say in the legal inability to retain what one acquires from an inheritance. The construction of the concept allowed the unworthy to accept and acquire the inheritance or bequest, but then everything fell to the fiscus, i.e. the imperial treasury. The solution was solidly thought out in ancient Rome in order to uphold the testamentary dispositions in this way and respect the last will of the testator. On the one hand, endeavors were made to obtain a sanction against the testator's murderer; on the other hand, care was taken with regard to those receiving *mortis causa* endowments from the deceased. By the simple means of transferring the murderer's inheritance to the imperial state, all the others in whose favor the testator had disposed of his estate received what he had provided for them. According to the rescript of Emperor Antoninus Pius, such transference did not even require a criminal sentence: the testator's killer was considered unworthy of inheriting even when the guilt was proven in private law proceedings.[7] Thanks to the European legal tradition, *indignitas* has permanently entered the jurisprudential framework of modern civil law. And so Roman law has once again proven to be a universal law, and as such studied for centuries at the universities of the world. It is worth knowing Roman law because an acquaintance with legal history can help one learn from previous jurists' wisdom and avoid many egregious and unnecessary errors, as well as repeated reinventions of the wheel.

3. EDUCATION OF LEGAL EXPERTS AND PRACTITIONERS

The question of who, in fact, can be considered to be a lawyer, i.e. *iuris peritus* — an expert in law— is prior to the question concerning the law graduate's profile. As regards legal education, it first boils down to what we consider to be the minimum — the essential content that must be mastered during legal studies, i.e. which matters and branches of law cannot be omitted, but also what options must be available for students to choose from. Of the two paths open to graduates in law — practitioner or scholar — law faculties must remember that those they educate will, almost exclusively, be future practitioners.

In fact, very few graduates become scholars or teachers of law, and those that

[7] D. 34,9,3 Macian, *Rules*, book 5; D. 48,20,7,4 Paul, *The Portions Which Are Permitted to Children of Condemned Persons*, sole book; C. 6,35,10 Diocletian and Maximian (294 r.); N. 22,47 (536). Dajczak, W. ; Giaro, T. ; Longchamps de Bérier, F., *Prawo rzymskie. U podstaw prawa prywatnego*, 3rd edn., PWN, Warszawa, 2018, pp. 285, 289–290.

do will acquire the academic skills they need mainly at seminars, a form of class which allows for close contact with the experts. Obviously, future scholars must in the first place have a desire to pursue research. Lawyers do not necessarily fit in with this model, unlike typical candidates for other arts, such as medicine. And we see that philosophers, sociologists, psychologists, and even philologists are often and quite naturally absorbed in research, sometimes indeed without seeing there is a world beyond. Lawyers, on the other hand, are kidnapped by the world and even representatives of the legal sciences are regularly and persuasively tempted into actually practising law. Of course, there is nothing wrong with academics lending their assistance in the conduct of real human affairs.

Above all, potential scholars must have curiosity for research. A university is not — or should not be — a mere workplace where one earns money in order to support oneself and one's family. *Alma Mater* is a mission, not only academic but also civilizational. Without an unwavering curiosity for research and a constantly fueled youthfulness of spirit, the path of a legal scientist is nothing but a career — in the Polish sense of the word, that is, which has a purely pejorative connotation, finding expression in the kindred word 'careerist', which describes a person who has lost his original fascination with truth or desire to know and understand. Whoever retains this fascination will pursue a university career (here understood neutrally, as simply the life itinerary of a particular destiny) as one that requires courage because it is, possibly contrary to common perception, fraught with high risk. The university pyramid is not steep. It has a vast base but only a tiny peak. There is not much space on this peak, so very few people will achieve in professional terms all they are capable of in their field and consolidate their achievements as a position within the academic structure.

And what is the position within the academic structure of the 'historical lawyer' we refer to in our title? First, we must explain the use of the term itself, for scholars in this field are usually referred to as 'legal historians', a commonly-used expression which, when looked at closely, turns out to be imprecise. Firstly, Roman law (but also other matters of academic research which we call legal-historical) is dealt with by lawyers, not by historians. Statistics show that the number of people in the world working in the research and teaching of Roman Law is constantly increasing, and yet there is no growing interest in the subject among historians. Secondly, the term 'historical lawyer' seems justified by the classification of the sciences and the arts. Law is a field of knowledge that was already organized — at least conceptually — in antiquity, i.e. by the Romans. The legal sciences concern themselves with man and society: they belong to the broadly understood humanities. However, they are not combined with history (which belongs to the sciences of the past), but with economics

and the sciences of administration, social matters and, possibly, politics — all of which belong to the sciences that determine the future of human activity.[8] Law — insofar, of course, as it is a science[9] — adopts not only a dogmatic or comparative legal perspective, but also a historical perspective of discourse and argumentation. The users of this argumentation — and, one might say, everyone who appreciates it — are, on the strength of this fact, historical lawyers. We might ask if this is limited to legal *scholars.* No, it is not only those researching in this field but *all* law graduates who, preparing to practice the law effectively, should be aware that during the course of the history of societies the law inevitably changes. And the truth is that every law graduate, during the study of virtually every subject in this field (postulates *de lege lata* and *de lege ferenda*), will be becoming acquainted with the historical development of law, and thus, whether it is his goal or not, become perforce a 'historical lawyer'.

As we mentioned, there are two occupational paths open to law graduates, that of practitioners and that of scholars. The vast majority choose to be practitioners; therefore, legal education in the main must ensure that graduates, even if not legal historians, are nevertheless historical lawyers. The historical lawyer is aware of the mistakes of the past and can thus take care to avoid them in the future — and, hopefully, help others to avoid them, too. True, rarely — if ever — for anyone does it really happen that, *historia est magistra vitae*[10] — "history is life's teacher". The mere recounting of history itself teaches little: its value is usually discovered only afterwards, by associating past events with ones newly experienced by us, often amazing us when we see that we have *not* benefited from the experiences of the past. Nevertheless, a historical perception of law is not a difficult matter: it is simply having one's eyes open to what happens in the world and a mind capable of interpretation even in difficult cases and rapidly-changing circumstances. In the context of this discussion, the basic lesson we can draw from Roman law is simply as a highly significant part in the process of the precise shaping of a historical lawyer, i.e. one for whom historical awareness and sensitivity to a legal-realistic approach to the historical development of law are not less important than broad historical knowledge.

---

8 Kamiński, S., *Nauka i metoda: pojęcie nauki i klasyfikacja nauk*, ed. A. Bronk, Towarzystwo Naukowe KUL, Lublin, 1992, pp. 270–274.

9 Longchamps de Bérier, F. (1912–1969), *Z problemów poznania prawa*, Ossolineum, Wrocław, 1968, pp. 11, 25.

10 Cic. *de orat*. 2,36: *Historia vero testis temporum, lux veritatis, vita memoriae, magistra vitae, nuntia vetustatis, qua voce alia nisi oratoris immortalitati commendatur?*—"By what other voice, too, than that of the orator, is history, the evidence of time, the light of truth, the life of memory, the directress of life, the herald of antiquity, committed to immortality?" Translated by J. S. Watson (1860) http://www.attalus.org/old/deoratore2A.html (access 3.03.2022).

As regards the common law lawyer, it seems completely natural that the law should be characterized by historical development: he always has to be aware of precedents and hence of the line of jurisprudence. However, in analyses undertaken within the framework of continental law not once does the historical development have to be taken into account. And when the historical development of the law is forgotten, then a specific legal solution — a judgment or an administrative decision, a legislative or executive act — may be perceived as an irreversible tragedy, as if the solution were eternal. The particular, historically-determined solution does indeed become law but, we need to remember, at a particular, given moment. It is a fact that the law changes, and it is precisely *this* that a historical lawyer recalls in this juncture. All lawyers need to remain objective and dispassionate in this regard, and so all lawyers should be educated as historical lawyers as part of their basic training.

The great emperor Justinian I, who was patron of the immortal compilation of Roman law, probably thought that by this feat he would effectively stave off any future changes to the law, which, as an entity, he himself had in fact ingeniously created. But only *lex divina* remains invariant. Human laws, like human fates, are subject to historical development. A historical lawyer is therefore a realist lawyer. A common law lawyer might well be surprised at the formulation of a special goal to educate all law students as historical lawyers: could it be otherwise? After all, in the curriculum of legal studies in common law countries, one is taught primarily about the methods of work and processes that occur in law. No attempt is made (and no students are required) to know — even if only roughly — all *branches* of law.

It is difficult to imagine someone graduating from law school without the knowledge to pass our conjectured course. We would gladly include this course in the group of compulsory subjects at our faculty. But is it really impossible to imagine a lawyer who would *never*, even during his studies, have to deal with criminal law or civil or administrative law? Unfortunately, the reality of the case exceeds the imagination: employers frequently complain that they hire law graduates who behave as if they have not had a lick of any of these important areas: civil law, criminal law, administrative law. Could someone actually become a lawyer without passing an exam in these basic subjects? This rhetorical question returns us to the question posed earlier: who can truly be considered to be a lawyer, and, dependent on this, what must a legal education comprise?

Legal education needs to be planned to include courses that will explicitly make legal adepts aware from the very beginning that the law is in a constant process of historical development. But we must be aware that students have both conscious and unconscious requirements. The expectations of adepts are

warranted when, full of confidence in their professors, they hope to be made aware of what is indispensable to their future in the legal world. When neglect in this respect occurs, they have a legitimate grievance which is expressed in what I call 'intellectual nervousness'. And with regard to the matter at hand, in order not to disappoint our students down the line they must be educated from the first in the historical development of law: a historical lawyer is one enlightened as to an ineluctable aspect of the reality of his field of study.

4. LEGAL METHODS AND EDUCATIONAL INNOVATION

A historical lawyer will usually be a practitioner, ready to work on behalf of persons or institutions seeking the help, entrsusting their affairs to him/her in trust. A historical lawyer par excellence will also be a scholar who seeks to see the law in a broader perspective. Both practitioner and scholar are concerned with interpretation, though using different methods, and not *primarily* but *also* with a historical argument. As far as the dogmatic method is concerned, its use today has become rather an expression of traditionalism. For the last century legal positivism has demonstrated the validity of this approach so it has been untroublesome to adopt. In face of the aforementioned traditional dogmatism, one sees how difficult it is to convince people to broaden their view to include a comparison with similar regulations that are in force in other jurisdictions. At the present moment this must be considered somewhat innovative, although dealing only with synchronic comparative studies, i.e. with regulations binding in different jurisdictions at the same time.

A more essential innovation today is the *diachronic* comparative studies approach, though these studies come in fact from an earlier European tradition than that of synchronic dogmatism. In particular, the study of Roman law has for many years been tirelessly offering this as a more complete, although admittedly more difficult, research approach. It is thanks to diachronic comparative studies that we can ask to what extent a given regulation — binding or proposed — actually works in the practice of legal transactions; we can expect an answer to the question as to what regulations are good or better or best for meeting social needs or realizing specific values. Let us use a neat distinction in English between *efficacy* and *efficiency*. In the legal context, the concept of efficiency refers primarily to maximizing social welfare, i.e. social utility. It is worth seeking effective solutions as these are more durable due to the rationality of the regulation concerned, a regulation which should thus be socially acceptable in subsequent epochs and even in different societies. The question concerns, of course, the relationship that may exist between the effectiveness

and efficiency — *efektywność* and *skuteczność*, *Wirksamkeit* and *Effektivität* — of the law. The distinctions between these terms are not always very strong, because the terms listed here — those in English, Polish and German — actually refer to each other, and each of them can be defined using the other.[11] However, on the one hand, *efficacy* in the law will be provided by the bare power of the existing authority to sanction the regulation it approves and possibly needs merely *ad hoc*. On the other hand, *efficiency* as social utility and the intrinsic potential for lasting social acceptability will survive the collapse of empires and despots, having the capability for reappearance in human thought due to its anthropological justification.

In legal education, do we want to limit ourselves to cramming graduates with a certain amount of knowledge, training them only in specific practical skills, or do we want to seek something deeper? Traditionally, the question was asked whether we should prepare technicians or educate with the aim of turning our graduates into artists — for law is undoubtedly an art. A historical lawyer, with his awareness of the inevitable successive changes in the law, has no illusions as to the immutability of specific regulations, and is consequently more able to estimate the spectrum of such changes and what future amendments might entail. In private law, such changes are likely to concern matters of details and everyday life, not theory. The practitioner must be proficient in the methods of private law in order to perform his craft properly — even if he does not realize that he is practicing an art. During his law studies he needs to be taught these methods as broadly as possible, so that he would be able to retrain should the market for legal services demand it (true, such cases are quite rare).

Most of the dogmatic solutions in use have been known for a long time. The historical lawyer should know what they are and be capable of having an in-depth knowledge of them. We should remember that the comparative part of legal research tends to be its weakest part. It often boils down to dogmatic analyses of mere linguistic similarities without, unfortunately, comparing the regulations as a whole, i.e. the whole of the comparative regulation to the whole of the principal regulation being studied and discussed, which constitutes the point of reference. In addition, legal studies should prepare students for the research of at least selected areas of foreign law, so that this decision is not left up to the individual graduate. It has long been recognized that sloppy education results in misdirected graduates. So neither legal dogmatics nor theory alone will suffice. Without comparative studies combined with legal history, our legal

[11] Stelmach, J., *Efektywne prawo*, in: Grodziski, S. et al. (eds.), *Vetera novis augere. Studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, 2010, p. 960.

education will result in nothing but the prototypical parochial local lawyer. Historical preparation would seem particularly useful in face of the opposition between continental and common law, remembering that it is the latter that is taught less.

Personally, I have much experience of teaching Roman law to those who also take a constitutional law course in their first year of studies. Those who study these parallel courses seem generally to have an excellent understanding of the deductive method and top-down analysis typical of constitutional law. By contrast, private law readily uses induction and is fond of bottom-up analysis. Thus public law turns out to be the more intuitive. However, there is a tendency for these law adepts to have learned their administrative law — an experience which they bring to their law school studies — rather in the same way as one learns road traffic law in order to get a driving license; what they are passionate about is chilling (often foreign) criminal law cases, and they have enjoyed participating in debates on politics and topics of high public concern. Private law, perhaps surprisingly given its often mundane subject matter, proves more difficult, primarily with regard to the way of thinking it requires and the methods used. This perhaps explains why the philosophy of law and legal theory seem to have shunned civil law for a long time, and studies in civil law — at least in Poland — are themselves hardly theoretical. The contemporary teaching of Roman law and the mainstream of European legal tradition studies are becoming not so much a study of history, but a diachronic approach to private law. Thus in contemporary teaching, these studies — which the typical curriculum of legal studies, unchanged for decades, would seem to dictate should be nothing but an introduction to private law — are not in practice limited to this sole function.

This is because it has been seen that it is necessary that Roman Law as a diachronic commentary on private law must go beyond the framework of the subject for beginners. After all, private law concerns everyday life: we enter into contracts incomparably more often than we visit an administrative office or a criminal court. We participate more often in this private law business than in public law business, even if we take into account the possible taxation of our contracts (tax law is public law *par excellence*). According to the classical Roman distinction, *publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem*[12] — "Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests."

[12] D. 1,1,1,2 Ulpian, *Institutes*, book 1. English translation of fragments of Justinian's *Digest* are taken from *The Digest of Justinian. Translation Edited by Alan Watson*, vol. 1–4, University of Pennsylvania Press, Philadelphia, 1998.

Taxes are in the common interest, representing by definition *utilitas publica*. And although they try to sneak into almost every transaction, there is still more civil and commercial law in every man's life than there is public law. In practice, private law should be closer to the individual person, even though the run-of-the-mill participant in legal transactions does not realize this. This need for a familiarity with the facts of private law could be served by Roman Law studies.

As responsible teachers, we think about our graduates and their profiles — not just the most elementary profile, but also the opportunities for developing a more substantial CV. There are many faculties of law providing numerous graduates in law for the labor market and legal services and we try to help ours stand out in this market. We owe it to them. And the area of interest is not purely local. For thirty years, schools of foreign law have been established in our faculties, though now perhaps with less intensity, because there is less interest in those specific areas than there used to be. And no wonder, since there are more offers and opportunities today than there were a decade or two ago. Thus, we are also developing new directions of research, exploration and cooperation, including within the field of foreign law itself, such as e.g. Chinese law. Tradition meets innovation: we remember that in reality it is all about raising the standard of legal services. It is with regard to this point that we try to convince people to open more China desks in law firms, which we want and which need to be provided with competent staff.

5. THE CALIBER OF THE LAWYER'S INTELLECT

As we have already mentioned, universities do not educate in how to practice law — that is not their remit. They humbly leave that field to the legal professions — judicial, attorney, legal adviser, notary, administrative and other — who administer professional apprenticeship courses. On such courses, practical details are taught, attention is paid to procedures as well as to the whole technical side of legal transactions and business. The business of universities is to give general and universal education, and this also applies in the field of law. Universities need to prepare graduates in law to be legally versatile so they can find their way in different workplaces.

Experience shows that many law graduates hold important positions in corporations, while some are senior officials in public administration. It is not in all cases that having had a legal education translates into working as a lawyer, though their experience of studying law should be useful whatever the specific positions they take up. For in truth, we need to see legal education as a matter of shaping in adepts something that can be called caliber of intellect. In their

courses of legal studies, universities select of course the content that seems necessary and proper for the formation and education of a lawyer, but it is important to realize that legal education is not at bottom a question of professional knowledge, nor even of skill, but of mental formation. The university has in truth the remit of forming in the legal student the way of perceiving reality, of thinking and of working that is characteristic of a lawyer.

So teaching procedures is not enough. True, they are easy to hide behind. But it is due to the exploitation of such procedures in excess of their proper use that lawyers are sometimes accused of stretching, circumventing, or abusing the law. In order to minimize such a danger, it is necessary from the very beginning — that is, in university education — to get to the substance of the matter. One must not be afraid to pose questions of justice and fairness, questions about values and what is good. All this in the full awareness that law, politics and morality must be seen as separate but not autonomous areas of consideration, which interact with one other and often interpenetrate each other. In short, when the caliber of a lawyer's intellect is touted, we should understand that it is referring to the university formation of a way of thinking and of perceiving the world that distinguishes legal studies from any other intellectual or scientific preparation.

The innovation of attempting to shape the caliber of the intellect through the means of individual lectures is impossible to discuss adequately in these brief reflections on the subject of the historical lawyer. Let us cite just one example[13] — the oldest university lecture, in fact. I refer, of course, to Roman Law, which holds out great promise in this respect, since innovation is intrinsic to the history of this subject and its teaching.

The science of Roman Law has changed significantly over the last 200 years. Considerable methodological multiplicity is evident. At the beginning of the twentieth century, scholars who were acquainted with the study and tradition of Roman Law developed dogmatics and the theory of law, undertook the criticism of ancient sources, dealt with papyrology, and initiated and developed the field of comparative legal studies. They then made significant observations on the European legal tradition and on various regularities of the historical development of law. Recent observations in this area concerned the processes of recodification and decodification and the multicentricity of legal systems. Roman Law scholars have been interested in regulatory matrices, such as the curule aediles' matrix, looking at law through the lens of values and basic principles. The reception of Roman law was a traditional subject of study; now, the

[13] Dajczak, W.; Longchamps de Bérier, F., *Prawo rzymskie w czasach dekodyfikacji*, Forum prawnicze, no. 2 (10), 2012, pp. 8 – 22.

theory of legal transplants has been proposed, a theory that is so important for comparative law and has been well received by comparativists. University specialists in Roman Law raised questions about the subject's conceptual grid—the jurisprudential framework shaped in Roman law and passed on in Europe to modern legal orders by the legal tradition. They were concerned with what works in private law and what still has untapped potential.[14]

The form in which the legal experience of previous generations is presented is not insignificant. It is obvious that it is necessary to teach Roman Law courses using modern means and methods. Along these lines we prepared a notebook to be used by students as their own — it took the form of "Roman Law Workshop"[15] — and at the University of Wrocław legal theory has followed our example, using the same format.[16] We prepared an on-line course at Copernicus College titled "Methodology of Legal Science"[17] which presents the foundations of jurisprudence in a way that is integrated with the legal experience of the Romans that has been passed down for 2500 years. All towards making legal theory the historical theory of law.

We strive for innovative approaches within the format of the basic university lecture, approaches in which Roman Law is not so much the subject of the history of law as a part of the subject of private law, and indeed a substantively and methodologically significant introduction to the whole subject of private law — even if this is not appreciated or even noticed by the so-called dogmatists who deal only with contemporary civil law. We get together with the dogmatists, however, to undertake within the framework of private law educational initiatives that are as practical as possible, such as a postgraduate studies course in "Contract Law in Consumer and Professional Trade"[18], con-

14 Dajczak, W.; Longchamps de Bérier, F., *W dyskusjach o prawie – doceńmy potencjał prawa rzymskiego*, available at: https://wszystkoconajwazniejsze.pl/ks-prof-franiszek-longchamps-de-berier-prof-wojciech-dajczak-prawo-rzymskie/ (access 3.03.2022).

15 Dajczak, W.; Giaro, T.; Longchamps de Bérier, F., *Warsztaty prawnicze: prawo rzymskie. Tablice chronologiczne, łacińskie maksymy prawnicze, rozbudowane o odniesienia do współczesności, kazusy z komentarzami*, OD.NOWA, Bielsko-Biała, 1st edn., 2012; 2nd edn., 2013, and previously by the same authors *Trener akademicki: prawo rzymskie. Tablice chronologiczne, łacińskie maksymy prawnicze z komentarzem, dzieje prawa rzymskiego w powiązaniu z rozwojem europejskiego prawa prywatnego*, ParkPrawo, Warszawa – Bielsko-Biła, 2010.

16 Gromski, W.; Jabłoński, P.; Kaczor, J.; Paździora, M.; Pichlak, M., *Warsztaty prawnicze: logika praktyczna z elementami argumentacji prawniczej*, OD.NOWA, Bielsko-Biała, 2014.

17 https://www.copernicuscollege.pl/kursy/metodologia-nauk-prawnych (access 3.03.2022).

18 https://prawoumow.wpia.uj.edu.pl (access 3.03.2022).

ducted jointly by the Department of Roman Law and the Department of Civil Law at Jagiellonian University.

6. IN LIEU OF A CONCLUSION

The paradox is that, on the one hand, we, as lawyers, tend to think highly of ourselves. On the other hand, we see that other people do not respect us, and often they genuinely hate us. The reasons for this state of affairs need a separate investigation. And it must be seen that this issue concerns not only legal practitioners but also academics. Often, colleagues from other faculties reveal that they do not consider representatives of the legal sciences to be real scholars — or even researchers. When considering the legal education paradox, all this must be taken into account.

We gladly teach — following Ulpian, a Roman jurist of the third century — that *iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*[19], i.e. "Practical wisdom in matters of right is an awareness of God's and men's affairs, knowledge of justice and injustice." Because of this knowledge — including, note, of divine affairs — the ancient jurist took the liberty of writing that as lawyers we are, in a manner of speaking, priests: *quis nos sacerdotes appellet*[20] — "we [jurists] are deservedly called the priests." The association with the priesthood (not, of course, in the sense as used in biblical Judaism or Christianity) is due to the fact that earlier, before the laicization of Roman jurisprudence, the law was dealt with by members of the priestly college of pontiffs. Four hundred years later, Ulpian proudly wants lawyers to be called priests, because *iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoqne exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes*[21] — "For we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good not only through fear of penalties but also indeed under allurement of rewards, and affecting a philosophy which, if I am not deceived, is genuine, not a sham." This remark appears at the beginning of a textbook titled "Institutes", which Ulpian prepared for his students. In his mouth, then, this assertion is undoubtedly a self-evident truth, and an encouragement addressed to adepts of the law. There is another view, however. In the 2015 film "Spectre", at the beginning

[19] D. 1,1,10,2 Ulpian, *Rules*, book 1.
[20] D. 1,1,1,1 Ulpian, *Institutes*, book 1.
[21] *Ibid*.

of a dinner which James Bond shares with a beautiful woman (the daughter of someone similar to himself, as a matter of fact), she asks him: "Why, given every other possible option, does a man choose the life of a paid assassin?" He replies without hesitation (though tongue in cheek): "Well, it was that or the priesthood." Do not we lawyers sometimes behave like paid assassins?

Are we able to produce lawyers who will not be like that? There will never be any certainty that we do not. It remains for us to try, however, treating students of law as persons given to (sometimes inflicted upon) us. It is clear that, in the normal course of things, every lecturer strives to improve their students' mastery of the subject because he or she is sincerely interested in making the recipient content. And our concern drives us to get together to engage in curricular discussions. And we rush to make suggestions. There does not have to be many proposals, however. After all, it is only necessary to change what needs to be changed. However, these proposals do need to be extremely concrete. One such proposal is that of making universal the inclusion, within the profile of the law studies graduate, of a historical lawyer.

BIBLIOGRAPHY

Dajczak, W.; Giaro, T.; Longchamps de Bérier, F., *Prawo rzymskie. U podstaw prawa prywatnego*, 3rd edn., PWN, Warszawa, 2018.

Dajczak, W.; Giaro, T.; Longchamps de Bérier, F., *Trener akademicki: prawo rzymskie. Tablice chronologiczne, łacińskie maksymy prawnicze z komentarzem, dzieje prawa rzymskiego w powiązaniu z rozwojem europejskiego prawa prywatnego*, ParkPrawo, Warszawa – Bielsko-Biła, 2010.

Dajczak, W.; Giaro, T.; Longchamps de Bérier, F., *Warsztaty prawnicze: prawo rzymskie. Tablice chronologiczne, łacińskie maksymy prawnicze, rozbudowane o odniesienia do współczesności, kazusy z komentarzami*, OD.NOWA, Bielsko-Biała, 1st edn., 2012; 2nd edn., 2013.

Dajczak, W.; Longchamps de Bérier, F., *Prawo rzymskie w czasach dekodyfikacji*, Forum prawnicze, no. 2 (10), 2012, pp. 8 – 22.

Dajczak, W.; Longchamps de Bérier, F., *W dyskusjach o prawie – doceńmy potencjał prawa rzymskiego*, available at: https://wszystkoconajwazniejsze.pl/ks-prof-franiszek-longchamps-de-berier-prof-wojciech-dajczak-prawo-rzymskie/ (access 3.03.2022).

Domingo Osle, R.; Longchamps de Bérier, F. (eds.), *Law and Christianity in Poland: The Legacy of the Great Jurists*, Routledge, London, 2022.

Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge, MA, 1978.

Dworkin, R., *Law's Empire*, The Belknap Press of Harvard University Press, Cambridge, MA, 1995.

Gromski, W.; Jabłoński, P.; Kaczor, J.; Paździora, M.; Pichlak, M., *Warsztaty prawnicze: logika praktyczna z elementami argumentacji prawniczej*, OD.NOWA, Bielsko-Biała, 2014.

Hart, H. L. A., *The Concept of Law*, Clarendon Press, Oxford, 1985.

Kamiński, S., *Nauka i metoda: pojęcie nauki i klasyfikacja nauk*, ed. A. Bronk, Towarzystwo Naukowe KUL, Lublin, 1992.

Longchamps de Bérier, F. (1912–1969), *Z problemów poznania prawa*, Ossolineum, Wrocław, 1968.

Longchamps de Bérier, F., *Roman Law and Legal Knowledge – Law Faculties versus Law Schools*, in Giaro, T. (ed.), *Roman Law and Legal Knowledge. Studies in Memory of H. Kupiszewski*, Stowarzyszenie Absolwentów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, Warszawa, 2011, pp. 13 – 19.

Stelmach, J., *Efektywne prawo*, in: Grodziski, S. *et al.* (eds.), *Vetera novis augere. Studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, 2010, pp. 957 – 966.

The Digest of Justinian. Translation Edited by Alan Watson, vol. 1–4, University of Pennsylvania Press, Philadelphia, 1998.

Sažetak

Franciszek Longchamps de Bérier*

PRAVNIK S POVIJESNOM PERSPEKTIVOM I CILJEVI OBRAZOVANJA PRAVNIKA

Loše stručno obrazovanje izvorište je niza problema koje je teško ispraviti tijekom kasnijeg rada. Navedeno vrijedi i za pravno obrazovanje koje je stoga potrebno oblikovati tako da proizvede kvalitetne intelektualce. Riječ je o sveučilišnoj naobrazbi u kojoj budući pravnik razvija jedinstven način razmišljanja i percipiranja svijeta oko sebe, a ona se razlikuje od naobrazbe bilo kojeg drugog intelektualca ili znanstvenika. Autor smatra da se tijekom obrazovanja budućih pravnika u njih treba usaditi sposobnost zauzimanja povijesne perspektive. Navedeno je važno s obzirom na oba moguća smjera u odabiru karijere za diplomirane pravnike: praksu i znanost. Velika se većina odlučuje za praksu, međutim, i glede nje treba istaknuti da pravo nema samo dogmatsku i komparativnopravnu perspektivu nego i povijesnu perspektivu diskursa i argumentacije. Oni koji se odluče za povijesnu vrstu argumentacije, kao i oni koji je razumiju i cijene, pravnici su s povijesnom perspektivom. Pravo se, naime, nalazi u neprekidnom procesu povijesnog razvoja, što pravnika s povijesnom perspektivom čini realističnim pravnikom. Takav pravnik, zahvaljujući svojoj osviještenosti o neizbježnim sukcesivnim promjenama u pravu, nema nikakvih iluzija o nepromjenjivosti konkretnih propisa te može stoga lakše procijeniti spektar takvih promjena i predvidjeti njihov budući razvoj. On je svjestan pogrešaka iz prošlosti pa ih može lakše izbjeći u budućnosti, a vjerojatno pritom može i drugima pomoći da ih izbjegnu.

Ključne riječi: obrazovanje pravnika, profil diplomiranog studenta, inovacije u obrazovanju, komparativni studiji, djelotvornost i učinkovitost propisa, rimsko pravo, pravna povijest

* Dr. sc. Franciszek Longchamps de Bérier, profesor Fakulteta prava i uprave, Jagelonsko sveučilište, Gołębia 9, 31-007 Kraków, Poljska; f.lb@uj.edu.pl;
ORCID ID: orcid.org/0000-0002-1485-0976