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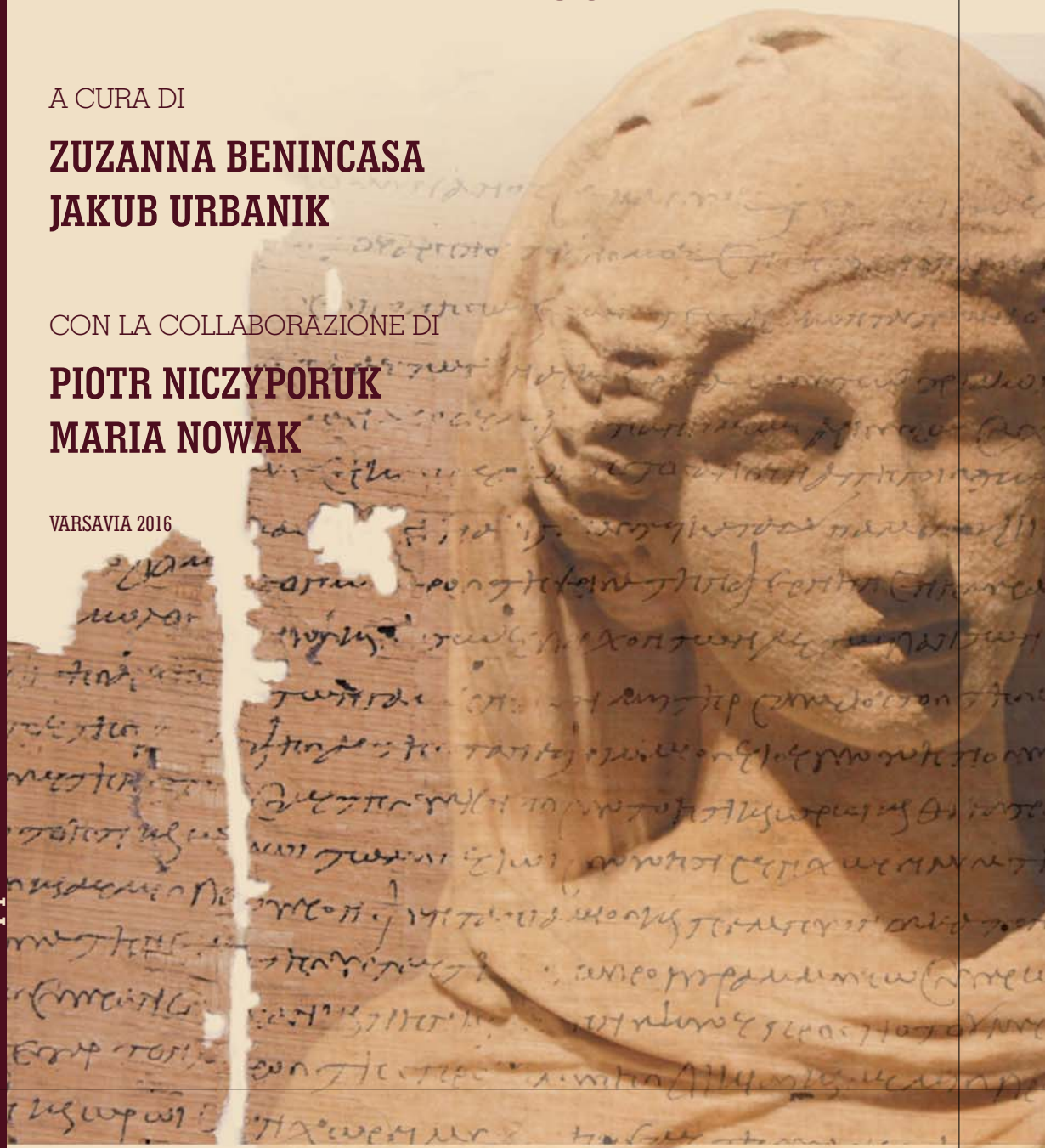
Supplement XXIX

MATER FAMILIAS
SCRITTI ROMANISTICI PER MARIA ZABŁOCKA



A CURA DI

ZUZANNA BENINCASA
JAKUB URBANIK

CON LA COLLABORAZIONE DI

PIOTR NICZYPORUK
MARIA NOWAK

VARSAVIA 2016

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SOME REMARKS ABOUT ROMAN LAW IN TADEUSZ CZACKI'S OPUS MAGNUM

Tadeusz czacki was one of the most prominent characters in Polish public life of the late eighteenth century and the first decade of nineteenth century, considered a remarkable historian and expert on law. A political writer, also a noted collector of antiquities, a bibliophile as well as an author of many important historical books. Publishing in 1800 the first volume of his *opus magnum*, Czacki did not realize that it would be a reason for two important events in the history of old Polish law. The first was the initiation of a very important discussion on the role of Roman law in the development of national law,[1] the other was giving rise to scientific method to the history of Polish law, at least according to Oswald Balzer.[2] Both these events remain uniform if we consider Tadeusz Czacki's attitude towards the genesis of old Polish law. The work, which Czacki entitled *On the Lithuanian and Polish Laws, Their Spirit,*

[1] The discussion was excellently presented by Jan Kodrębski in his great work devoted to the problem of the presence of Roman law in 19th century Poland. See: J. Kodrębski, *Prawo rzymskie w Polsce xix wieku* [Roman Law in Poland in 19th Century], Łódź 1990, pp. 109–176.

[2] O. Balzer, *Historia porównawcza praw słowiańskich. Studia nad historią prawa polskiego* 1 [A Comparative History of Slavonic Laws. Studies in History of Polish Law], Lwów 1900, p. 5.

Sources, Relation and Things Presented in the First Statute for Lithuania Given in 1529, became not only his *opus magnum*, but also his *opus vitae*, in which he encompassed his entire enormous knowledge on history and history of law.

This grand composition constitutes a most erudite commentary to the *Lithuanian Statute* of 1529, though, as Jan Kodrębski points out, a rather chaotic one. It principally takes form of a historical reference to the text of the Statute.[3].The commented text of Lithuanian law is prefaced with a pathos-ridden prologue, in which Tadeusz Czacki manifestly imparts his views on legislative authority of the old Poland,[4] only to move directly to present his views on the sources of Polish and Lithuanian law later on.

I have written about the author *On the Lithuanian and Polish Laws* numerous times. In this place, therefore, I would only repeat, that he knew Roman law very well; this knowledge he gained by his own education, mostly through exploration of various eighteenth century studies, as well, which I consider important to this learning process, through studying the sources of law of the ancient Rome. While reading the work under scrutiny here, I found many references to Roman law. It would be impossible to present them all in this paper. Therefore, I will only focus on the most those. I shall not consider the information regarding individuals related to the creation of Roman Law, *e.g.* the emperors Augustus, Theodosius and Justinianus,[5] or the eminent Roman jurists, like Papinianus, Paulus, Tribonianus and Gaius, quoted by Czacki.[6] I will also omit information regarding people who spread the knowledge of Roman law in the Polish-Lithuanian Commonwealth.[7]

[3] Kodrębski, *Prawo rzymskie* (cit. n. 1), p. 113; Ewa Danowska, *Tadeusz Czacki 1765 – 1813. Na pograniczu epok i ziem* [Tadeusz Czacki 1765–1813. Between of Epochs and Territories], Kraków 2006, pp. 219–220.

[4] T. Czacki, *Dzieła zebrane i wydane* przez hr. Edwarda Raczyńskiego [Collected Works] 1, Poznań 1844, pp. iv–v.

[5] Czacki, *Dzieła zebrane* 1 (cit. n. 4), pp. 13 and 32.

[6] Czacki, *Dzieła zebrane* 1 (cit. n. 4), pp. 35 and 37.

[7] Czacki stated: 'The foreign lawyers settled in our land, and they wanted to find Roman law in our laws and many Polish lawyers followed this opinion'. *Cf.* Czacki, *Dzieła zebrane* 1 (cit. n. 4), p. 11. Czacki recalls Tomasz Drezner and he also cites a lengthy passage concerning Roysius. He had, however, a negative opinion on him. He calls him 'a polonised Spaniard'.

Like I mentioned before, Czacki knew *ius romanum* very well and moved through its broad area with ease. He was well acquainted with the sources, however his attempts to analyse and comment them and his idea of their contents were less successful. He erred in interpreting Roman law.[8] Neither is every piece of commentary on the Lithuanian statute is clear and accurate; it should be reminded, however, that Czacki used his own knowledge in the commentary and not on the scholarly research, which was due to the fact that such research had not, mostly, taken place yet. There is a large gap in the status of Roman law research back then and nowadays.[9] For Czacki – a true erudite – Roman law examples were merely ornaments in some of the cases he was discussing. His erudition in this area was a bit antiquary, in the general, Age of Enlightenment, sort of way.[10] However, the very fact, I suppose, that he used these examples in this way proves his reverence to *ius romanum*. He did not have to do it: as a follower of the so-called Norman theory, he could limit himself to use the illustrations from the laws of Northern Europe. It is reasonable thus to assume he recognised the authority of Roman law and its presence in eighteenth century European legal systems, including Poland. The quotations from the institutions of *ius romanum*, which Czacki included in his work, both in the areas of public and private law, build a strong authority of this law, as a most reliable legal system, containing values worth calling upon, due to its clarity, certainty and the precision of solutions.

[8] Kodrębski, *Prawo rzymskie* (cit. n. 1), p. 116.

[9] I think that Kodrębski may not have taken into consideration those differences. And this is why he openly writes that Czacki is mistaken about the reasons of the promulgation of the *edictum perpetuum Hadriani*.

[10] Czacki emulated the general method of this universal movement by collecting 'souvenirs of the past'. As A. F. Grabski points out this kind of 'methodology' was the fundament of the scholary activity of many collectors and collection owners. I share this this view in reference to Czacki. *Cf.* A. F. Grabski, *Myśl historyczna polskiego Oświecenia* [Historical Thought of Polish Enlightenment], Warszawa 1976, pp. 271–74.

Not even in the commentary to the Statute itself, but in the introduction called *The sources of Polish and Lithuanian law*, Czacki presents his view on the historical conditions of the influence of Roman law on the laws of Europe. He reports the discovery of the parts of the *Digest* in Pisa and in Amalfi, and on the emergence of the new schools lecturing this 'newly discovered law'. On the next pages, he reviews the gravity with which Roman law was considered in many states on the European continent. He writes about Spain, Gaul, and even parts of Africa.[11] And those remarks he concludes with 'I have shown, that distaste for Roman law was visible. So our nation ... could not search for regulations in this source'.[12] In many other comments, though, Czacki takes the opposite view, praising the correct nature and adequacy of Roman law solutions. Most of positive remarks are be found in commentaries to civil law solutions.

In his commentary to the provision on succession after the death of one's parents. Czacki comments, that the Roman solution 'that allowed both daughters and sons to succeed' was right. He subsequently endorses the principle recognizing a child as born in marriage: 'Justly it is then, as Roman law says and the more common opinion of jurists, that doubts should be decided in favour of the child: those who are 1-month to 6-months old who are born after marriage, 10-month old after the death of father are considered legitimate'. This observation is followed by a partial quote of the principle *pater est quem nuptiae demonstrant* (*cf. D.* 2.4.5).[13]

In the second volume of his work, Czacki, commenting dowry matters, rightly observes that there was no requirement to provide a dowry in Roman law. At the same time, he quotes Ulpian's opinion, that 'not giving dowry *est res indigna*'.[14] It should be reminded here that the calling to endower one's daughter remained moral until Justinian imposed a legal duty to do so on the father (*cf. CJ.* 5.11.7).

[11] Czacki, *Dzieła* zebrane I (cit. n. 4), pp. 28–29.

[12] Czacki, *Dzieła zebrane* I (cit. n. 4), p. 33.

[13] Czacki, *Dzieła zebrane* I (cit. n. 4), p. 285.

[14] Czacki, *Dzieła zebrane* II (cit. n. 4), p. 5 n. 8. This entire reference is influenced by many cross-references to the epoch of Dominate.

Regarding the regulations of the order of succession, Czacki points out, that the Roman solution by which the son naturally succeeded his father was just. He furthermore favoured Justinian's *Novel* 118 of AD 543 and *Novel* 127 of AD 548, which admitted to the succession after children their ascendants 'cum fratribus germanis'.[15] Czacki praises Roman law also for the order of intestate succession.[16]

In his commentary to parental authority Czacki calls upon Roman solutions, remarking that 'The father was the absolute master of his child, and children were household property. All and every punishment he could ordain, and for a long time the fathers were the masters of life and death of their children'.[17] Moving on to his commentary on statute's marriage law regulations, he refers to just methods introduced by Augustus regarding limiting the number of divorces, and to the injunctions and orders regarding marriage. He also refers to Constantine's decision of AD 331, giving the husband right to repudiate his adulterous wife.[18] Commenting on the problem of legal age to marry, he considers Romans to be right when he quotes the differences between legal schools on the legal marriage age for a man:

> Roman jurists differed on the subjects, says Ulpian in fragm. *Instit*., tit. II §. 28: Puberem Cassiani quidem esse ducunt, qui habitu corporis pubes esse apparet, id est qui generale potest. Proculejani vero, qui XIV. Annos implevit. The canon law mostly this age required, and by this s girl in her twelfth year can have a husband, and the man in his fifteenth year already begun [so in accordance with Roman law – *I. I.*] can have a wife'.[19]

[15] CZACKI, *Dzieła zebrane* II (cit. n. 4), p. 14 n. 21.

[16] CZACKI, *Dzieła zebrane* II (cit. n. 4), II, p. 16.

[17] CZACKI, *Dzieła zebrane* II (cit. n. 4), p. 19. The paternal power over children, although officially unlimited, in practice was limited by the non – legal sacral rules and long standing customs. The *ius vitae ac necis* itself was abolished in the times of Valentinian I (AD 365).

[18] CZACKI, *Dzieła zebrane* II (cit. n. 4), p. 26 and 31.

[19] CZACKI, *Dzieła zebrane* II (cit. n. 4), p. 37. This comment by CZACKI is kind of reconfirmation of his excellent knowledge of the Roman law and his mature familiarity of its sources. Additionally, he is referring to the problem of transferring provisions of *ius romanum* to the rules of canon law; he is also mentioning the maxim *ecclesia vivit lege Romana*. *Cf.* A. DĘBIŃSKI, *Kościół i prawo rzymskie* [Church and Roman Law], Lublin 2007.

Analysing the statute's regulation of widow remarrying, he also quotes Roman law, writing that 'Among Romans, widows couldn't marry unless a year after the death of their husbands, and such time was called *annus luctus*'.[20] In the matter of establishing custody Czacki adheres to Roman solutions, which prefer the custodian to be the closest relative, as only he can guarantee *summa providentia* and only he would have 'most devotion to the pupil'.[21] It is so, of course, regarding statutory custody. The following text of the commentary is also interesting, because Czacki enumerates three kinds of custody in Polish law: 1. Testamentary; 2. Based on the 'order of the blood' and 3. Assigned by the land courts.[22] It immediately hints comparison to Roman forms of custody: *tutela testamentaria*, *legitima* and *dativa*.

In his opinions presented regarding testamentary succession, Czacki analyses the kinds of Roman testaments – the testament given before the gathering of the people, the testament given before the army ranks, he also refers to private mancipatory testament *per aes et libram*; writing about the latter, Czacki mistakenly reports that one of the witnesses held the scales needed to weigh the coin, whereas the *libripens* was, in Roman law, a separate person. He also refers to nuncupatory testament, and special testament of the soldier *testamentum militare*, *militis*, introduced, as he correctly regards, probably by the ceasars.[23] He also quotes a fragment from *CJ*. 6.21 – *De testament militis*; *CJ*. 6.21.15 specifically. He doesn't remark on which Caesar introduced this form of testament is voluminous.[24] Czacki also reports that ecclesial courts used 'Roman law's oracle, permitting *nuncupative testamenta*', though he later notes that 'I have not seen trace of such testaments, as the end of Seventeenth Century'.[25]

[20] Czacki, *Dzieła zebrane* II (cit. n. 4), p. 42. About the Roman provisions *cf.* P. Niczyporuk, *Żałoba i powtórne małżeństwo wdowy w prawie rzymskim* [Mourning and the Second Marriage of Widow in Roman Law], Białystok 2002, and Agnieszka Kacprzak in this volume. Both authors analyse the problem of the widow's remarriage after the obligatory period of mourning.

[21] Czacki, *Dzieła zebrane* II (cit. n. 4), p. 52.

[22] Czacki, *Dzieła zebrane* II (cit. n. 4), p. 52.

[23] Czacki, *Dzieła zebrane* II (cit. n. 4), p. 58. He treated the text of the Constantine's constitution of AD 334 marginally and he omitted several its fragments.

[24] Gai. 2.109; *IJust*. 2.11; *D*. 29.1.37.13; *CJ*. 6.21.

[25] Czacki, *Dzieła zebrane* II (cit. n. 4), p. 60.

In his commentary to the articles of the Statute regulating the matter of courts and court authority, Czacki attentively refers to Roman solutions in arbitration in the form of compromise. He writes that 'truly, the compromise as the Statute wants it, is taken from Roman law'. In private law, he quotes Roman solution regarding *alluvio*[26] as creation of property. And those are the most important quotations from Roman private law.

I would also like to refer to Czacki's quotations of Roman public law, *i.e.* criminal law.

In another of Statute's chapters, commenting the article regarding the responsibility of the son or daughter for murder of a mother or father, Czacki calls upon other provisions of the second and third Statute, which constituted torture for such a crime, and later 'the criminal into a leather sack with a dog, a cat, a lizard and a snake should be sewn up and cast into the water'.[27] It absolutely reminds us of Roman *poena cullei*. Czacki comments that Roman law regulated patricide in detail, and set forth such severe punishment. He tries to speculate on the reason behind putting the animals into the sack but he fails to convince in that regard. Actually, the practice of sewing up four animals – initially a snake, later a monkey, then a cock and a dog were added – was known in the ancient times and came from a custom, though the death of the animals was mandatory probably only starting from the Empire.[28] Czacki himself notes that he does not understand such companionship for the sentenced one, mostly companionship of a monkey – it is agreeable that the *parricida* could not be drowned in a sack with a monkey in old Poland or Lithuania due to a very simple reason, the lack of sufficient number of such monkeys.[29]

[26] Czacki, *Dzieła zebrane* II (cit. n. 4), p. 178.

[27] Czacki, *Dzieła zebrane* II (cit. n. 4), pp. 117–118.

[28] A. Dębiński, '*Poena cullei* w rzymskim prawie karnym' [*Poena cullei in Roman Criminal Law*], *Prawo Kanoniczne* 37. 3–4 (1994) , pp. 133–146. See too: K. Amielańczyk, '*Parricidium* i *poena cullei*' [*Parricidium* and *poena cullei*], [in:] A. Dębiński & M. Kuryłowicz (eds.) *Religia i prawo karne w starożytnym Rzymie*, Lublin 1998, pp. 139–150.

[29] About the origins of this penalty in the Lithuanian Statute I have already written in: I. Jakubowski, 'Elementy rzymskiego prawa karnego w dziełach Tadeusza Czackiego' [The elements of Roman criminal law in the works of Tadeusz Czacki], [in:] H. Kowalski

In his commentary to the article on the intentional killing of a child by mother or father, Czacki refers to the influence of stoic philosophy on Roman law.[30] He comes to a conclusion, that such philosophy led in the archaic period to considering a child as nascent and becoming human 'when it starts breathing with air',[31] and inducing miscarriage was not, until third century AD, treated as a killing.[32] He also quotes Roman legislature in regard to flogging, noting that 'Striking with a stick considered a flogging, and was always associated with disgrace. Flogging in Rome was for slaves and more serious criminals.'[33]

The last reference to Roman criminal law made by Czacki is in the commentary to the chapter called 'On thieveries'. He writes a bit about *perquisitio lance et licio*, known to the Roman law, not seeing anything similar to it in the statutory norms; instead, he reports similarity to the tribes of Northern Europe and Germanic laws (which is another argument for Czacki's acceptation of the Norman theory). I believe the provenience of the statutory norm is however Roman, and Czacki tries to discredit it without much success.

In his further remarks, he praises the prohibition of using torture against Roman citizens. He notes that no citizen of Rome 'could not be tortured', and only slaves were put 'to interrogation and burning hot metal'. Emperor Augustus introduced tortures for crimes against the *maiestas* of the state and this punishment was against all, 'regardless of status.' Another line of his commentary is specifically interesting: 'In sordid Rome, free people who were not swayed yet were put to torture.'[34] One would assume

& M. KURYŁOWICZ (eds.), *Contra leges et bonos mores. Przestępstwa obyczajowe w starożytnej Grecji i Rzymie*, Lublin 2005, pp. 10–107.

[30] See: J. KODRĘBSKI, 'Z badań nad wpływem filozofii greckiej na prawo rzymskie schyłku republiki i wczesnego cesarstwa' [From the studies over the influence of Greek philosophy on Roman law and the end of the Republic and Early Empire], *Zeszyty Naukowe UŁ* 99.1 (1973), pp. 17–30.

[31] CZACKI, *Dzieła zebrane* II (cit. n. 4), p. 119.

[32] Only In the Times of Severs the first provisions against delinquents of the abortion were issued. In that period the abortion was declared as *crimen extraordinaria*. See the great monography E. NARDI, *Procurato aborto nel mondo greco- romano*, Milano 1971.

[33] CZACKI, *Dzieła zebrane* II (cit. n. 4), p. 143.

[34] CZACKI, *Dzieła zebrane* II (cit. n. 4), pp. 225–226.

Czacki refers to late Dominate, when barbaric tribes would invade Rome, and their laws would infiltrate the Roman system, and this probably resulted in increases in severity of punishments, especially corporeal.

To sum up those short considerations, it can be said that Czacki accepted many of public and private Roman law solutions. He also accepted their influence in both Polish and Lithuanian law. In general, he referred to *ius romanum* and its influence on his homeland law with great wariness. But it doesn't mean he did not recognize its authority, praising Germanic law solutions whenever possible.

I believe, though it is a bold thesis, that he was a secret admirer of Roman law. His later works bring manifest and visible changes in his regard to Roman solutions. Who knows, if the prepared or at least planned new edition of *On Lithuanian and Polish Laws* would not put more accent on his strong, though secret, approval of Roman law, and bring a departure from the Norman theory of Polish law's origin and instead avow the reception, if only indirect, of Roman law by Polish law. Unfortunately, Czacki's weakened heart failed him enroute to a meeting with prince Adam Czartoryski. Danowska reports, that Czacki fell victim to typhoid fever, common during that time in this land. He died on 8 February 1813; therefore a bicentenary of his death has passed; we have recently celebrated the 250th anniversary of his birth (28 August 1765).

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