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Supplement XXIX

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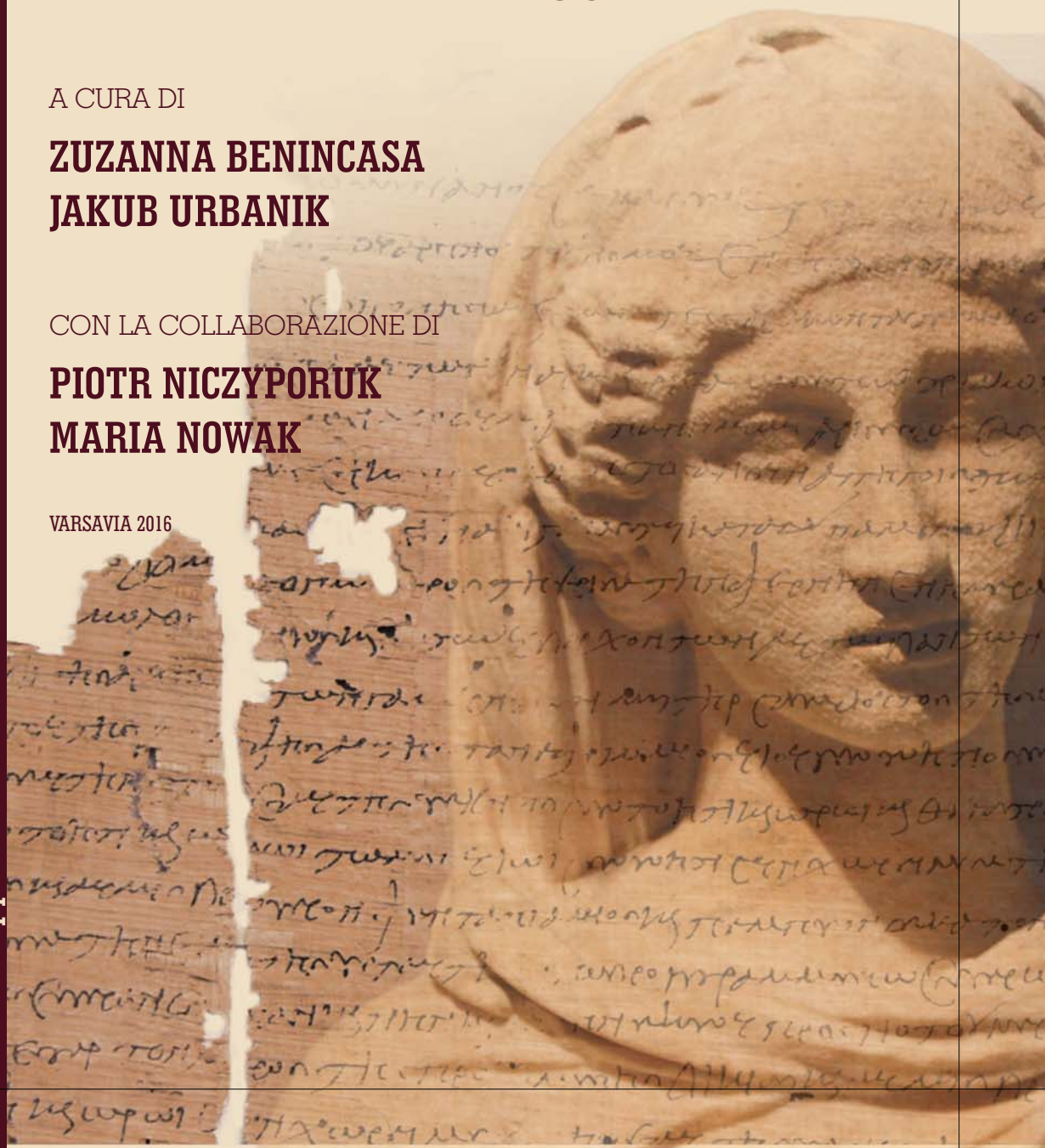
SCRITTI ROMANISTICI PER MARIA ZABŁOCKA



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ZUZANNA BENINCASA
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CON LA COLLABORAZIONE DI

PIOTR NICZYPORUK
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Joanna Misztal-Konecka

THE NON-LITIGIOUS PROCEEDINGS IN POLISH LAW AND ROMAN IURISDICTIO VOLUNTARIA

Fundamental issues arise once and again in the discussion on the new draft of Polish *Code of Civil Procedure*. One of them is the way in which private rights would be safe-guarded, especially in the contexts of the necessity of a legal distinction between litigious proceedings and non-litigious proceedings (non contentious, voluntary proceedings, Latin: '*iurisdictio voluntaria*', Polish: 'postępowanie nieprocesowe', German: 'freiwillige Gerichtsbarkeit', Italian: 'giurisdizione volontaria', Spanish: 'jurisdiction voluntaria', French: 'jurisdiction volontaire', 'jurisdiction gracieuse', Austrian German: 'nichtstreitige Verfahren'). And then, should this distinction be adopted – for which cases the latter would be competent.[1] Comparison with the procedural systems of other countries in this respect does not unfortunately provide convincing models – as they usually adopt extreme solutions regarding the types of the cases submitted to non-litigious proceedings.[2]

[1] On the works of the Civil Law Codification Commission in this area, *cf.* further M. Walasik & K. Markiewicz, 'Założenia wstępne dotyczące przepisów o postępowaniu nieprocesowym w nowym Kodeksie postępowania cywilnego przyjęte przez zespół problemowy Komisji Kodyfikacyjnej Prawa Cywilnego do spraw postępowania cywilnego', *Przegląd Sądowy* 9 (2012), pp. 101–111.

[2] For more information on this subject see K. Lubiński, 'Jurysdykcja nieprocesowa w prawie rzymskim a współczesne postępowanie nieprocesowe', [in:] Ewa Gajda & A. Sokala,

I. THE NON-LITIGIOUS PROCEEDINGS IN THE POLISH CIVIL PROCEEDINGS

According to the provisions of the Act of 17 November 1964 – the *Code of Civil Procedure*[3] non-litigious proceedings are equivalent to fact-finding proceedings in civil cases, which is the result of lively debates over many years also regarding the name of those proceedings.[4] The objectives and functions of these two proceedings are similar; they regard investigation and settlement of cases submitted for judgement. While, the litigious proceedings cover disputes arising between parties with respect to private legal relationships, with two claimants whose interests are opposed, the domain of non-litigious proceedings, especially in the modern model, spans over the settlement of cases, in which the number of interested entities may different, and whose their interests are similar or conflicting, yet often interwoven and intersected. Among the important features of the non-litigious proceedings there is also their preventive and protective character, much more often visible than in the case of a trial. Oftentimes public law norms and the rights and obligations resulting therefrom are the grounds of non-litigious cases. Non-litigious proceedings are also distinguished by the fact that more often than litigious proceedings they entail constitutive rulings, *i.e*. the ones that create or shape legal relations related to many different entities.

The key distinctions of non-litigious proceedings are in particular connected with the fact that a litigious proceeding is built on the bilateral principle, which does not have to occur in non-litigious proceedings; anyone whose rights are affected by the outcome of proceedings is a participant in the proceedings (Art. 510 *CCP*); a litigious proceeding can be issued only as a result of the initiative (by filing a suit), non-litigious pro-

Honeste vivere ... Księga pamiątkowa ku czci Profesora Władysława Bojarskiego, Toruń 2001, pp. 119–25 together with the referred literature; Z. Świeboda & K. Piasecki, [in:] K. Piasecki & A. Marciniak (eds.), *Kodeks postępowania cywilnego,* III, Warszawa 2012, (5 ed.), pp. 9–10.

[3] Consolidated text: *Journal of Laws* of 2014, item 101 as amended; hereinafter *CCP*.

[4] For more information on the search for more adequate term *cf*. K. Lubiński, *Istota i charakter prawny działalności sądu w postępowaniu nieprocesowym*, Toruń 1985, pp. 87–104.

ceedings may be prompted *ex officio* by the court (Art. 506 *CCP*); non-litigious proceedings do not always end with a judgment; in litigious proceedings cases are settled after the hearing, in non-litigious proceedings cases are settled at the hearing, if the provision so provides, whereas identification of cases in chambers is the rule; in non-litigious proceedings there is no petition for the resumption of the proceedings in the cases in which the provisions allow for revoking or amending legally binding rulings; in litigious proceedings the court awards costs of proceedings upon the request of a party according to the outcome of the case, whereas in non-litigious proceedings each participant pays the costs of proceedings connected with his participation in the case; in non-litigious proceedings all decisions are issued in the form of rulings (Polish: 'postanowienie').

The litigious proceeding, is the fundamental model of fact-finding proceedings regardless of the equivalence of the two proceedings; according to Art. 13 (1) of the *CCP*, the court investigates cases in a proceeding, and if a case – under a separate statutory provision – belongs to non–litigious proceedings (or to other types of proceedings), the provisions regarding the proceeding are applied accordingly. Moreover, the issue of the proceeding is not subject to free decisions of the parties or the court, so the court is obliged to ensure, during every status of the case, that the case is investigated in an appropriate proceeding. This assessment is not affected by the regulation of Art. 13 (2) of the *CCP*, which makes the litigious proceeding a 'model', since the provisions regarding the litigious proceeding apply *mutatis mutandis* to other proceedings regulated by the *Code*. This application is determined by the fulfilment of two premises: the lack of specific regulations for the non-litigious proceeding and the lack of conflict with the essence of non-litigious proceedings.

It should be noted that the term 'non-litigious proceedings', which prevailed of the previous term 'non-contentious proceedings'[5] in the course of legislative work, emphasizes only the fact that cases are investigated within the scope of this proceeding in a judicial fact-finding proceeding in civil cases different from a civil suit, but at the same time it in

[5] For more information see K. Lubiński, 'Uwagi o terminie postępowanie nieprocesowe', *Państwo i Prawo* 2 (1986), pp. 79–89.

no way reflects the specificity of this proceeding, the specificity of its subject, the specificity of the court functions, etc.[6]

The lawgiver assigned to the non-litigious model of proceeding a number of cases of varied character ranging from custody cases, family and inheritance cases, entries into land and mortgage registers and other registers.

The scholarship tried identifying the premises delimiting the litigious proceeding and non-litigious proceedings. According to one of the hypothesis, trials are to serve the confirmation of the existing law, while non-litigious proceedings serve the transformation of a pre-existing legal relationship. Another idea stresses the purpose of litigious proceeding to terminate violation of the law, while non-litigious proceedings would aim at prevention. Yet another theory puts forward the protection the rights of individuals in the case of a trial, while underling the legal custody in the case of the non-litigious proceedings is legal custody. Finally, procedural rules are often mentioned as the basis of the distinction.[7] As we may see, there is no uniform criterion for differentiating the proceedings.[8]

The assignment of matters to non-litigious proceedings is determined on the part of the legislator by various reasons, especially:

- a possible lack of litigiousness,[9]
- the nature of cases, especially the necessity to interfere in significant spheres of social life[10] (the type of matters subject to protection),
- a possible lack of bilateralness,[11]

[6] K. Lubiński, 'Jurysdykcja nieprocesowa' (cit. n. 2), pp. 125–126.

[7] K. Korzan, *Post powanie nieprocesowe*, Warszawa 1997 (5th ed.), pp. 14–25.

[8] The impossibility to indicate such a criterion was pointed out even before the adoption of the *1964 Code of Civil Procedure*, *cf.*, *e.g.* W. Siedlecki, 'Stosunek postępowania spornego do niespornego', *Pa stwo i Prawo* 2 (1949), pp. 26–30; M. Piekarski, 'Stosunek postępowania niespornego do spornego', *Przegl d Notarialny* 3–4 (1949), pp. 269–273.

[9] A number of cases identified in the non-litigious proceeding are litigious in character, *e.g.* joint estate administration, partition, abandonment or demarcation of the estate.

[10] In some cases the public interest is so strong that they have been assigned to a special proceeding, *e.g.* custody cases.

[11] Those non-litigious cases can be easily transformer into litigious proceedings by making the petitioner a claimant and making other participants – respondents and interven-

- the necessity to issue the proceeding *ex officio* (the impact of the principle of disposition),
- the necessity of repeated actions (the character of provided legal protection),
- the necessity of transformation of the legal relationship by the court,
- character of activities of state authorities connected with documents and registration.[12]

And so, the current structure of non-litigious proceeding makes it difficult to sharply define its character and distinctive features. The mere choice of the lawigiver dos not seem enough to provide comprehensive factors unifying the scope and shape of the non-litigious proceedings. It may be useful, therefore, to look back at the jurisdictional model functioning in ancient Rome, the cradle of modern solutions for civil and procedural law. It is generally accepted that the origins of modern non-litigious proceedings may be found in the variety of structures of Roman law, in which magistrate cooperated with the parties that were not in the

ers (*e.g.* cases for partition of estate, prescription), or by introducing a custodian to the proceeding (e.g. cases for declaration of death *in absentia* or declaration of death). See B. Dobrzański, 'Scalenie postępowania spornego z niespornym w projekcie kodeksu postępowania cywilnego', *Państwo i Prawo* 7 (1960), p. 42.

[12] J. Krajewski, 'Stosunek procesu do postępowania nieprocesowego', *Zeszyty Naukowe UMK* 7 (1967), pp. 19–28; M. Sychowicz, 'Podstawy przekazania spraw cywilnych do trybu nieprocesowego', *Nowe Prawo* 10 (1969), pp. 1522–1531; K. Lubiński, 'Uwagi o terminie' (cit. n. 5), pp. 79–89; Maria Jędrzejewska, 'Ogólne zagadnienia postępowania nieprocesowego w świetle praktyki sądowej i doktryny', *Zeszyty Naukowe Instytutu Badania Prawa Sądowego* 25–26 (1987), pp. 100–103; A. Miączyński, 'Specyfika postępowania nieprocesowego', [in:] Ewa Ł towska (ed.), *Proces i prawo. Rozprawy prawnicze. Księga pamiątkowa ku czci Profesora Jerzego Jodłowskiego*, Wrocław – Warszawa 1989, p. 404; K. Korzan, 'Teoretyczne podstawy wyodrębnienia postępowania nieprocesowego z sądowego postępowania cywilnego', [in:] *Zbiór rozpraw z zakresu post powania cywilnego. Profesorowi Włodzimierzowi Berutowiczowi w 40-lecie pracy naukowej*, Wrocław 1990 (*Acta Universitatis Wratislaviensis* 1990, Prawo 170), pp. 65; 69–78; M. Sawczuk, 'O celach i funkcjach postępowania cywilnego procesowego i nieprocesowego (niespornego)', [in:] A. Marciniak (ed.), *Symbolae Vitoldo Broniewicz dedicatae, Księga pamiątkowa ku czci Witolda Broniewicza*, Łódź 1998, pp. 313–329; W. Siedlecki & Z. Świeboda, *Postępowanie nieprocesowe,* Warszawa 2001, pp. 21–25; W. Broniewicz, A. Marciniak & I. Kunicki, *Postępowanie cywilne w zarysie,* Warszawa 2014 (11th ed.), pp. 330–331.

dispute in order to produce legal effects of considerable social importance.[13] It seems that this new view may be a valuable spur to put discussions on the proposed shape of the modern law on the right track.

II. IURISDICTIO – CONTENTIOSA AND VOLUNTARIA IN ROMAN LAW

The term *iurisdictio*[14] was used in Roman law since the times of the *Law of the Twelve Tables*. The understanding thereof is multifarious[15] and derived from the words *ius dicere,* which meant verbal declaration of a magistrate the law in a given case.

Iurisdictio constituted a part of state authority (*imperium*), judicial power in modern-day terms,[16] and, it consisted in grants or refusal or the legal remedy. It remains beyond any doubt that lawsuits were the first method of deciding litigious civil cases (*iurisdictio contentiosa*) and that until the decline of the Roman state they remained the most popular of dispute resolution.

And yet, the Romans identified relatively early some cases of substantial social importance, which despite the lack of dispute between parties required, in their opinion, some intervention or at least some cooperation between a magistrate and the parties for the purpose of attaining the

[13] K. Lubiński, *Istota i charakter prawny* (cit. n. 4), pp. 26–27.

[14] On *iurisdictio* in Roman law, *cf.* A. Steinwenter, *s.v.* 'iurisdictio', *PWRE* x 1, col. 1155–1157; W. Litewski, *Słownik encyklopedyczny prawa rzymskiego,* Kraków 1998, p. 132, *s.v.* 'iurisdictio'; W. Dajczak, T. Giaro & F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego,* Warszawa 2014 (2nd ed.), pp. 154–156.

[15] Zob. też E. Szymoszek, '*Iurisdictio* w prawie rzymskim', *Acta Universitatis Wratislaviensis* 138 (1971), Prawo 34, p. 95.

[16] Szymoszek, '*Iurisdictio*' (cit. n. 15), pp. 95–98. *Cf.* also, M. Kaser & K. Hackl, *Das römische Zivilprocessrecht,* München 1996 (2nd ed.), pp. 183–191; W. Litewski, *Rzymski proces cywilny,* Kraków 1988, pp. 16–18; W. Wołodkiewicz & Maria Zabłocka, *Prawo rzymskie. Instytucje,* Warszawa 2005 (4th ed.), pp. 276–278.

intended legal effect (*iurisdictio voluntaria*).[17] It is commonly assumed that this type of jurisdiction originates from *in iure cessio*, which included admission of the counter-claim (*confessio in iure*) in order to achieve substantive law effects, by means of right-conveyance (like ownership, easements, family power) from the transferor to the transferee.[18]

Interestingly, the term *iurisdictio voluntaria* appears in Roman historical records only once.[19]

> *D.* 1.16.2 pr. (Marc. 1 *inst.*): Omnes proconsules statim quam urbem egressi fuerint habent iurisdictionem, sed non contentiosam, sed voluntariam: ut ecce manumitti apud eos possunt tam liberi quam servi et adoptiones fieri. – Once the proconsuls have left the city <of Rome>, their acquire jurisdiction, yet not in litigious cases, but in non-litigious civil proceeding. Thus, in front of them, it is possible to free from power both children and slaves and adopt children.

The text by Marcian contrasts litigious jurisdiction with voluntary jurisdiction (*iurisdictio voluntaria*), which refers to freeing children from paternal authority (*emancipatio*), liberating slaves (*manumissio*) and adopting children (*adoptio*). Therefore, the competences of the proconsul had been limited to non-litigious cases.

Taking into account the educational character of Marcian's work, it should be noted that the three enumerated types of activities were the typical and possibly the most frequent; all were also based on the archaic *in iure cessio* and aimed at the change of the personal status.

[17] To find out more on *iurisdictio voluntaria,* see, in particular: A. Fernández de Buján, *Jurisdicción voluntaria en derecho romano*, Madrid 1999 (3rd ed.), and other works by this author, who dealt with the issue of non-litigious jurisdiction both in a historical and legal and comparative perspective. *Cf.* also A. Wacke, 'Zur *iurisdictio voluntaria*', *ZRG RA* 106 (1989), pp. 180–209.

[18] Dajczak, Giaro & Longchamps de Bérier, *Prawo rzymskie* (cit. n. 14), p. 154.

[19] S. Solazzi, '*Iurisdictio contentiosa* e *voluntaria* nelle fonti romane', [in:] idem, *Scritti di diritto romano* III, Napoli 1960, pp. 163–196, suggests that this one-time appearance is a result of an interpolation. Differently Kaser & Hackl, *Das römische Zivilprocessrecht* (cit. n. 16), pp. 186–187: § 25 1 3 and n. 25: 'Die Stelle ... ist wohl echt', likewise Wacke, Zur *iurisdictio voluntaria*' (cit. n. 17), pp. 182–183; 201–204.

The legal actions taken in the course of non-litigious jurisdiction were subject to simplification over centuries. In the post-classical period the unilateral declaration of the owner made in front of the magistrate was enough to liberate a slave; in like manner an apposite declaration of the father included in the court protocol was sufficient to free a child from paternal power; similarly, submittal of the biological father's declaration to the court protocol with an appended consent of the adoptive father and of the adoptee resulted in adoption.

On the other hand the scope of issues subject to control by state authorities was extended: the magistrates were entrusted with the obligation to choose guardians for minors (*tutela*) and custodians (*cura furiosi, cura prodigi*), cooperating in selling real property and establishing restricted material rights, confirming contracts for obligation to pay alimony (*transactio alimentorum*), registration of donations and receipt of testimonies by authorised offices (*ius actorum conficiendorum*).[20]

All the above-mentioned cases did not have as their scope the resolution of a legal conflict resulting from a breach against the interests of the parties involved. Yet, the participation of a magistrate or judge was justified by the need to protect the public and private interests: the state officials guaranteed in fact the legality of the transaction, in all the instances of great social importance and they also served as the official witness thereof. And thus, *iurisdictio voluntaria* encompassed judicial and administrative functions (the term 'voluntary' in the name of the *iurisdictio* meant by no means that the magistrate was free to grant it, or that he was able to refuse to participate in it).

As it may be deduced from the above Roman law did not develop any general notion of non-litigious proceedings or had it presented any in-depth dogmatic reflections to this extent.[21]

[20] *Cf.* further, Wacke, 'Zur *iurisdictio voluntaria*' (cit. n. 17), pp. 196–200.

[21] Wacke, 'Zur *iurisdictio voluntaria*' (cit. n. 17), p. 201: 'Die Unterscheidung zwischen streitigen und nicht streitigen Gerechtigkeit hat keine fundamentale und technische Bedeutung'.

Nevertheless, it is possible to distinguish certain groups of actions taken in case of lack of dispute about the law, in which public or private interest spoke for assistance of magistrate. This referred to the need for documenting legal actions in order to any avoid future disputes or the disclosure thereof to third parties. It was at that time when the scope of cases under *iurisdictio voluntaria* was growing, nonetheless such cases were still connected by lack of dispute about the law and the unity of efforts of all those interested towards achieving a specific legal effect. This was a relatively precise criterion, which, as it seems, could be used to establish subject boundaries of non-litigious proceedings.

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