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ORCID 0000-0001-9930-7528
Małgorzata Biszczanik[1]

LEGES SINE MORIBUS VANAE, OR HOW ROMAN LAW SHAPED THE MODERN RIGHT TO A COURT

Introduction

The right to a court, shaped through centuries, is now understood as the right to a fair and public hearing, whether civil, criminal or administrative, without undue delay by a competent, independent, and impartial court in a non-discriminatory way. Within the Member States of the European Union, the right to a court is a condition for the proper functioning of a democratic state as expressed by Article 6 ECHR and Article 47 of the Charter of Fundamental Rights. It is intended to implement the principle of equality and dignity, as originally stated in the concept of 'public morals', because of a need to equate all people in every society[2]. It's also worth noticing that, according of the Article 14 ECHR, which enshrines the right not to be discriminated against in the enjoyment of the rights and freedoms set out in the Convention, under the Convention, the right to justice is broadly guaranteed of the right to a fair trial under Article 6 and 13 ECHR. In addition, since the concept of the right to a court is defined at the constitutional level of all European countries, the establishment of regulations at the national level concerning the right to a court does not raise any doubts in the legal environment as it is a fundamental principle of the system of democratic states.

The terms "right to court" and "discrimination" have undoubtedly their roots in Roman law, which dates back to the earliest times of Roman civilisation. This is probably the reason why the institution of a fair trial is seen nowadays in the legal norms of European countries. This is also

[1] University of Warsaw, Faculty of Law and Administration, e-mail: ma.biszczanik@student.uw.edu.pl.

[2] A. Wróbel, *Application of European Union law by the courts: Volume I,* Warsaw 2010, s. 102.

the reason why the institution of discrimination in the access to a court has not been fully analysed, although such study might be seen useless because of the nowadays international legal norms. This institution however constantly appears in the practice of national and international courts and tribunals and still remains subject to research because of the lack of definition of its ground bases and its essential elements. As it was observed in the Roman times, the idea of discrimination is an obstacle to the regular functioning and usage in the judicature of some people. Although at the beginning of Roman civilisation all interpersonal disputes were settled by force or self-help, already between 451 and 450 BC, the Law of the Twelve Tables became the first law concerning private law in order to prevent public authorities from applying the law in the arbitrary manner[3]. Over time, self-help in the process has become a marginal phenomenon, and the state judiciary has become particularly important, especially since, as regards the right to a court, in numerous European constitutions, as well as in the doctrine, reference is frequently made to the Roman order as the most perfect and order that systematised whole[4]. Judging the scale of Roman legal influence on the modern concept of the right to a court, however, the idea of protecting 'morals' needs to be considered. The question is whether, in the context of the right to a court, the way the society sees them right now stays close to the way the Roman society saw them then. It is believable, that the way the law

[3] §1 of the Law of the Twelve Tables: "First, that the laws shall be public, that the arbitrary whims of individual men and women have no place in a society ruled by law. We declare ourselves to be nations of laws, not empires of men. Second, that the laws shall apply equally to all. There shall not be one minimum wage for people of color and another for white people. There shall not be one court for men and another for women. The vote shall not be reserved for the rich, disenfranchising the poor with poll taxes or other artificial barriers meant to come between a people and their government. Third, that there shall be due process under the law. Judgment shall only be applied after a fair and open proceeding; you shall know the charges levied against you and shall be provided counsel, so that you may be heard". See also: M. Zabłocka, *Pierwsza palingenezja Ustawy XII tablic,* Prawo Kanoniczne 1993, z. 36, vol. 304, pp.149, 151, 155; J. Łoś, *Prawo XII Tablic,* Głos Prawa 2022, vol. 5, nr 2 (10), item. 29, s. 414, 424-425. It is to be noted that the codification of the Roman law, exclusively in the form of the Law of the Twelve Tables was done because of the compromise between the two main groups among the Roman citizens of that time – however from the push of the plebeian faction of society, who were excluded from the traditional ancestral organization of the Roman people (Populus Romanus) –and because of the need to bring the basic universality and consistency to Roman law.

[4] A. Jakab, *European Constitutional Language*, Oxford University Press 2016,s. 388.

is shaped right now is the result of how Roman law was built on public morals, which, that is to say, a combination of traditions, customs and various unwritten rules, and which were so important that the *boni mores* were praised by Roman jurists as 'the basis of the Roman legal system and life'[5]. Undoubtedly it is impossible to find Roman regulations directly referring to the institution of discrimination in the context of the right to a trial, however the criteria of participation of certain social groups in the case and procedural authorization together with complex course of proceeding do not it possible to conclude that the substantial limitation of the right to a court was not a manifestation of discrimination against selected social groups. Given the above, the institution of a fair trial should undoubtedly have been linked to access of a non-discriminatory nature. If, however, current national legislation is returning to its roots in Roman law and significantly restricting access to court for selected social groups, in particular by imposing significant substantive and formal restrictions on them, there is no doubt that there is a need to look back in time and to take into account all the legal and moral consequences which, in the age of Roman law, have resulted in an increase in this right over time. Indeed, if Roman law had not enlarged the subjective scope of the right to a court over time, it is not surprising that this would have led to significant bottom-up initiatives on the part of those thus victimised.

Overview of Roman perspective on law and public morality

It should be pointed out here that the construction of modern civil procedure is a fruit of a long historical development dating back to the Roman times. It was in the Roman trial that its actors, i.e. the plaintiff (*actor*) and the defendant (*reus*)[6], as well as the notions of procedural capacity and judicial capacity, which are used on a daily basis, became distinct for the first

[5] R. Perrone, *Public Morals and the European Convention on Human Rights*, Israel Law Review 2014, nr 47 (3) s. 361.

[6] It's Festus who defines "reus" as a term that, according to him, in the ancient usage, could refer to either the plaintiff or the defendant: "At Capito Ateius in eadem opinione est [Author: this word can mean either plaintiff – actor or defendant – reus], sed exemplo adiuvat interpretationem; nam in secunda tabula secunda lege, in qua scriptum est "quid horum fuit unum [vitium, Cuj.] iudici arbitrove reove, eo dies diffissus esto" hic uterque, actor reusque, in iudicio 'reus' vocatur....". Festus, *De*

time[7]. The procedural process in ancient Rome would be recognizable to us today: it involved opening statements, examination and cross-examination of witnesses, introduction of other evidence such as documents, and closing arguments as because the Romans considered any evidence regarding the character of the accused to be significant. Like today, the judicial authority had the authority to punish a witness who committed perjury – this is just because of the reception of Roman law[8].

In the doctrine of constitutional law and civil law, the view has long been popularised that legal regulations concerning access to court and obtaining a fair trial should be characterised by a high degree of detail[9]. However – while the right to a court is now understood as the right to have a dispute, that has arisen between two or more persons or between a particular person and the State (a public authority), resolved in a binding and definitive (final) manner by a body independent of the legislative and executive power, composed of impartial and independent judges – there are still provisions which either limit or even eliminate the right to a court for certain social groups. This is contrary to the principle of equality of all people. However, it should be remembered that such mechanisms were not surprising from the perspective of Roman law. It is known that in Roman society there were, on the one hand, privileged groups that

Verborum Significant, ed. W, Lindsay, Leipzig 1913, s. 336, s.v. Reus. See also: E. Metzger, *A New Outline of the Roman Civil Trial,* Oxford 1997, s. 94.

7 T. Honoré [I in.], *Law and procedure, Roman*. Oxford 2016, s. 9, par. 10.

8 It is worth noticing that Paul Vinogradoff said in this context that: 'Within the whole range of history there is no more momentous and puzzling problem than that concerned with the fate of Roman law after the downfall of the Roman State. How is it that a system shaped to meet certain conditions not only survived those conditions but has retained its vitality even to the present day, when political and social surroundings are entirely altered? Why is it still deemed necessary for the beginner in jurisprudence to read manuals compiled for Roman students who lived more than 1,500 years ago? How did it come about that the Germans, instead of working out their legal system in accordance with national precedents and with the requirements of their own country, broke away from their historical jurisprudence to submit to the yoke of bygone doctrines of a foreign empire?'. P. Vinogradoff, *Roman Law in Medieval Europe*, 3rd, Oxford 1961, s.11.

9 Office of the United Nations High Commissioner for Human Rights (OHCHR), *The right to a fair trial: part I – from investigation to trial. Professional Training Series no. 9 Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Office of the United Nations High Commissioner for Human Rights 2013, www.ohchr.org/Documents/Publications/training9chapter6en.pdf, 20.08.2020.

could initiate court proceedings and, on the other hand, slaves, on which Roman society heavily rested, who only exceptionally could sue their masters in liberty trials[10]. However, the question is whether the discrimination of certain social groups with regard to the right to a court, obviously objectified due to past events, is still observable after antiquity.

In many jurisdictions in the countries of the European Union, it can be observed that the right to a court and the individual powers that make it up may be subject to various restrictions, which are subject to an assessment of the principle of proportionality. Recently, the problem of restricting access to a court and a fair trial has become more acute. In result some social groups, as refugees, cannot benefit from this fundamental right, which is, after all, enshrined in the constitutions of democratic countries[11]. After all, the right to a court of law is one of the general principles of the

[10] J. Bodel, *Slave Labour and Roman society* (in:) eds. K. Bradley, P. Cartledge, *The Cambridge World History of Slavery I: The ancient Mediterranean World*, Cambridge 2011, s. 311-336. In this context it's worth noticing that D. 1,5,4 reads as follows: Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. 1. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur. 2. Servi ex eo appelati sunt quod imperatores captivos vendere ac per hoc servare nec occidere solent. 3. Mancipia vero dicta, quod ab hostibus manu capiantur" – meaning that slaves were viewed as property ("dominio alienoo (…) subicitur"). In this context see also translation given in the A. Watson (ed.), *The Digest of Justinian vol.1*, Philadelphia 1998, s. 15. However, this idea, although forming the theoretical basis of Roman law, never received absolute application – E. Shumway, *Freedom and Slavery in Roman Law,* The American Law Register 1901, vol. 49, no 11, volume 40 New Series, s. 642. Although, in the 1932 Samuel Parsons Scott translated those words as if slaves were to be found persons – "Slavery is a provision of the Law of Nations by means of which one person is subjected to the authority of another, contrary to nature", meaning that slaves were no longer perceived as property. By using the term "person is subjected" the author shows an exceptional difference as he has underlined the lack of reference to the property as it was before. See S.C. Scott, *Civil Law vol. II*, Cincinnati 1932, title 3, s. 2. In any event however, the most important thing to perceive is that Romans regarded slaves as "res" and were thus subjected to all legal rights and obligations regarding res, meaning that they lacked any competence to any rights given to people. In the case of possibility of perception of slave as a plaintiff it's worth noticing that Plank said that it sufficed to determine that the claimed slave was in possession of liberty, but that if he was, he had to give up if in the *liberali causa*, thereafter, to be tried, he was found to be slave (Planck, Mehrheit 222, n. 8). See also D. 40.12.25.2. In contrary to above, see Title XIX, De ordine cognitionion, Bas. 48.22, 7.19.1, 7.19.2. The principle of the Law of the Twelve Tables also indicated that temporary possession of a person reported as a slave should be granted pending trial in favour of freedom, i.e. to that person who had not yet been proven to be a slave – E. Shumway, *ibidem*.

[11] European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights*, Council of Europe/European Court of Human Rights, 2013, https://rm.coe.int/1680700aaf, 01.09.2020.

law, which allows the requirements of the law, the idea of justice, to be met. It is not without reason that the expression *ex bono et aequo*, that is to say, fair and just, appeared on the lips of the Roman pretenders, which over time became predominant, and thus binding, law[12].

It is also not without reason that the law is defined in the Digest as *ars boni et aequi*[13], i.e. the art of what is just and fair[14], and the Roman emperor Justinian defines justice as 'the constant and perpetual desire to render one his due'[15]. Justice has not emerged recently in order to have any basis for considering the law as superior to other norms[16]. Since the beginning of European civilisation, justice has been the fundamental value of the law, which of course can be applied to various issues such as a person's attitude, his behaviour, normative systems other than the law, but ancient philosophers and lawyers already considered the main justice as a virtue of ethical perfection (greek *arete*, latin *exellentissima virtus*), which is manifested in the behaviour. Therefore, it is not surprising that, already in the Institutions and Digests, the law has been described as just and equitable. Even today, justice taken from Roman law is the most essential component of the legal norm. In addition, as Judge Dillon said: 'The Civil Law is often of great service to the inquirer after principles of natural justice and rights'[17].

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[12] W.L. Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, Rochester 2012, s. 4.

[13] W. Wołodkiewicz, *Europa I prawo rzymskie. Szkice z historii europejskiej kultury prawnej,* Warsaw 2009, s. 665: 'It is precisely by basing legislation on the ideas of iustitia, aequitas, fides, benignitas that it will become ars boni et aequi and ensure suum cuique, that it will recognise as its natural and fundamental principle: homo est et qui futurus and ensure the protection of human life in all its spiritual and material dimensions'.

[14] For this notion see: Ulpianus 1 inst, Dig. 1.1.1pr, where is indicated that: 'Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter celsus definit, ius est ars boni et aequi'. See also W. Wołodkiewicz, „Ius est ars boni et aequi": na marginesie nowego czasopisma prawniczego „Forum Iuridicum" 1 (2002), wydawanego przez Papieski Wydział Teologiczny, Sekcja „Bobolanum", Zeszyty Prawnicze 2003, vol. 3, nr 1, s. 251-252.

[15] Institutiones Iustiniani, I. 1.pr.

[16] W. Litewski, *Rzymski proces cywilny*, Zeszyty Naukowe UJ 1988, no. 123, s. 9, 104: The Romans did not create certain technical terms and jurisprudential theories and did not formulate certain concepts. Above all, there was a lack of a technical term and a definition of civil process, although the concept itself was known. Accordingly, civil trial was distinguished from criminal trial and from administrative proceedings.

[17] W.L. Burdick, *The Principles*…, s. 4.

Considering this, the so-called formal concept of justice has been defined by Kazimierz Ajdukiewicz, as the principle of static justice[18]. It means that justice is the property of someone's conduct consisting of equal treatment of those in the same situation or have the same characteristics[19]. While this may have been important in the post-war period of the 20th century, today, the theory of justice is not limited to group responsibility. However, it combines justice with the principle of equality and dignity, defining justice as impartiality or fairness[20]. While today's understanding of justice is, in a sense – due to the common European legal heritage – linked to the understanding of justice in Roman times, it is only possible to establish the substantive content of the rules of law in a court where justice takes precedence.

According to the Roman civil procedure, it was the complaints (*actiones*) that made it possible to initiate any action to conduct a civil trial against the person indicated. *Actiones* were therefore of particular importance for substantive and procedural law[21], which also occur in modern civil proceedings. It should be noted, the current possession of a right, secured by its enforceability, was unknown to the Romans. Today's contestability reverses the Romans' understanding of procedural and substantive law, i.e., current contestability includes the realisation of claims from the substantive side, not from the procedural side. Returning to the notion of *actiones*, they did not have to be based on the subjective power that would have been in the *ius civile* – by granting protection, the praetor could have granted the claim even in situations that were not protected by the *ius civile*. It therefore turns out that, although the *ius civile* rules were a closed catalogue when the *actio* was granted, in fact during the preclassical and classical periods of law, the praetor, through his edict, simply appended complaints (*hoc edicto [...] adicitur*) to the already established safeguards of civil law. These complaints, categorized as homogeneous,

[18] K. Ajdukiewicz, *O sprawiedliwości*, [in:] K. Ajdukiewicz *Język i Poznanie*, Warszawa 1960, s. 365.

[19] J. Hołówka, *Trzy zasady sprawiedliwości,* Przegląd Filozoficzny. Nowa Seria 2014, s. 469.

[20] J. Rawls, *A theory of Justice*, Cambridge 1971, s. 96; F. Longchamps de Bérier, *Pretor jako promotor dobra wspólnego*, in: *Dobro wspólne. Teoria i praktyka*, ed. W. Arndt, F. Longchamps de Bérier, K. Szczucki, Warsaw 2013, s. 82-84.

[21] D. 44.7.51 Celsus 3 dig.: Nihil aliud est actio quam ius quos sibi debeatur, iudicio persequendi.

were further classified into *superiores* and *inferiores* based on their position in the edict[22]. Therefore, it can be deduced from this that this action by the praetor was intended to protect the interests of the injured party and thus bring about an idea of justice.

Their way of conducting them and their two-phase nature – replaced in the Roman Empire by a one-phase *cognito extra ordinem* – laid foundations to today's model of conducting a trial. Both systems of civil procedure were formalised, i.e. they required the termination of specific verbal phrases – in modern times, the power to initiate a lawsuit may be subject to various formal requirements, as in Roman law – such as (i) an indication of the subject matter of the claim (legislative process – *legio actio sacramento in rem* – G. 4, 16-17); (ii) summoning the defendant to appear before the judicial authority (praetor) and presenting the procedural allegations, facts or legal circumstances, the ruling of which had the effect of terminating the dispute (peremptory exceptions) and postponing the dispute temporarily allowing for the forced realisation of the claim by the defendant (dilatory exceptions) while establishing and applying the appropriate content of the formulae, and subsequent judicial entrenchment (*litis contestatio*) and the taking of evidence (formulaic process), (iii) the filing of an appropriate claim under in *ius vocatio* and its judicial entrenchment (*litis contestatio*) while initiating a legal theory of evidence (cognate process).

In this context, mention should also be made of the class representation of society, which plays a significant role in the enforcement of the right to a court and to a fair trial. The personal status of the time is reflected in the Gaius' systematic subdivision of the legal material into persons (*ius quod ad personas pertinent*), things (*ius quod ad res pertinent*) and claims (*ius quod ad actiones pertinent*)[23]. Justinian's Institutions outline

[22] Gaius lib. 9 ad edictum provinciale) [...] etiamsi deficient superiores actiones, id est exercitoria institoria tributoriave, nihilo minus tamen in quantum ex bono et aequo res patitur suum consequatur. D.14,3,17,1 (Paulus lib. 28 ad ed.) Si servum Titii institorem habueris, vel tecum ex hoc edicto vel cum Titio ex inferioribus edictis agere potero.

[23] S. Nenad, *Human Rights and the Social Position of Citizens in Ancient Rome,* Pravo – teorija I praksa 2022, vol. 3, s. 39-41; Gaius Institutiones 1.19.12 – "Freedmen, again, are divided into three classes, citizens of Rome, Latins, and persons on the footing of enemies surrendered at discretion. Let us examine each class in order and commence with freedmen assimilated to enemies surrendered at discretion".

a comparable system. Within the framework of personal law, subgroups of people have been singled out, which was expressed in the division into free people and slaves. Within the framework of free people, people were divided into citizens and not citizens, with citizens being subordinated or not within the internal family structure, the latter subdivision which need not be discussed more widely in this article. The class division of society resulted – contrary to the principle of equality and justice, which were, however, raised by ancient Roman lawyers – in the fact that the notion of the right to a court and a fair trial did not have a greater raison d'être at the time (the concept itself being unknown). The division of society into people and things, which included slaves, and leaving foreigners in the care of those who decided to take care of them (*praetor peregrinus*), resulted in the proclaimed principle of equality not being respected[24].

The correlation between the social standing and rights of Roman citizens was closely intertwined. In contrast to the modern concept of universal equality across all rights, Roman society did not afford such uniformity. This meant that not all inhabitants of the empire enjoyed equal human rights. However, various scholarly perspectives offer differing periodizations based on criteria utilized to delineate historical eras. It can be said that the social standing of the populace varied across different epochs of Roman history. Consequently, each periodization carries subjective interpretations of pivotal historical events. Within four main periods: the Period of Kings, the Period of the Republic, the Principate, and the Dominate, the status of citizens and their rights underwent changes compared to the preceding or subsequent periods. However, to participate in a Roman trial, one needed to fulfill certain requirements, which included having procedural capability, contingent upon possessing legal capacity. Legal capacity, in turn, hinged on one's status of *libertatis*, *civitatis*, and *familiae*[25]. At first, the legislative process in ancient Rome was limited to Roman citizens and Latins under the *ius civile*, while Peregrines could only engage through the formulaic procedure, derived from the *ius*

[24] M. Radin, Roman Concepts of Equality, Political Science Quarterly 1923, vol. 38, no. 2, s. 269.

[25] W. Wołodkiewicz, M. Zabłocka, *Prawo rzymskie. Instytucje*, Warszawa 2001, s. 275.

honorarium[26]. Since the granting of citizenship to Latins after the social war in 91-87 BC, and to all free inhabitants of the Empire in 212, it has been held by almost everyone, except slaves[27]. They were still not considered persons, after all, they were subordinated to things[28]. During the Period of Kings, the authority to grant freedom to slaves rested with the king, but by the enactment of the Law of Twelve Tables, liberation had become a well-established legal practice. In the subsequent Period of the Republic, two forms of liberation emerged: civil liberation, which conferred citizenship upon the freed individual, and liberation by a praetor, which did not grant citizenship. The effect of liberation was to place the freed person on equal footing with a Roman citizen in matters of private law. Limitations on the scope of liberation were introduced later by Octavian Augustus through the *lex Fufia Caninia*, which restricted the number of slaves that could be freed by will, and the *lex Aelia Sentia*, which imposed constraints such as age limits for both the slave and the owner (G. 1.17 and G.1.38), as well as changes to the liberation process itself. However, a slave freed through informal means only attained the status of a Julian Latin (G. 1.22), i.e., a de facto free person without civil rights, until the *lex Aelia Sentia* provided pathways for such freed individuals to attain Roman citizenship. This situation was altered by the *lex Iunia Norbana*, which granted liberators legal freedom and the status of colonial Latins (*Latini coloniarii*), affording them the right to engage in economic transactions and contracts, though political rights remained inaccessible[29]. They were though considered humans[30].

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[26] W. Wołodkiewicz, M. Zabłocka, *ibidem*, s. 275.

[27] P. Keresztes, *The Constitutio Antoniniana and the Persecutions Under Caracalla*, Johns Hopkins University Press 1970, s. 446-459.

[28] Gaius Institutiones 1.9. – Summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi.

[29] W. Kosior, G. 1,17 I G. 1, 38. Uwagi na tle społecznych I demograficznych uwarunkowań ustawy Aelia Sentia, Łódzkie Studia Teologiczne 2018, vol. 2, no 2, s. 80-89; L. Casson, *Everyday Life in Ancient Rome,* John Hopkins University Press 1999, s. 60.

[30] A. Berger, *Encyclopedic Dictionary of Roman law,* Philadelphia 1953, at 537– 'Latini. The descendants of the population of ancient Latium, which was organized as a federation of various smaller civitates. […] An important advantage of the Latini coloniarii was the opportunity to obtain Roman citizenship (wither generally or individually) for services rendered to the Rooman state. Th eius Latini was

Even if liberation had been achieved, whether through civil liberation (which gave liberated people citizenship) or liberation by praetor (which did not give citizenship), legal position of freedmen was not equal to that of the free born. It was only in the Principate that it was possible to equalise them to the level of the free born because of the termination of patronage rights (*natalium restitutio*[31]). As a result, the freedmen could not sue the patron, which of course results from the relationship of patronage that took place before the liberation, but still their position was much better than that of free people living on the lands conquered by Rome, who had no access at all to the Roman right to a court and a fair trial[32].

From the partial systems to the current legal system

Roman law served as the foundation of contemporary private law, rooted in ethical principles. Roman private law has had an enormous impact on the subsequent history of legal systems, being adopted by many legal systems and continued to be used in legal. What sets Roman law apart is its ability to create universal, rational legal formulas that later became the foundation of European civilization. This to be said, the Roman law was the first to set apart both the religious origins and the political ones to provide law with its own independent significance and to be viewed as the cornerstone of civil order. Whether a principle can be deemed ethical hinges on whether all social conditions are fulfilled, including today's standards of equality regardless of factors like race, religion, or ethnicity. Hence, the right to a fair trial inherently embodies a fundamental ethical principle, signifying the equality of all individuals regardless of their specific attributes, thereby granting everyone access to legal recourse and the ability to assert their rights. Nonetheless, when

a particularly favorable legal status, in a sense, an intermediate status between Roman citizenship and the status of peregrini.

[31] A. Berger, *Encyclopedic…,* at 591 – 'Natalium restitutio. The privileges of a free-born, granted by the emperor to a freeman. All official posts accessible to free-born persons were open to the individual thus privileged. He could enter the ordo equester (the equestrian class, see Equittes) for which the status of a free-born was required – D. 40.11; 6. 6.8.'.

[32] P. Finkelman, *Free Blacks, Slaves, and Slaveowners in Civil and Criminal Courts: The Pamphlet Literature*, New Jersey 2007, s. 11.

the prerequisites of social justice and morality are not met, potentially impeding access to justice, such a right remains incomplete. In this way, the Roman law set the way to ensure societal progress over time.

In addressing the question of the place of the right to a court in the system of current moral principles and European law, it is worth considering whether the current form of the right to a court is in any way related to the possibility of a bad recitation of fundamental ethical principle of Roman law and, if so, why there is still no such action, either at European or national level, which would lead to equal opportunities for all people in the context of the right to a court. The right to court is primary addressed with the equality and anti-discrimination issues included in the concept of human rights, which are originally formulated on the basis of philosophical and political theories[33]. This is all the more important because many of the new constitutions are similar to norms given in Article 6 of the European Convention on Human Rights and Fundamental Freedoms, paragraph 1 of which states:

> In the determination of his civil rights and obligation or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice[34].

It should therefore be noted that the European Convention on Human Rights expresses the right to a fair and public hearing and expresses the provision that the proceedings before the court are open to everyone. Thus, if Roman society was already striving for equality during these periods, even though it was then practically impossible to implement all equality laws in society, it should undoubtedly be acknowledged that the idea of equality and the prohibition of discrimination should now constitute the

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[33] P. Finkelman, *Free…,* s. 11.

[34] Article 6 of the European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, 1950.

foundations of any law. Thus, if the concepts of prohibition of discrimination and maintenance of equality are often used interchangeably, both in a legal context and as moral principles, it should be considered that unequal treatment of individuals or groups is morally unjust. However, when such treatment becomes a legal issue, subject to sanctions for its illegality, this raises questions about whether it violates legal norms. The prohibition of discrimination is a multifaceted topic that spans various disciplines, precisely including the legal discipline as understood from the practical side. Although there is no indication of all the elements of discrimination nor is there a universally agreed definition of discrimination, the term becomes an abstract term open to subjective interpretations. Despite this, the concept of discrimination has become one of the most important concepts in legal discourse, as first presented in the Decision of the European Commission of Human Rights of 11 July 1989 in the case of Sténuit v France[35]. It therefore follows from the wording of this provision that the right to a fair trial is a right for all people, and that the public hearing of a case should be carried out within a reasonable time, considering also the fact that the trial should be fair and public, as stated in the Universal Declaration of Human Rights. It is in the preamble, with the words:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[36],

and:

> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person

[35] ECtHR judgement of 27 January 1992, nr 11598/85, *Societe Sténuit v. France*. Although the Commission found it admissible, Sténuit withdrew it with a change of law in France, but the mere fact that the case was accepted for consideration in the context of Article 6 of the ECHR indicates that this article may also concern legal persons. However, in this case, the Commission has stated that not all the rights contained in this article are enjoyed to the same extent by legal persons as by natural persons – and a restrictive interpretation cannot be applied, which is of particular importance in the case of legal acts at European level, which will remain the subject of this article.

[36] Preamble of the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

> and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom[37],

which reaffirms the individual's inherent right to human dignity, on which further rights are based, precisely including the right to a court and a fair trial. It is not surprising, therefore, that the above issues given in the preamble are perceived as the highest values to be pursued by all Member States of the United Nations. It turns out that the failure to ensure that all people can have a fair trial in a binding and definitive manner can mean that a country does not even fit into the definition of a democratic state.

The principles of equality and the principle of dignity proclaimed there – based on which further provisions are drawn up, which specify the legal situation with regard to these principles – are binding, in contrast to the provisions of the Universal Declaration of Human Rights. It is in the European Convention on Human Rights and Fundamental Freedoms, in Article 6, that the European Convention on Human Rights and Fundamental Freedoms contains more detailed provisions concerning the right to a court[38]. Because, the European Convention on Human Rights, like the Declaration, was created as a response to the acts of the Second World War, and which was influenced by the Universal Declaration of Human Rights, it had to create a new reality and thus had to create or reconstruct basic human rights standards and instruments. It is therefore not surprising that the right to a court was recognised by the Court of Justice of the European Union in 1986 in Case 294/83 'Les Verts' as a general principle of law, which was then connected to a rule of law[39]. In both cases, it is about the general principle of law and about criminal law, the judgement states that:

> It must first be emphasized in this regard that the European economic community is a community based on the rule of law, in as much as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty[40].

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[37] *Ibidem*.

[38] E. Flynn, *Disabled Justice?,* London 2016, s. 30-31.

[39] Judgment of the Court of 23 April 1986, 294/83, *Parti écologiste "Les Verts" v European Parliament*.

[40] *Ibidem*.

Despite numerous pieces of legislation aimed at levelling the playing field in terms of equal access to court and ensuring a fair trial, it should be made clear that there is a noticeable lack of decisive action in selected European Union Member States to address inequalities in access to court and the protection of one's rights. Despite advances in the legislative and political field, which, as the following article shows, are linked to fundamental principles already in force in Roman law, formalities and obstacles still exist that make it difficult for certain groups of society to benefit from the services of the judiciary in an equal and fair manner. These inequalities may be due to various factors, such as limited access to adequate legal representation, difficulties in financing court costs or long waits for cases to be heard. Despite binding commitments at the international level – as indicated above – in practice, some social groups may face difficulties in realising their rights in court, which in turn may lead to a further widening of social inequalities and hinder the achievement of social justice. Additional action by Member States and European institutions is therefore needed to effectively combat these inequalities and ensure equal access to justice – without any concept of discrimination of certain social groups. The lack of dissemination of the right to a court result in the opposite situation to that assumed by the legislator when writing a given act.

This brings back to the issues that existed in the Rome procedure, where only adult male Roman citizens with the position of father in the family had full access to court, which affected groups such as slaves or women, as well as foreigners. Of course, this was understandable at the time, as the Romans considered the family model differently. In this case, of course, there is no objection – there is historical evidence of this – but another issue arises. Why, now that the Roman tradition is being reverted to, not only in formal but also in substantive law, and is it also referred to in many rulings[41], whether by European supreme courts or tribunals, is the problem that existed in the Roman order, which once again plays a major role not being noticed – namely the principle of equality, particularly related to the humanist theory of 'proper' jurisdiction, understood as the need to distinguish between the legal 'right' of sovereignty and the

[41] *Ibidem*.

mere factual 'use' or 'exercise' of sovereignty[42]. Indeed, on this subject, a doubt arises as to how the right of liberty constituting the direct basis for the initiation of proceedings for the protection of one's liberty rights is to be understood. As it should be pointed out, the current jurisdiction introduces numerous legal restrictions, which are currently being used by national judicial authorities to undermine claims to national jurisdiction, resulting in the impossibility of judicial redress. Such activity by national authorities is of course in conflict with the rules of international law, but the question arises as to whether such issues are not closely related to the historical background emphasizing the close connection of current law with the branch of Roman law, as indicated above. At the same time, the question arises as to whether such formal restrictions, regarding procedural and judicial capacity, do not have the effect of initiating an analogous process towards equality of all persons, as was the case throughout the existence of the formalized Roman state. Indeed, based on the historical background, it is impossible to see that this situation even represents a return to the original assumptions of Roman law, limiting the rights to a court only to a selected narrow group of persons.

According to Theodor Mommsen, *Römisches Staatsrecht*, *imperium* was the possession of official power, which passed from the hands of kings and ranks of consuls and other superiors, involving both military and judicial authority – even though in their original context they dealt judicial process rather than a general theory of public authority[43]. Within the *imperium* there were several degrees, i.e. the consul had a larger *imperium* than the judge, but from each judge it was the emperor who had the largest *imperium*. The traditional Roman examination of *iurisdictio* served as a cornerstone for the medieval understanding of legal power, as elaborated by Azo. In the Azonian theory, it was seen as a broad category encompassing various degrees or types of authority, which included not only the *imperium* wielded by emperors, kings, or lower-ranking officials,

[42] In this context see D. Lee, *Roman Law and the Renaissance State: Dominium, Jurisdiction, and the Humanist Theory of Princely Authority*, in: ed. D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought,* Oxford 2016.

[43] T. Mommsen, *Römisches Staatsrecht,* vol. 1, Leipzig 1887, s. 91.

but also the feudal jurisdiction exercised by a lord, or dominus, over his feudal estate[44]. The official power was either the *imperium merum*, within which there was *iurisdictio* with *ius gladii/potestas* (the power of the sword) and public jurisdiction in criminal law matters, that is, tort law, or the *imperium mixtum* only with *iurisdictio*[45]. It was *actiones* that were the result of *iurisdictio*, which played a major role in civil judgment, although in the late classical period it also began to be used in the context of criminal and administrative proceedings. Indeed, the word *iurisdictio* comes from the expression *ius dicere*, which is an oral statement, which is the law of the case, and it can be said to correspond to the current legislation, which states the law[46]. However, in Roman times the situation of *iurisdictio* was so complicated that, in the absence of a uniform definition in Roman times, any magistrate could determine an act or failure to act as lawful. If, however, there is a distinction between the power of emperors and judges – especially if one of these groups is not the same as the other after all, they different not only within the *merum imperium*, but also the *iurisdictio*. It is not without reason that the Glossators redefined *iurisdictio* in such a way that it – and not the *imperium* – became the basis of medieval public law, encompassing within it all kinds of power, including the coercive power of the sword, the *merum imperium*[47]. Consequently, *iurisdictio* became a genus of which the *merum imperium* was merely a species. The

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[44] Azo, Summa Codicis on C.3.1; Azo, *Summa Azonis, Locuples Iuris Civilis Thesaurus*, Venice, 1566, column 179 [Azo on C.3.13, §17: 'Can it be that this merum imperium belongs only to the emperor? They declare that he alone has it...But certainly even exalted magistrates [sublimes mag istratus] have merum imperium, as it is to be observed in the Digest at [D.2.1.1] if the definition of law which we have declared is valid. For the governors of provinces [praesides provinciarum] have the right of the sword [ius gladii], as at [D.1.18.6.8; cp. Glossa Ordinaria on D.2.1.3 on Potestatem]. Yet, it is true also that municipal magistrates do not have such power, as discussed at [D.2.1.12]. I say, therefore, that full [plena] or the fullest [plenissima] jurisdiction belongs to the emperor alone, since by the lex Hortensia [= the lex regia] the people transferred [transtulerit] to him and in him all imperium and all power, as at [Inst. 1.2.6], so that only he can decree a common justice, as at [C.1.14.1], which the definition of jurisdiction suggested. For the text there says "the establishing of equity." I grant nevertheless that any magistrate can make a new law in his city [in sua civitate], as at [D.2.2.1]. And I say that even merum imperium belongs to other exalted authorities.

[45] T. Mommsen, *Römisches*..., s. 93.

[46] T. Mommsen, *Römisches*..., s. 8.

[47] As it was based on the D.2.1.1.

result of the above was a radical departure from classical Roman law, paving the way for a distinctly new medieval theory of jurisdictional power constituting authority. Whereas Papinian and Ulpian saw *iurisdictio* simply as a delegable judicial function, medieval glossators noted that *iurisdictio* constituted the basis for the exercise of power about itself[48] – as that was Azo's idea. Since the *iurisdictio* began to be applied beyond the limits of private law over time, reaching universal law, which includes a range of rights and rights of the public, it was necessary to create a means by which the case would certainly be resolved in the manner most suited to the public's expectations. Such a measure was *actio*, which was the result of *iurisdictio*, defined for the first time by Celsus as the right to pursue a judicial remedy[49] [50]. Consequently, virtually anyone could have *iurisdictio*. In this conception the term *iurisdictio* can't be perceived the same as the term jurisdiction, such as civil or penal jurisdiction[51]. According to Azo's theory, not only subjects at the highest level of government possessed *iurisdictio*, albeit to a lesser degree. Thus, as a general rule, Azo allowed for a perfect correlation between the holder of *iurisdictio* considered 'incomplete' on the one hand, and the type of *iurisdictio* considered 'proper' [*propria*] – or belonging to that holder – on the other. Even now, it should be pointed out that private law subjects with full legal capacity are in possession of both incomplete and proper *iurisdictio*. For the above treats that just as the father possessed his paternal *iurisdictio*, so too every other person possesses his own variety of *iurisdictio*, regulating the autonomy of the individual, able to decide his own fate – all individuals, according

[48] F. Maiolo, Medieval Sovereignty, Eburon 2007, s. 145.

[49] F. Long, *Actio* [in:] W. Smith, *A dictionary of Greek and Roman Antiquities,* Cambridge 1875, s. 9.

[50] Gaius, Digestia Iustinani 44.7.0.

[51] It this subject it's worth noticing that the protection of private-legal relations, that is, the interests of both personal and property of individual subjects of law is guarded by civil jurisdiction. It differs from criminal jurisdiction, the object of which is to protect public interests. One and the other jurisdiction is only a part of the state power, which, in the form of legal norms, creates a certain legal order in the area under its authority. The action of a person may aim to violate both private and public interests in the legal order in force, and depending on this meets with a response from the state in the form of a civil or criminal lawsuit. See M. Jońca, *Rzymski proces cywilny I rzymski proces karny Rzymian w ujęciu ks. prof. Stanisława Płodzienia (uwagi na marginesie maszynopisu BU KUL 1443A),* Miscellanea Historico-Iuridica 2023 vol. XXII, no.1, s. 423.

to Azo's theory, coexisted side by side in the jurisdictional hierarchy of the hierarchy. If, however, there is currently no way to guarantee the individual's own possession of *iurisdictio* proper understood as the right to a court of law, this is grounds for indicating that current national law is returning to the roots of Roman law. However, it should be borne in mind that Azo's analysis of *iurisdictio* makes it possible to point out that it is a general concept of power with numerous degrees, which at some point became a standard. The restriction of the individual as to his fundamental rights, on the other hand, represents a lack of rightful analysis of the existing body of law. Therefore it must be agreed with Accurius thath 'There are four grades of *iurisdictio*. For some are *merum imperium*, others are *mixtum imperium*, others *coercitio modica*, and finally others remain in its own name and are simply called *iurisdictio* [52].

Roman Law in Human Rights?

The legal protection measures presented above in the modern law do not indicate how and where they came in their form, although it is stated that they existed even before the above standards were written down in international law, in particular in the Universal Declaration of Human Rights and the European Convention on Human Rights[53]. Moreover, it is worth mentioning that, much like in Roman law, not all individuals today enjoy equal access to the right to a fair trial – ranging from plebeians, who only gained legal understanding after the theft of the manuscript containing the formulas, to slaves and *pater familias*, to contemporary migrants and stateless individuals. While readers may contemplate the basis upon which equality is asserted among these groups, it is important to acknowledge that these groups have historically faced discrimination, being denied the right to pursue legal action. Such denial contradicts both international

[52] Glossa Ordinaria on D.2.1.3 on Mistum Est; D. Lee, *Roman Law and the Renaissance State: Dominium, Jurisdiction, and the Humanist Theory of Princely Authority*, in: ed. D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought,* Oxford 2016, s. 88-89.

[53] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR). European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, 1950.

and national legal norms and often entails the assertion that they do not possess the same rights as citizens of a given country. From the issues described above it can be easily deduced that first plebeians and then slaves and foreigners were treated as foreigners by the authorised citizens of Rome. It is worth noting, after all, that according to the Gaius system, i.e. *personae-res-actiones*, slaves were counted as things, although in some cases they had partial legal capacity to act, but no full legal capacity[54].

The position of certain social groups today seems to be similar to the position of non-citizens in ancient Rome as far as the right to court is concerned. Right now, all international conventions and treaties relating to the situation of migrants and refugees now claim that any foreigner fleeing persecution based on religion, belief and the like, and because of the threat or consequences of armed conflict and other issues, has the right to legal proceedings. The doctrine distinguishes between two rights of access – one refers to an administrative procedure in which the prerequisites from the formal and substantive point of view are examined, and the practical side, i.e. access to court and a fair trial[55]. It was international and European legislation that was supposed to create, for the first time, standards for an equal right to a court and a fair trial in a court where everyone is equal, with respect for the principle of dignity and non-discrimination. Considered to be the most far-reaching legal instruments for preventing discrimination and combating inequality, they were to codify, for the first time, legislation that would stop inequalities in access to court, and those who have limited or no access to court would receive comprehensive care from the State and from the legal side, as the International Commission of Jurists has identified as playing an important role[56].

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[54] J. Skorupka, *O*…, s. 171-178.

[55] M. Górczyńska M., *Prawo cudzoziemców do sądu* [in:] Helsińska Fundacja Praw Człowieka, *W poszukiwaniu ochrony. Wybrane problemy dotyczące realizacji praw cudzoziemców ubiegających o nadanie statusu uchodźcy i objętych ochroną międzynarodową w latach 2012-2014. Obserwacje Programu Pomocy Prawnej dla Uchodźców i Migrantów Helsińskiej Fundacji Praw Człowieka*, Warszawa 2014, s. 45.

[56] M. Pollard, *Scope of remedies upon a successful challenge to the lawfulness of detention*, UN Working Group on Arbitrary Detention 2014, www.ohchr.org/Documents/Issues/Detention/Consultation2014/MatthewPollard.pdf, 20.08. 2020. International Commission of Jurists, *International Commission of Jurists: Key Elements for Basic Principles and Guidelines on Remedies for Arbitrary or Unlawful Detention, and The Right to Challenge the Lawfulness Of Deprivation of Liberty Before A Court*, International Commission

There is also no specific reference in the doctrine to the Roman order and the current State of the right to a court, but the issues outlined above certainly make it possible to conclude that the Roman legal State is currently reflected in a number of European countries' legal orders, as well as in international treaties and agreements, mainly European. Of course, European law is not built directly on Roman law, but it is the result of historical evolution, including Roman and modern law, which also includes new legal instruments and new issues that did not exist in Roman law. It does not seem, however, that the statement that Roman law has had a major impact on the current form of the right to a court is exaggerated. In the case of such analyses, it is necessary to interpret them from the perspective of time, changing attitudes to certain issues and from the perspective of new legal institutions. Although it cannot be said that the situation of slaves in Roman law reflects the state of refugees, women or foreigners, as the second group has legal capacity and the capacity or legal acts, it can certainly be seen that both groups have been discriminated against to some extent, to a greater or lesser degree, and this state of affairs has persisted for a long time, with the result that society, even at the end of the Roman Empire, and also in the present day, does not notice these people – this makes them become increasingly 'invisible' in society.

Conclusions

There is no doubt that social justice, closely linked to access to the right to a court while prohibiting discrimination, is directly linked to the Justinian Institutions, indicating that justice is defined as the constant and perpetual will to render each his due[57]. Bearing in mind that the position put forward is significantly abstract until further elaborated, it should nevertheless be pointed out that it indicates as many as four aspects of justice – the permanent will, the eternal will, the giving of this right to people regardless of their origin, and the equal treatment of all subjects

of Jurists 2013, www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/ICJ1.pdf, 18.08.2020.

[57] Iustiniani Institutiones, I.1.

of the law. The question of justice arises in particular in circumstances in which subjects are entitled to make specific claims which, although potentially subject to a specific legal conflict, are at the same time an exclusive right of the individual concerned (to render each his due). Consequently, justice is particularly linked to ensuring that every individual has recourse to a higher instance to ensure that his or her rights are protected. Otherwise, limiting the scope of subjectivity to a narrow group of individuals has the effect of giving way to justice for other values. This would not constitute a legal obstacle, however, as long as these values were of equal or higher importance than justice. In other cases, it is not possible to limit the right to a court to specific, even the lowest in the hierarchy, groups of individuals only in order to guarantee this right to a specific group placed much higher in the hierarchical ladder. One must therefore agree with Hume, who pointed out that in a hypothetical state of abundance, in which 'every individual is fully supplied with all that his most voracious appetite can desire', 'the careful, jealous virtue of justice would never dream'[58].

Consequently, Justinian correctly indicates that fair treatment is something owed to every person. In Roman law, these words meant the ability to make specific claims against a particular person. Of course, the issue of the scope of subjectivity varied depending on the period and the exercise of a particular power, but the main value of Roman law was to ensure that a claim could be made against the subject of justice, be it a person or an institution. Consequently, if in Roman law it was possible to identify specific legal issues that could justify a legal cause of action, it is unreasonable to adopt excessive formal and substantive restrictions today. It should be emphasised that the Roman idea of justice brought numerous mechanisms to the judicial process, which constitute the timeless character of Roman solutions that were intended to ensure justice in judicial proceedings. Leaving aside the differences that existed in the situation of those entitled (theoretically) to the right to a court, the aspect of equality in the right to a court in Roman law was noticeable

[58] Hume, An Enquiry Concerning the Principles of Morals, s. 183-184.

for a considerable period of the Roman state. Nevertheless, the equality aspect itself has now been strictly delimited in international law norms.

As a consequence, the problem of non-discrimination should be completely eliminated nowadays. However, it is worth noting, especially in the light of an analysis of contemporary developments in continental states, the considerable degree of formalisation of civil procedural systems, which, from today's perspective of international law obligations, appear as particular limitations on the right to trial. There is thus a significant contrast with other legal ideas linked to the idea of justice. Referring to this, the current legal arrangements do not guarantee the flexibility of legal protection, as was developed, inter alia, under the *ius gentium* in relation to the procedural rights of the Latins and peregrines. While one can, of course, point to the far greater scope of legal protection thus provided to the Latins and peregrines, which encouraged the use of these instruments to protect their rights by citizens, doubts now arise as to whether the current scope of justice allows for the enforceability of the requirements defining justice per se. Nowadays, the nature of the judiciary generally goes hand in hand with its enforceability, allowing for increased procedural rights of any social group, but in practice, the difficulty of obtaining adequate legal aid due to lack of knowledge or lack of means to provide an adequate level of legal protection even causes a significant differentiation in the scope of human and civil rights depending on the social group in question. It seems, therefore, that Kupiszewski was right to say that 'tomorrow' will always bring 'the unknown' [59].

[59] H. Kupiszewski, *Prawo rzymskie a współczesność,* od.nowa 1988, s. 217.

Summary

The idea of justice, linked to the idea of human rights, has a very long and rich tradition, beginning as early as the time of Roman law, which saw the emergence of the rule of law and the state, due to a society developing in many places, rich in traditions and a culture of law. The following article aims at presenting anew the most important elements of the modern right to a court, which were incorporated from the legislation of the Roman Empire, and which have an increasing influence on the understanding of this right. In essence, therefore, as stated by A.H. Robertson and J.G. Merrills: 'The struggle for human rights is as old as history itself, because it concerns the need to protect the individual against the abuse of power by the monarch, the tyrant, or the state'.

Keywords: Roman Law, right to court, Roman influence, human rights, law culture

mgr Małgorzata Biszczanik
University of Warsaw
Faculty of Law and Administration
e-mail: ma.biszczanik@student.uw.edu.pl