

Book Review: An Introduction to Roman Legal and Constitutional History, by Wolfgang Kunkel

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AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY. By WOLFGANG KUNKEL. Oxford, at the CLARENDON PRESS: OXFORD UNIVERSITY PRESS. 1966. pp. 217. (\$5.95).

Since, as a student at university, my first acquaintance with the world of advocates and law was in the prosecution speeches of Cicero, I may be forgiven the expression of regret that in the common law schools of Ontario, unlike England, no course is offered in Roman law. I have long entertained the conviction, which not even three years in an Ontario law school could shake, that the most valuable asset in the law, or any other intellectual discipline, is a keen and searching mind. The value of a training in classics, which is but a confrontation with a great civilization of the past, is to be found in its intellectual discipline rather than in any practical application to

¹⁴ This is a paraphrase of the Texas law of provocation.

¹⁵ P. 21.

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the present. However, the crowded curricula of our law schools perhaps do not permit students to indulge in the luxury of examining the roots of a great legal system (no more than engineering students have time to engage in basic research), which provides the conceptual basis for the laws of most of the countries of the world.

Professor Kunkel's book does not deal with the development of legal concepts but rather is a social history of some of the factors which determined the growth of Roman private law. In less than 180 pages, he traces in skeletal form the law-making and law-interpreting persons and bodies as they emerged from the shadows of a distant past to take their place in history and to fade away in the course of more than a thousand years. He tells the story of important constitutional bodies like the *comitia centuriata*, a popular assembly which chose the highest magistrates, passed statutes on their proposal and gave formal decisions on peace and war; its influence was spent by the time of Caesar. There is also the Senate, an advisory body possessing no legislative or executive power of its own, but which among the annual change of magistrates represented the focal point of stability in Roman political life and as a concentration of all the power and experience of the politically dominant stratum of Rome exercised immense power for centuries.

It is interesting for a common law student to note that although its legal concepts have to a much greater extent been adopted by the civil law jurisdictions, the historical development of Roman law has been closer to that of our own system. Beside the codification of the Twelve Tables, the *ius civile*, stands the imposing edifice of the *ius honorarium*, a compilation of the decisions of individual magistrates. Professor Kunkel describes the phenomenon as follows:

When classical jurisprudence began its work it found, beside the *ius civile*, the *ius honorarium* already in a state of strong development: the *ius civile* strict and rigid in its basis though certainly modernized in some details by later legislation and by borrowings from magistral law; the *ius honorarium* progressive and free, subject to constant further development. Both stood in contrast to one another, as in English law common law stood beside equity, the latter derived from the practice of the Chancellor's court. Classical jurisprudence took the contrast between *ius civile* and *ius honorarium* for granted, but in seeking out the many points of contact between both masses of law and in developing both of them in common it gradually obliterated their boundaries.¹

An illustrious chapter in the history of Roman law was written by the classical jurists for whom legal science was not an occupation through which one earned one's daily bread, but rather an intellectual recreation for aristocratic circles which brought those who pursued it no gain other than honour and popularity. Owing to the annual change of magistrates, legally expert advisers exercised a decisive influence and "the brilliant creations of magistral law are probably very largely the work of jurists who steered the creative hand of the praetor".² With the *ius respondendi* conferred upon certain renowned

¹ P. 79.

² P. 93.

jurists by Augustus (the extent of which remains contentious) by virtue of which they were empowered to give binding opinions of law, there was created a source of guidance for the administration of justice which operated in the same way as do the highest courts in the modern civil law world. Although the jurists are popularly remembered for their commentaries, Professor Kunkel points out

. . . it is not on them [the literary works of the classical jurists] that the fame of Roman jurisprudence rests; for the great strength of the Roman mind lay not in theoretical construction but in the technically accurate mastering of actual individual cases.³

There are other significant events in a legal history which spans ten centuries: the decline of classical jurisprudence with the practice of direct appeal to the emperor; the role played by imperial legislation, and; the revival of jurisprudence in the codification of Justinian. These and others find their place in Professor Kunkel's exposition. If the theme of this book could be summed up in two sentences, they would be:

In a word, Roman law, in the same way as English law, is a legal system particularly rooted in history and viewed in its proper context, it shows the indelible marks left by the processes which formed it. The abstract system of Roman law principles which modern science in particular the theoretical German jurisprudence of the nineteenth century, has distilled from the Roman sources shows, it is true, hardly anything of this peculiar structure of ancient Roman law.⁴

Professor Kunkel's text was written to give German law students taking their first lectures in Roman law some knowledge of the factors which determined the growth of Roman private law. Owing to the brevity of the book and the great period of time it seeks to encompass, it is inevitable that a most cursory treatment be given to significant events. However, as a complement to the main text the author provides a bibliographical essay which indicates and discusses both primary and secondary sources for the student who wishes to engage in further study.⁵ Although a translation of a German text, the English style is remarkably smooth and the book very readable. The sole indication of the original language is the use of the word "fire-raiser" (a literal translation of *Brandstifter*) for "arsonist".⁶ This book is recommended to all common law students who would like to read the story of the sinews that held together a small republic which grew to be a great empire—that magnificent and terrible civilization evoked by the name of Rome.

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³ P. 103.

⁴ P. 80.

⁵ I should welcome essays of this nature which are growing in popularity in the context of literary and historical scholarship, but perhaps the case consciousness and rapid development of the common law, which quickly dates articles and larger works, militates against the bibliographical essay.

⁶ P. 28.

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