

11 November, 2020

## MEMORANDUM

**TO:** 2020 Roman Law Class

**RE:** Some Thoughts on the Jurists and Roman Society

Here are some thoughts that I put together for the last class (the second part). Rather than having me make a lecture out of them if only because lectures don't work very well in Zoom, perhaps it would be better if we simply had a discussion on the basis of these notes. In particular it might be interesting to talk about what is missing from this very brief general account.

1. What does what we have done in the last three weeks tell us about the juristic achievement? What does it tell us about law and society? There are three views of the general issue:
  - a. Law proceeds, at least private law, on the basis of an autonomous set of rules and ideas. This can be broken into *Begriffsjurisprudenz* (a jurisprudence of concepts) or Watson's irrational conservatism.
  - b. The results if not the rules are determined by the social situation. This in turn breaks down into a naturalistic functional notion (law and economics school) or into an *Interessenjurisprudenz* (jurisprudence of interests) which in turn can be viewed as more or less consciously manipulative (some versions of Critical Legal Studies).
  - c. Some form of compromise eclecticism which tries to see limited areas of autonomy, sometimes overlapping, for each sphere. Donahue's hour glass image (to be illustrated when we get to the class).
2. Now much of what we have said about the jurists has emphasized the limitations society put on them.
  - a. In the area of the family they were limited by a social situation quite exogenous to their scheme of ideas. The Augustan marriage legislation was failure and may not even have been a juristic effort.
  - b. In the area of commerce social structures dominated which they probably wisely made only minimal efforts to control.
  - c. The 'housing problem' of urban Rome (a problem that we did not get to) was not only beyond their ability to control but probably beyond their interest in controlling as well.
  - d. Roman society had large amounts of vertical distance. Those at the top had large amounts of autonomy; those at the bottom did not.

3. Clearly too there is a darker side to juristic activity. Many modern judges and lawyers would not see much value in preserving the interests of investors in real estate. A tort law which focuses on damage to property rather than personal interests can only be regarded as bizarre (think of the injury to the free worker). Much oppression was clearly possible in the procedural system. The juristic emphasis on ownership and wills can certainly be seen as a conscious or unconscious reflection of the interests of the ruling class.
4. When all of this is said, however, the body of ideas with which they worked and the way with which they worked with them is impressive:
  - a. Not only were they firmly committed to principled decision-making, a remarkable achievement in a world where principle may not have played too great a role in many actual decisions, but they showed an uncanny sense for balance in the way they derived their principles.
  - b. A body of values which put a trust in the individual and individual initiative. This accords with our own basic moral views, despite the increase of ideas of social morality. Liability for fault not for accident, a marriage law which emphasized the free volition of the parties, a landlord and tenant law which balanced interests.
  - c. A notion that an adherence to precedent rather than radical change preserves a sense of stability, the stultifying effects of the past can be removed without losing our sense of identity.
  - d. A keen sense of their own limits and of the limits of law. What we can change, what can't be changed. In this they may have erred on the side of conservatism.
5. There's something inelegant about all of this. It doesn't have the attraction that more reductionist theories tend to have, but maybe what I'm saying is that when you are dealing with a model as complicated as the hour glass model neat predictive theories are hard to come by. We can study the complexities of reality; we can arrive at partial generalizations about what forces produced a given result, but at least at this stage of our knowledge we can't completely tie it down; maybe we'll never be able to; maybe that's what a humanistic approach to law means.

Charles Donahue, Jr.  
Paul A. Freund  
Professor of Law  
(617)495-2944