AM Devine[*]

THE HISTORICAL CONTEXT OF ROMAN LAW

Michael Lambiris

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ROMAN Law is one of the great achievements of Western antiquity. It represents a mindset in which adherence to principle, reliance on logic, abstraction of thought, and elegance of language are predominant features. Lambiris' small book is thus useful as a basic introduction to what is still a leading system of law in its historical context.

However, Lambiris' reliance for his understanding of late republican and imperial Roman politics and constitutional law on the obsolete views of Charlesworth, Cary, and Hadas - rather than on the once revolutionary and now canonical work of Sir Ronald Syme and AHM Jones - renders the book about sixty years out of date in this regard. Lambiris resurrects, for example, Theodor Mommsen's nineteenth century concept of a dyarchy or joint rule by princeps and senate[1] - an idea exploded by Syme in *The Roman Revolution.*[2] The author, moreover, confuses the nature of Augustus' *imperium*,[3] which was clearly consular until 23BC and then proconsular, there being no constitutional requirement or basis for combining the two.[4] Lambiris misconceives the basis of the dominate of Diocletian (384AD onwards) in terms of *imperium. Imperium*, the fundamental constitutional concept of Roman Law, was always the formal grant by the sovereign People (delegated from 70AD to the senate, and

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1 Lambiris, *The Historical Context of Roman Law* (LBC Information Services, North Ryde 1997) p 71.

2 (Clarendon Press, Oxford 1939).

3 Lambiris, *The Historical Context of Roman Law* pp 71-72.

4 Jones, *Studies in Roman Government and Law* (Basil Blackwell, Oxford 1960) p 7.

thereafter taking the form of an exhaustive *lex de imperio*) of power to exercise military command, while the essence of the dominate was the rejection of the idea that the emperors were constitutionally appointed. While they were *de facto* installed by the army, their theoretical claim to office approximated divine right - a claim which in the case of Constantine the Great was completely overt.

There is much to irritate the professional historian. Lambiris' clichésque account of Hannibal concentrates on elephants,[5] which Hannibal did not in fact use on the battlefield in Italy. He accepts improbably high figures for barbarians enslaved in the frontier wars of the late Republic, notably 500,000 for Caesar's Gallic campaigns.[6] His account of the "Roman Revolution" and the rise of Augustus,[7] whom he insists on calling Octavius (a name abandoned in 44BC), is so truncated as to be impressionistic. Also irritatingly impressionistic is Lambiris' treatment of Caligula and Nero, which fails to mention the tide of treason trials which aroused the senatorial order and the commanders of the empire's principal armies against these inept tyrants. The statement that Vespasian was not a member of the senatorial order prior to becoming princeps[8] is simply wrong; Vespasian had a normal senatorial career, culminating in the consulship of 51AD.

There is a brief flirtation with the idea of matriarchy as historically prior to patriarchy, being (it is claimed) based on matrilineality derived from primeval ignorance of reproductive biology.[9] That matrilineality does not in fact found matriarchy is, however, demonstrated by the actual nature of the social organisation and customs of matrilineal societies, like the Apaches, whose patriarchal excesses provoked the intervention of the tender-hearted General George Crook in the 1880s.[10] To such historical examples can be added the contemporary Chewa and Yao of Malawi in central Africa, who, though matrilineal, are functionally patriarchal.

The most useful aspects of this book are Lambiris' discussion of the history and content of Roman law itself.[11] Pedagogically valuable appendices include a complete translation of *The Laws of the XII Tables*,[12]

5 Lambiris, *The Historical Context of Roman Law* p 45.
6 At p 90.
7 At pp 68-70.
8 At p 107.
9 At p 10.
10 Faulk, *The Geronimo Campaign* (New York, Oxford 1969) pp 20, 50.
11 Lambiris, *The Historical Context of Roman Law* pp 120-167.
12 At pp 169-183.

a chronological table and an alphabetic index of selected Leges, Senatus Consulta, Codices and Imperial Constitutions,[13] and a glossary of legal and political terms.[14]

The publication of the laws which prior to that were secret, sacred patrician business - by the *decemviri* in the XII Tables in 451/50BC, reminds us that many contemporary legal systems still lack the consistency and transparency of process that some Westerners, at least, have been able to rely on for centuries. The *Shari'a* case of *Gilford v Parry and McLauchlan* - where for more than a year of judicial proceedings, the principal accused was still in doubt as to whether or not she had been convicted or sentenced - is a disturbing reminder of the actual effect of more opaque legal systems.

Law XIII of Table VII, the Law of Numa, *"Si quis hominem librum dolo sciens morti duit paricida esto"* is loosely translated by Lambiris as "if anyone knowingly and maliciously kills a freeman, he shall be guilty of a capital crime".[15] A better translation is "if anyone should kill a free man by guile, he shall be guilty of *paracidium*", *paracidium* here being the killing of an equal, from *par*, an equal, not (as commonly supposed) from *pater*, a father. This is contrasted with a killing "by accident, without malice and unintentionally". Although Lambiris thus purports to discover a sophisticated doctrine of mens rea in the earliest Roman criminal law, what Law XIII actually seems to have in contemplation is not mere intent, but premeditation in the sense of cold deliberation or planning. To the ancient (or medieval) mind, which had a marked tolerance for spontaneous violence, this was the true form of murder.

To the primitive Roman criminal law may be compared the more ancient Mosaic law of the Old Testament, likewise one of the foundations of common law. As known to the medieval common lawyers, *Exodus* 21:14[16] read *"si quis per industriam occiderit proximum suum, et per insidias, ab altari meo evelles eum, ut moriatur"* ("if anyone by diligence, or by plotting, kills his neighbour, you are to take him from my altar, so that he dies"); *"per industriam"* and *"per insidias"* being perhaps best translated as "by diligence" and "by plotting".[17] By contrast, accidental

13 At pp 184-196.
14 At p 201.
15 At p 178.
16 Vulgate translation.
17 Compare with *Deuteronomy* 19:10-13 (the killing of the innocent by lying in wait) and *Numbers* 35:20 (killing out of enmity, by lying in wait).

killing is not punishable by death and places of sanctuary are specified for such killers.[18]

The doctrine of the primacy of mens rea, in the limited sense of intention, is in fact explicitly enunciated around 120AD by the Roman emperor Hadrian, whose rescript to that effect is quoted in the *Digest*:[19] *"in maleficiis voluntas spectatur, non exitus"* ("in wrongdoing, we look to the will, not the outcome"). This tremendous jurisprudential advance grounds St Augustine's coining of the actual phrase 'mens rea' in his *Sermon 180.2*[20] and its first appearance in common law in the *Leges Henrici Primi*[21] (datable to 1118 or a little earlier) in the form *"reum non facit nisi mens rea"* ("one does not do a guilty thing unless the mind is guilty"). It is the otiose form *"actus non facit reum, nisi mens sit rea"* that is quoted by Sir Edward Coke CJ in 3 *Institutes* 107 and becomes the commonplace of modern criminal law.

18 *Deuteronomy* 19:4-6; *Numbers* 35:11-15.

19 Mommsen (ed), *Digest of Justinian: Latin Text* (University of Pennsylvania Press, Philadelphia 1985).

20 St Augustine, *Sermons* (Parker, Oxford 1866).

21 Downer (ed), *Leges Henrici Primi* (Clarendon Press, Oxford 1972) p 94.