

WOLFGANG KUNKEL

An Introduction to
Roman Legal
and Constitutional
History

SECOND EDITION

based on the sixth German edition
of *Römische Rechtsgeschichte*

Translated by J. M. KELLY

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HISTORY

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WOLFGANG KUNKEL

*Emeritus Professor of Roman Law at the
University of Munich*

TRANSLATED BY J. M. KELLY

*Professor of Jurisprudence and Roman Law
University College, Dublin*

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FOREWORD

THIS short introduction to the history of the Roman state and of Roman law corresponds in its scope and arrangement with the lecture-courses in Roman legal history customarily taken by law-students at the German universities. Naturally, the most important thing for a young law-student is to gain some knowledge of the factors which determined the growth of Roman *private* law; and for this reason I have limited my treatment of constitutional history to a simple outline, and have dealt, in connection with criminal law, more with procedure than with the substantive rules, and discussed civil procedure only in so far as I thought this indispensable for an understanding of praetorian legislation. In general, I have acted in the belief that it was more important to provide a clear historical picture than to offer detailed information on individual points.

The bibliographical appendix is not intended to provide support for the conclusions in the main body of the work, but rather to afford the reader some idea of the basis of our knowledge and of the development of research. In accordance with this purpose I have not merely given a list of sources and book titles, but have attempted to make the appendix into a readable text with a short description of at least the most important works. The fact that the book was originally intended for German students explains the preponderance in the appendix of books and articles in German; though the translator has added some additional references to important works in English.

The English version is based on the text of the fourth German edition. I am most grateful to my friend Professor Kelly for undertaking the work of translation.

W. K.

Munich, November 1965

FOREWORD TO THE SECOND EDITION

THIS second English edition incorporates changes and additions made in the fifth and sixth German editions. My thanks are due once more to Professor Kelly for undertaking this substantial work of revision, and I am grateful also to the Clarendon Press for agreeing to reset the entire work.

W. K.

Munich, July 1972

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Part One

THE EARLY PERIOD: TO THE
MID THIRD CENTURY B.C.

1

THE EARLY CITY STATE AS THE STARTING-POINT OF ROMAN LEGAL DEVELOPMENT

1. *Area and population*

THE history of Roman law, the law destined ultimately to dominate the civilized world, began in a community the modesty of whose circumstances it would be difficult to exaggerate. The early Roman state was one of those numerous city states of antiquity which were built around a fortified settlement, the scene of commercial traffic and of all political life; around it stretched a countryside on which nothing stood but isolated farmsteads and open hamlets. An impression of the smallness of this hinterland—the entire area of the Roman community's state—may be gained from the *ambarvalia*, a solemn procession around the fields in which sacrifices were offered at various erstwhile boundary-points, which took place each year in May and continued into Christian times; it took in an area which could be comfortably crossed on foot in any direction in three hours. In the economic conditions of the early Roman period this area, perhaps about fifty-eight square miles, can have sustained only about 10,000 or 12,000 persons.

In the first dim centuries of Roman history both area and population increased considerably. At the beginning of the fourth century B.C., at a time when the city was already playing an important part in the political life of central Italy, and when its sack by the Celts attracted attention as far away as Greece, the Roman state occupied about 600 square miles, many times its original area, but still not more than half the area of modern Luxembourg. Not until the fourth and third centuries B.C. did Rome develop into a state which might be called large by modern standards and which eventually came to dominate all Italy. This development into a large state was, however, also significant in the history of Roman law, for it brought with it fundamental economic changes which imposed entirely new tasks on the legal system.

The population of Rome was basically of Latin race. It was connected with other Latin communities, its neighbours to the east and south, by a common language, a similar culture (and legal system), and also by the immemorial tribal cult of Jupiter Latiaris which had its seat on the *mons Albanus*, three hours south-east of Rome. The speech of the Latins, destined through the political rise of Rome to become a world language, is one of the Indo-European group of languages and is thus related in origin to Greek, Celtic, Germanic, and Indo-Iranian. Of these the most closely related to Latin was Celtic, while the speech of the Umbro-Sabellian and Samnite tribes bordering on the Latins to the north-east, east, and south-east shows a closer relationship with Greek. Like these neighbouring peoples, the Latins must have immigrated into Italy in prehistoric times, probably in the later second millennium B.C. Whence and how they came is disputed; but archaeological finds seem to indicate that their ancestors had once been settled in the Danubian lands of southern Hungary and Serbia. It is likely that in the course of their migration and later in Italy itself they absorbed other racial elements as well as foreign cultural influences; at any rate, the earliest recognizable form of Latin-Roman culture already exhibits basic features which must be regarded as 'Mediterranean' and indeed partly as specifically 'Italic'.¹

The nature and extent of these foreign cultural influences becomes more clearly discernible in the age of early Roman history, i.e. from the sixth century B.C. onwards. They came in this era principally from two culturally superior peoples, the Etruscans and the Greeks.

The Etruscans lived directly to the north of the Roman state. This people, organized in numerous city states, speaking a non-Indo-European language, and with a culturally predominant stratum which seems to have originated in the north-west of Asia Minor, exerted at the zenith of its power what was to be a more or less enduring influence over the whole of Italy. Etruscan art, great quantities of which have been revealed by archaeology, followed Greek originals so far as form was concerned, but transformed these originals with its own very characteristic spirit. In other cultural areas as well, notably that of religion, the Etruscans developed in

¹ This fact must throw doubt on the attempts frequently made by scholars of the older generation to explain the beginnings of the Roman legal and social system by reference to Indo-European peoples, in particular the Germanic race.

their own way ideas which came from Greece. Particularly in the second half of the sixth century B.C., Rome was intensely affected by its Etruscan neighbour, who at that time had gained a foothold also in the south of Latium on the coast of Campania. There is no doubt that the Roman royal dynasty of the Tarquins was of Etruscan origin, and a whole series of noble Roman families which flourished later in the Republic have Etruscan names. Culturally the Etruscan influence made itself felt chiefly in Roman religion; in particular, the cult of the Trinity of the Capitol (Jupiter, Juno, Minerva) was borrowed from Etruscan cities, and the Temple of Jupiter on the Capitol, dedicated in 509 B.C., together with its wooden image of the god, was, according to reliable tradition, created by Etruscan artists; the originally imageless cult of the Roman gods experienced a general change under Etruscan influence. It was from Etruria too that Rome received the custom of the augury of political and military enterprises from the entrails of sacrificial animals (while augury from the flight of birds, although devoted to the same purpose, was probably an original Roman institution). Attempts have been made to discern Etruscan elements even in Roman law and in particular in the system of the Roman state; but here we are left with more or less uncertain hypotheses, since we have no reliable information on corresponding Etruscan institutions. However, we may be certain that some of the symbols of Roman magistral power were borrowed from the Etruscans.

The content of Greek influence over Rome is easier to appraise, although no great clarity exists as to the route which it took. Up to about the year 1900 many scholars assumed a direct influence of Greek culture on Rome, and this influence was associated with the Greek colonies of lower Italy, in particular with the mighty city of Cumae in Campania. Today, on the other hand, the predominant view is that the Etruscans were mediators, at least in the earlier period. Thus the origin of the script used by the Romans, the Latin alphabet, is generally assumed to be the Etruscan alphabet, which of course in its turn was borrowed from the Greeks. The Greek gods, too—Apollo, Hermes-Mercury, Athena-Minerva, Artemis-Diana—which had already become domesticated at Rome by the sixth century B.C. were probably brought there by the Etruscans. Thus, in spite of the break caused by the half-barbaric Etruscan civilization these were in fact genuine rays of the Greek spirit that reached Rome in its early history. In the legal sphere, where Greek

influence becomes noticeable around the middle of the fifth century in the Twelve Tables legislation (although it may go back even further), Etruscan mediation cannot be proved, for we have no notion of the Etruscans' own legal system. But in all these cases of foreign mediation we are dealing only with isolated elements which were absorbed by the strength of a vigorous population and transformed into their own institutions and forms of thought. Not until very much later was Rome hellenized in a deeper sense, when Greek influence penetrated the whole of spiritual and material life.

II. *Economic and social conditions*

Rome in its early period was a community of farmers. It is possible that the advantageous position of the city on the navigable Tiber (which at this point moreover was easily bridgeable) and on the ancient *via Salaria* into the Sabine country was an early encouragement to trade and industry; but during the entire early period and for a long time thereafter political and economic power was associated with the ownership of land. This lay at first almost exclusively in the hands of a comparatively small number of noble families (*patricii*) who also, as knights (*equites*), formed the core of the Roman army. They were separated from the mass of the Roman people (*plebs*) by a huge social gulf; according to the law of the Twelve Tables marriage between patricians and plebeians was not allowed (although, according to tradition, this was changed in the year 445 B.C. by a *lex Canuleia*); and the plebeians were excluded from offices of state until the struggle of the orders in the fifth and fourth centuries, and from some priesthoods at all times.

A considerable proportion of the *plebs* seems originally to have consisted of small dependent farmers who lived on patrician-owned land. The patrician landowners were themselves farmers and not mere absentee landlords; they conducted their farming with their sons and a few slaves and thus they needed for themselves only a fraction of the land they owned. The rest they allowed plebeians, who had themselves little or no land, to occupy by way of *precarium*; these plebeians thus became their *clientes* and were obliged to lend them support in war and politics. In return the patrician lord was obliged to afford his clients protection and help in every necessity. How strictly this duty of the *patronus* was regarded may be seen from a provision of the Twelve Tables (VIII. 21) which outlawed the *patronus* who abandoned his *clients*.

This original form of *clientela* seems to have disappeared early, presumably through the economic and social rise of the *plebs* which had begun by the fifth century B.C. But very similar relationships of loyalty and protection persisted into later times and remained at every period a characteristic feature of Roman life. These social phenomena influenced the political development of Rome to such a degree that the nature and working of the Roman state cannot be understood if we disregard them. As late as the time of Cicero and Caesar political battles were conditioned by them; and Augustus founded his authority upon, among other things, ancient Roman notions of social and political dependence. And at the very end of Roman history we find again, in the relationship between landowner and half-free tenant (*colonus*), almost the same form of client-status as existed in the earliest period.

The patrician nobility was organized according to clans (*gentes*), a system which was perhaps peculiar to it. The members of the *gens* were united by a common name and a common cult for as long as they were still descendants of the original patricians in Rome, and up to the late Republic a right to inherit and to be a guardian was associated with *gens*-relationship. There is no doubt that these were only the relics of the very important position occupied by the *gens* in the early period: there are, for instance, certain indications that patrician land was once in the collective ownership of the *gentes*. At any rate the *gentes* with their following of clients were bodies of great strength and unity, and composed a very powerful (sometimes too powerful) element within and alongside the system of the state, which by comparison took a long time to assert itself.¹ On one occasion it seems that a *gens* undertook a single-handed feud against Rome's neighbours (see the account in Livy 2. 50 of the fall of the Fabii in the fight against Veii); and as late as the fourth century one can observe how certain powerful and noble *gentes* and their dependants keep recurring throughout whole generations in the magistracy-lists.

The absolute dominance of the patrician nobility was assured so long as the cavalry recruited from its ranks remained the basic fighting arm of the Roman military levy. But this situation changed

¹ According to a widely accepted theory of the Italian legal historian Pietro Bonfante, the *gentes* were a form of political organization older than the state, and the state in fact arose out of a federation of *gentes*. This theory cannot be examined here; but it can be said that it is not susceptible of any strict historical proof.

with the introduction of hoplite tactics; brought from Greece, they spread all over Italy and, as we know from archaeological finds, were adopted in Rome before the end of the sixth century. Henceforth the core of the army was provided by the heavily armed infantry recruited from the more well-to-do plebeian farmers. This class, which had formerly been nothing but a disorganized horde of baggage-carriers in the field of battle, now became the principal bearer of the burdens and spoils of war. As in many Greek commonwealths some generations earlier, so too in Rome this revolution in military methods brought political change with it, and the *plebs* joined battle with the patrician families in a struggle for political equality. This struggle, which lasted about a century, ended with a certain degree of democratization of the Roman state. But this was in appearance only: in reality the aristocratic political leadership remained unbroken. The only difference was that a certain number of plebeian families, which had in the course of time risen to wealth and political importance, now shared political power with the patrician families.¹

The part played by slavery in the rustic society of the early Roman period was fairly small, not to be compared with its role in the later Republic and Empire. The unfree serf ate the same bread as his master, and at the same table, and was protected against personal injury by a statutory composition of half the amount prescribed for the case of a free man (Twelve Tables, VIII. 3); if he were set free he was still required to be loyal to his former lord, just like a *cliens*, and (unlike the practice of later times) did not acquire citizenship. A peregrine in Rome was in principle without rights,² just like a freed slave, and needed the protection of an influential citizen, unless he happened to belong to the racially kindred Latins or to some other community to which *commercium* had been granted, i.e. a position of equality with Roman citizens in private legal relations.

Although the production of the necessities of life by domestic industry was certainly the rule, the exchange of goods for money was a very ancient aspect of Roman economic life. The description

¹ Many of the distinguished plebeian families, moreover, derived from the nobility of neighbouring communities which had been closely connected with the Roman nobility and finally migrated to Rome.

² In the Twelve Tables a foreigner is called *hostis*; he was thus described by the same word as was afterwards used only for 'enemy'. The word *peregrinus*, meaning 'foreigner', is later, and indicates one who has come over land (*per agros*).