Peter Garnsey: *Social Status and Legal Privilege in the Roman Empire* Oxford: Clarendon Press, 1970; pp. xiii & 320. Cloth, £ 3.25 net.

This book is a revised version of a thesis submitted to the University of Oxford for the Degree of Doctor of Philosophy in 1967. The title is obviously inspired by the contention that law serves the interests of the governing élite of a society. According to the author the validity of this contention in the case of Roman society has been illustrated more recently by scholars of whom he mentions Cardascia and Kelly as the most prominent.[1]

As no comprehensive treatment of the subject of legal privilege in the Roman judicial system has been attempted so far, the author undertakes to investigate the techniques of discrimination used by the Romans in the administration of the law in more detail. Moreover, an attempt is made, as the author states in his preface, to relate patterns of discrimination to the social and political forces which produced and transformed them over a period of time. The hypothesis that the legal system in Rome favoured the interests of the higher orders in Roman society together with the above mentioned contention that law, generally, serves the interests of the governing in a given society, makes the present book a study in historical sociology. As a work of this kind it may arouse the interest of scholars of ancient history and legal historians. The book is divided into four parts, I. Courts, II. The dual-penalty system, III. The civil suit, and IV. The *honestiores*.

The period with which the author principally concerns himself stretches from the age of Cicero to the age of the Severan emperors, that is, more or less the age of classical Roman law (p. 3).

1. Part I is devoted to a discussion of some of the criminal courts, notably the senatorial and imperial courts (p. 13 sq.). These extraordinary courts are chosen because they are the best known to us and also, as the author points out, of central interest and importance, both from a legal and political point of view (p. 15).

Chapters 1 and 2 (pp. 17,43 sq.) are concerned with the senatorial court under the Julio-Claudians, and from the Flavians to the Severans. The result of this study which is mainly based on the well-known non-legal sources, is on the whole a confirmation of the dominant opinion as held by legal

1. Cardascia, *L'apparition dans le droit des classes d' 'Honestiores' et d' 'Humiliores'* (1950); Kelly, *Roman Litigation* (1966).

historians.[2] The senatorial jurisdiction was indeed meant to provide a privilege for a class of persons. Members of the senatorial order were not to be tried in the public light of the ordinary jury-courts charged with the administration of criminal law. However, as the Senate tended to become increasingly obedient to the real or even presumed will of the princeps, this privilege more often than not turned out to be of little value for the privileged.[3] From the middle of the first century the importance of the senatorial court declined, and at the time of the Severans it had long since lost its role as the 'High Court of the Empire' (p. 62), a label which the senatorial court certainly never had deserved. However, the author, at any rate, concludes that the court maintained a meaningful jurisdiction into the Severan age (p. 63) although it then had no higher ambition than to protect the interests of its own membership (p. 91)[4]

Different imperial attitudes and policies towards the senatorial court produced different discrimination patterns with that court from the Flavians to the Severans. One pattern is more characteristic of the Julio-Claudian age, and a second pattern is exemplified in the Trajanic *repetundae* trials, in which the emperor apparently played no part, while the senators were free to favour senatorial defendants because of their rank (p. 64).

In Chapter 3 (p. 65 sq.) the author turns to the courts of the emperor, governors and to delegated jurisdiction. Here again the emphasis is put on criminal law and procedure, while occasional glances are directed to private law. The outcome is that there is no sharp dichotomy between 'high-level and low-level courts' (p. 99). In general the treatment of low-status defendants was worse than that of their 'betters' (p. 100).

2. The tenor of Part II on the dual-penalty system is in principle the same. Within the ambit of three chapters the author discusses penalties and the treatment of the accused (p. 103 sq.), Hadrian and the evolution of the dual-penalty system (p. 153 sq.), and the legal basis of the dual-penalty system (p. 173 sq.). Quite obviously, a man of low status, and as a matter of course the slave, was punished more severely then was a member of the higher orders, from the municipal councillors, the decurions, on and upwards.
The different kinds of punishment are thoroughly discussed by the author (p. 103 sq.), and the overall impression is that criminal justice was not always impartial. However, it must be pointed out that our information about the details of the procedure before the criminal courts is very poor, because the historians on whom we have to rely for information up to the

2. Cf. W. Kunkel, *Römische Rechtsgeschichte (RRG)*, 5th ed., 1967, p. 76. On the value of Tacitus' account in the *Annales* Kunkel, Über die Entstehung des Senatsgerichts, *Bayer. Akademie der Wissenschaften, Phil.-Hist. Klasse* (1969) p. 39 sq.

3. Kunkel, *RRG*, p. 76.

4. From the middle of the first century the Senate as a court loses importance, Kunkel, *RRG*, p. 76.

late second century have left only a vague, incomplete, and often prejudiced account of imperial justice.[5]

3. Part III covers the civil suit and is subdivided into two chapters, on the praetor (p. 181 sq.) and the judge (p. 207 sq.).

The object of the chapter on the praetor is to show that this magistrate who was charged with the administration of private law, had ample opportunity to discriminate against the weaker party. The praetor would do so as the controller of the sanctions behind the summons of the defendant, and on the strength of his power to grant or to deny an action, and, finally, by controlling the composition of the *formula* for the instruction of the judge. The same applied to the execution of the judgment as far as this required another action by the victorious plaintiff, the *actio iudicati*. Of course the praetor shared the feelings and prejudices of his rank (p. 206).

The chapter on the judge is opened with Kelly's statement that the pervasion of the Roman legal system by improper influences made equality before the law unattainable (p. 207). According to the author the judicial system at its best was still far from equitable, because it was permeated by influences which, in Roman eyes, were perfectly proper (p. 207). This is a very important point, for the reader often wonders why the Romans should have taken the trouble to create the impressive legal system which they in fact have, if the administration of justice fell so considerably short of all standards of justice, at least in the eyes of the modern observer.

After having discussed proper and improper influences on judges, the torture of witnesses – in criminal trials – the author turns to the question whether a plaintiff who lacked power and rank ever tried to bring to justice an opponent of higher standing (p. 216). He admits that the possibility of suits brought by men of comparatively humble origin and position against men of rank cannot be ruled out (p. 217); but they are unlikely to have been of frequent occurrence. However, all this is not far from mere conjecture. Nevertheless, the author concludes that bringing action against persons of high status by persons of low status through the formulary system of procedure was impeded, first, by the aristocratic bias of both praetor and judge, and second, by the *de facto* incapacity of the lower orders, through insufficient education, resources, and initiative, to use the legal system (p. 218). Here again we have the often reiterated attacks against an 'establishment' using its position for the oppression and exploitation of the weak and the poor, the insufficiently educated and the helpless.

4. Part IV is a discussion of the *honestiores*, the members of the 'establishment'. The subdivision is into four chapters, the first dealing with the vocabulary of privilege, i.e. the *honestiores-humiliores* distinction (p. 221 sq.). Privileged groups (Ch. 10, p. 234 sq.) comprised senators, equestrians, decurions, veterans, soldiers, *magistratus*, *aedilis* and *iudex*. Another source

5. Kunkel, *RRG*, pp. 77,78.

of legal privilege is citizenship, citizens and *honestiores* being discussed in chapter 11 (p. 260 sq.). It is a well-known fact that citizens were favoured above freedmen, slaves and peregrines, although citizenship did not prevent the judiciary from exploiting the social divisions within the population (p. 269).

A last chapter is devoted to a discussion of the differences in rank and the value of legal privilege (p. 272 sq.). Here attention is being focused again on the decurions. The privileges of the decurions were legal rather than financial, as they had to carry the various burdens of liturgies and public *munera*. Accordingly, the privileges enjoyed by decurions were generally felt to be a compensation for the expenditure of time, energy and money expected from them.

5. In a Conclusion the author sums up the results of his studies (p. 277 sq.). The book is, in the author's own words, 'built around the hypothesis that the legal system in Rome favoured the interests of the higher orders in Roman society'. To this he adds that there is nothing original about this proposition, and few perhaps would dispute it (p. 277). In order to give it more substance the author has attempted to answer two basic questions: What were the characteristic features of the Roman system of legal privilege? Which groups gained preferential treatment in the law courts, and why? (p. 277).

The sources yield many instance of *de facto* and *de iure* inequalities permeating the whole of the Roman society. It is also possible to identify the privileged groups as the *honestiores* and the *humiliores*. However, these do not represent large homogeneous groups. The representatives of the *honestiores* did not have equal access to legal privileges and remedies. Nor were *humiliores* in an equally disadvantageous position before the law. 'In law, as in other aspects of Roman society, the principal benefits and rewards were available to those groups most advantageously placed in the stratification system by reason of their greater property, power, and prestige.' (p. 280). At last it all boils down to the contrast between rich and poor, between powerful and weak. Of course the matter could be left there, but the reader inevitably feels that the author could have asked another question, the question whether all the cases of discrimination and inequality make for an outright denial of justice to certain persons and group of persons, and if so, whether this occurred generally, frequently or only in exceptional cases which are by no means typical of the situation as a whole. The nature and state of our sources might have prompted this question. With regard to the legal sources the author observes that it is odd that there was no concentrated treatment of the subject of legal discrimination by any classical jurist, and that no section of either Digest or Code was devoted to it, although he is convinced, on the evidence, that legal discrimination was thoroughgoing (p. 9). According to the author it is certain that there are many omissions, and he finds the answer to such anomaly in the informal nature of a system which was grounded not in legislative enactment, but in administrative rules, customary practices, and ultimately the social attitudes of the ruling élite (p. 10).

If the Romans ever had created a legal system, its informal nature cannot be blamed for the fact that the Roman jurists did not write on the author's subject. A legal system may flourish without resorting to legislation for its development. This is a common feature of all systems based on unwritten common law. Moreover, it is certain that the Roman legal system was not simply grounded on administrative rules, customary practices, and ultimately the social attitudes of the ruling élite. Even the Romans distinguished between rules of law and mere custom, between *ius* and *mores*.[6] If legal discrimination was part of the Roman legal system and took the shape of rules of law, the jurists would probably have discussed the relevant rules as they very often extensively discussed every branch of their law, especially in the field of private law. In fact, they did not omit to mention privileges where they thought it fitting to apply them as is apparent from the cases treated in the present book. As a matter of fact, privilege has never been a legal subject such as the law of persons or the law of obligations. The principles of no discrimination and equality before the law are fundamental elements of justice, and justice is part of a specific legal subject, the philosophy of law. The Roman jurists certainly were not very fond of theoretical speculation, but they nevertheless were aware of what the ends of law had to be, and this enabled them to create legal principles and institutions of lasting value.[7] Many Roman legal principles and institutions stood the test of time and exerted a considerable influence on the legal conceptions of posterity up to the present day, not because of their favouring the interests of the rulers, but because of their equitable nature which corresponded to the demands of justice. Formally treating all cases and persons equally does not always mean doing justice, nor does justice require the existence of uniform laws. Doing justice well admits of differentiation with regard to cases and persons. This is the purport of Ulpian's *suum cuique tribuere* in his famous statement on the *iuris praecepta* (D.1.1.10.1).

As a matter of fact, the ideas of what justice must comprehend and how justice must be done vary from one society to another. This accounts for the plurality of legal systems among nations and even within the boundaries of one state. A society may find it possible to practice justice by allowing for the recognition of local and gentile or personal differentiations, without even insisting on a uniformity of law to ensure equality.[8]

The same phenomenon can be noticed in Roman society. Roman law is characterised by a heterogeneity of systems which lack all uniformity peculiar to many modern legal systems trying to regulate all legal matter in a coherent system. Roman law is composed of several layers of law differing the one from the other in accordance with their scope of validity or in

6. Cf. M. Kaser, *Das römische Privatrecht*, vol. I (1955), p. 22.
7. Kaser, *op. cit.*, p. 2 sq.
8. Cf. G. Broggini, Dauer und Wandel im Recht, *Coniectanea* (1966), p. 35.

accordance with their source of validity. For example, it is the diversity of the scope of validity which accounts for the contrast between *ius civile* and *ius gentium; ius civile* on the other hand and *ius honorarium* have different sources of validity[9].

The author observes that discrimination in favour of citizens as opposed to aliens was a permanent feature of the Roman judicial system (p. 262). In fact it was not only a feature of the judicial system, but one of Roman law, and a consequence of the rule that everybody, wherever he may be domiciled, was judged according to his nationality and according to his native law. This principle of personality applied throughout the ancient world.[10] Obviously, the operation of this principle meant that peregrines were excluded from the *ius civile*, and Romans could not be judged according to Alexandrian or any other law.

However, these aspects may be of no great avail if one looks at the law from the sociological point of view.

For information about the the first century of the empire the author turns to the non-legal sources which must provide evidence for his argumentation (p. 8). However, it must be doubted whether the accounts of historians and antiquarians provide an adequate picture of the situation. Quite naturally, they were in the main concerned with events with a political background. Criminal cases were mentioned only if they were of the most uncommon kind and had caused extraordinary or even sensational measures. Moreover, they hardly concerned themselves with legal technicalities, and consequently their evidence loses much of its weight for the purpose of summing up the normal position with regard to the administration of the law.[11] At any rate, it is quite certain that the bulk of legal proceedings or litigation in a given society is of such a nature that it would not interest even the lawyer. By no means all cases are recorded in the law reports, and only exceptionally does history take notice of isolated cases, mostly if they have at least some political consequence. It follows that the picture which might be drawn from facts reported by historians will most probably be extremely one-sided and by no means typical of the situation.

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9. Kaser, *op. cit.*, pp. 175 sq.

10. Kaser, *op. cit.*, pp. 26, 190.

11. Cf. Kunkel, Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit, *Bayer. Akademie der Wissenschaften, Phil.-Hist. Klasse* (1962), p. 47; Kunkel, *RRG*, p. 77.

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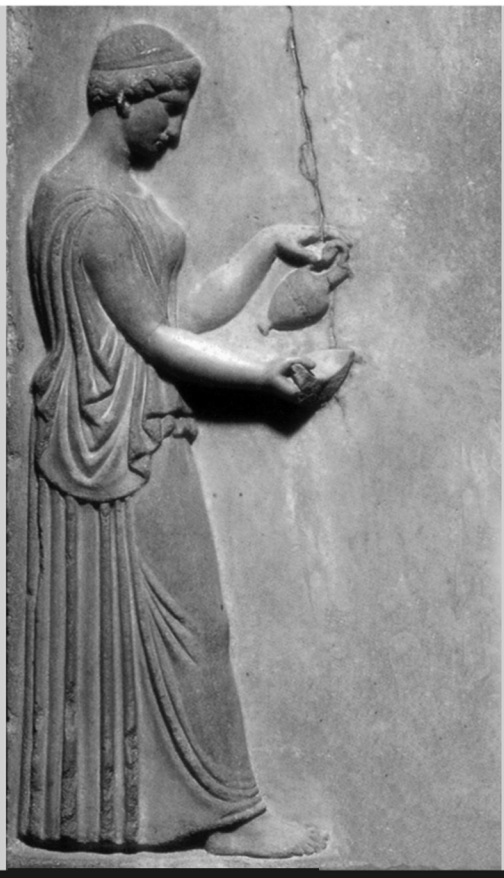

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