

wrote'.⁹ I can think of hardly anybody better qualified for undertaking this than the author of the book under review, who has combined detailed research with a clear and logical exposition. In this he has certainly adopted something of Seneca's pedagogical approach.

Universiteit van die Oranje-Vrystaat
Bloemfontein

W. J. RICHARDS

A. H. M. Jones: *The Criminal Courts of the Roman Republic and Principate*, edited by J. A. Cook. Basil Blackwell, Oxford, 1972, pp. vi + 143.

This posthumously published work deals with a subject of major interest and importance, but one that has proved singularly resistant to clarification and stabilisation. The Roman criminal law has attracted a vast and erudite literature since Mommsen's *Strafrecht* at the turn of the century, but on many aspects scholars are further away from a *communis opinio* today than they were then. Three of the most crucial areas have been selected for exposition in this book – the *Iudicia Populi*, the *Iudicia Publica* and the Criminal Courts of the Principate. The author devotes a chapter to each, and there are two appendices.

The first chapter sets out to rescue Mommsen's theory of universal *provocatio* from the virtual exile in which it has languished since Kunkel's *Untersuchungen* and other recent works. The issue is not so much the institution of *provocatio ad populum* as such, for even its most severe critics allow it some sort of shadowy existence in the realm of political prosecutions by the tribunes; the challenge has been to the belief that it applied to ordinary crimes and to the man in the street, that it played a part in the everyday dispensation of justice, and that is where Mommsen stands in urgent need of therapy.

The author's method is 'to proceed from the known to the unknown', to begin with the later Republic and argue back to the origins. The argument opens with what is virtually new evidence, since although often noticed it has not hitherto been put to constructive use. It consists of the passages in Cicero's *De Legibus* in which *provocatio* is allowed against all sentences except those pronounced *militiae*, and in which Cicero advocates the abolition of the *iudicia publica* and their replacement by *iudicia populi* as in 'the good old days'. The argument is that Cicero here reflects the Roman constitution of the early second century BC as he saw it, that he was not mistaken in his view, and that these passages are good evidence for the all-embracing character of the comitial jurisdiction. This postulate is fundamental to the author's position and will be adverted to again, after inspecting the remainder of the first chapter.

9. Quinn, *Latin Explorations*, p. 110.

The author gives a full account of the *iudicia populi* of the later Republic in their various aspects, but at the same time he is constantly, whether by argument, positioning or implication, reinforcing his case for universal *provocatio*. This simultaneous realisation of two diverse objectives accounts in large part for the fragmented and scattered nature of the discussion in some places, although one feels that the organisational skills that forced order out of chaos in *The Later Roman Empire* would have enabled the author to eliminate most of the trouble if he had lived to revise the work.

The first supporting argument for universal *provocatio* is that in the Late Republic two *iudicia populi* for ordinary crimes – murder and *stuprum* – are found amongst the mass of political *iudicia*. But more weight may have been placed on this fact than it is able to bear: an ‘ordinary’ crime was quite capable of becoming ‘political’ if political figures were involved. A description of the *iudicium populi* procedure follows. An interesting account of *diem dicere* stresses aspects not hitherto given enough attention in the literature, but the discussion of the presiding magistrate’s role which follows is less effective than one might have hoped: the crucial question of whether or not the magistrate pronounced a formal judgment (without which *provocatio* was not possible) is insufficiently confronted, one feels, and the arguments of Brecht are not noticed. The *duoviri perduellionis* and the *pontifex maximus* are discussed, and also such topics as the assemblies (the remarks on obtaining a day from the praetor are valuable), imprisonment and exile, and the magistrates who possessed *iudicium* (with special reference to the aediles). An exposition of political charges brought by the tribunes follows. Most of the well-known cases are listed, with the possible exception of Flamininus, Flaminius and Lepidus Porcina. The point about the tribunes judging *vel legibus vel moribus* is new and important: one would have liked to see it tested more fully, perhaps against Siber’s *Analogie*.

With the provisions concerning *iudicia populi* in the *Lex Osca Tabulae Bantinae* the chapter returns to its main thesis. The case of Q. Pleminius is cited to prove that *provocatio* was also available outside Rome, and the cases of the Campanian legion and the Capuan senators are apparently intended – though this is not quite clear – to show that *cives sine suffragio* could claim *provocatio*. This leads into a discussion of the *leges de provocatione*. The *lex Valeria* of 300 will have allowed *provocatio* against flogging-plus-execution, and a *lex Porcia* will have extended the remedy to flogging alone. Support is found in the *lex Acilia* and in Livius Drusus’ bill of 122, and a most interesting argument is that the practice of forcing a condemned soldier to run the gauntlet and be beaten to death by his comrades originated as an evasion of a *lex de provocatione*. However, by not noticing Oldfather’s theory of execution by flogging the author does not quite round off his case.

It is argued that far from the *iudicium populi* procedure being more cumbersome than the *iudicia publica*, it was in fact more expeditious. The point is well

taken: delays in the *iudicia publica* were notorious, but one does not recall similar complaints about the *iudicia populi*. The author sets out to eliminate possible alternatives to the *iudicia populi* in the dispensing of day to day justice. The first of these, the *tresviri capitales*, cannot be said to have been fully explained away by the author: Varro *L.L.* 5.81 and Festus s.v. *sacramentum* seem to be corroborated by Cic. *Clu.* 38, Ps. Ascon. *Div. Caec.* 50 and Plaut. *Asin.* 130ff, and one hesitates to reject the criminal jurisdiction of these magistrates. As for special commissions, the author considers that the praetor sitting with a *consilium* was not a regular jurisdiction but an *ad hoc* measure (illegally) authorised by the senate. The question is, however, whether the very frequency of this procedure does not make it 'regular'. The praetor was, after all, the hub and centre of the administration of justice.

The author next works backwards from the historical period to the XII Tables. Numerous aedilician trials (concerning ordinary crimes) are noticed on the way, and 'such dull information can only have come from records' seems an apt comment. Again, however, the evidence does not return an unequivocal answer: usury, grain speculation and misappropriation of the *ager publicus* were not commonly practised by the man in the street, although *stuprum* obviously was. After Manlius Capitolinus, Servilius Ahala and the special commission of 314, the discussion returns to the *leges de provocatione*. The Valerian and Porcian laws are further considered and are joined by the *lex Sempronia* and the *lex Julia de vi publica*. Cicero's references to the *maximus comitiatus* and the universal *provocatio* of the XII Tables lead to an assertion of the authenticity of the *lex Valeria* of 509. The *iudicia populi* of 509-451 are briefly surveyed.

The criminal jurisdiction of the tribunes is seen as having originated as a concession by tribunes who could simply have hurled their victims over the Tarpeian Rock. The role of the quaestors and *duoviri perduellionis* is discussed, and the chapter ends with pecuniary *provocatio*, the criminal clauses of the XII Tables and regal *provocatio*. The first appendix, on the trial of Rabirius, follows.

The author's case for universal *provocatio* has great strength and will generate a lively and prolonged debate, but in the absence of an answer to the cogent arguments of Brecht doubts must remain. Brecht's case scarcely needs embellishment, but how was it possible for a tribune, who could not so much as assemble the centuries without 'borrowing the auspices' from an *imperium*-holder, to exercise an exclusive prerogative of *imperium* in the shape of capital adjudication? Indeed it is on this very question of the tribunes' need to 'borrow the auspices' that reliance on *De Legibus* becomes hazardous, for one of the provisions advocated by Cicero is *omnes magistratus auspicium iudiciumque habento* (*Leg.* 10). If this was in the Republican constitution of the early second century, the whole tribunician jurisdiction as it has been accepted in the literature falls away: conversely, if the 'borrowing of the auspices' is genuine (as it

must be unless Varro *L.L.* 6.91 is describing an institution which disappeared in the third century), Cicero does not reflect the real-life Republican constitution. Another difficulty is that in the constitution described by Cicero the jurisdiction of the *tresviri capitales*, about which we are at best ill-informed, is specifically attested (*Leg.* 6), whereas the criminal competence of the aediles, which we know as a significant reality in the Republican constitution, is ignored (*Leg.* 7). Moreover, can Cicero have seriously thought that the dictatorship (*Leg.* 9) had been a vital institution in the early second century BC? And would he have seen it as desirable in, precisely, 44 BC? Finally, did Cicero really vacillate so much as to favour the return of the *iudicia populi* in 44 BC but to offer violent opposition in the same year to Antony's attempt to allow *provocatio* from some of the *iudicia publica* to what Cicero is pleased to call 'multitudini conductae, . . . operas mercennarias' (*Cic. Phil.* 1.22)?

The second chapter, on the *iudicia publica*, does not require the author to be constantly arguing a case, and a skilfully organised and skilfully presented exposition of the sort that we had come to rely on from him is the result. The subject is the jury courts of the Late Republic, beginning with the *quaestio de repetundis* established by the *lex Calpurnia* of 149 BC and working methodically through the many ramifications of the system – it is, after all, an entire code of criminal procedure that is being here described, from the delator's first stirrings of accusatory fervour to the final infliction of punishment on his victim –, not hesitating to pause at controversy on the way, but proceeding all the while at a smooth and even pace. This is the best chapter of the three, and a worthy monument to its author's memory. It is not possible to summarise all its content, but as much as possible, especially of the more controversial material, will be discussed.

The discussion opens with the two kinds of *iudicium publicum* – a subject on which Mommsen was less than lucid and which most scholars prefer to give a wide berth. Apart from the familiar kind that we know as the *quaestio perpetua*, there was a *iudicium publicum* for offences arising out of constitutional, not criminal, statutes: the proceedings were initiated by any citizen obtaining *recuperatores* from the urban praetor; the state used its powers to coerce witnesses, and the (monetary) penalty when recovered went to the state. As the author points out, these *iudicia* were very close to the *actiones populares*, and one suspects that he would not have objected to equating them. One cannot, however, follow the author when he assigns the trial of Vatinius to this head. The charge there was more probably *maiestas* and the court the regular *quaestio maiestatis*. If the author had accepted *Amtsverbrechen* as the only proper subject of *iudicia populi* in his first chapter, he might have taken a different view of the relationship between the 'junior' *iudicium publicum* and some of the *quaestiones perpetuae*.

The argument linking the *lex Acilia repetundarum* with the *lex Junia* via the 450 jurors in the album is persuasive, and so is that which makes Glaucia's law

the first to give any citizen the right to accuse *de repetundis*. The proposition that C. Gracchus' law *ne quis iudicio circumveniat* was aimed at extraordinary criminal courts is novel, but Kunkel and others have uncovered *quaestiones perpetuae* besides that *de repetundis* prior to the Gracchan period. A survey of the special *leges* from Saturninus to Caesar is accompanied by an interesting discourse on the general judiciary laws, but the author sees too many separate courts. He unearths one under the *lex Licinia de sodaliciis*, another under the *lex Scantinia* and a third under the *lex Papia*. Three *iudicia publica* not known to Justinian's compilers (cf. *Dig.* 48.1.1, 48.4–15) is too much, given their knowledge of a shadowy statute like the *lex Fabia de plagiariis*, and it is safer to assume the submission of charges under such *leges* to one or other of the existing *iudicia publica*. The discussion of the *iudex quaestionis* is very important: many have been puzzled by the appearance of this office in careers. There is, inevitably, some arithmetic on the album. It is comforting to note that the rules concerning capacity to accuse are not, as so often, denied a place in the Republic because found only in the classical jurists. The motives of accusers and counter-accusations are very well done, and so are *postulatio*, *patroni* and *nominis delatio*. The detailed regulations for selecting juries – a labour of love, this – will surely supplant Mommsen.

On the actual trial procedure, *comperendinatio* is likely to become the subject of renewed interest following the author's remarks, and the same goes for voting by the jurors; but *praevaricatio* and *calumnia* are insufficiently stressed, and on capital penalties Levy's position remains secure. The theory of two scales of penalty for extortion may mark the end of a long controversy, although first it needs filling out considerably; the theory seeking to account for the connection between extortion and *maiestas* is not persuasive. The explanation of the *extra ordinem* procedure is, one feels, only part of the story; and the execution of sentences is also dealt with too briefly. A full and valuable discussion of the merits and demerits of the *iudicia publica* is followed by *iudicia publica* in Italian towns, and the chapter concludes with trials in the provinces. The second appendix, on the definition of *equites* as jurors, follows. It deals interestingly and well with the *equites* and the *tribuni aerarii*, but insists on perpetuating the recently-exploded myth that the Augustan (fourth) decury was only for minor civil suits.

Chapter three, on the criminal courts of the Principate, does not approach the excellence of either of the other two. The trouble seems to be that the author had not yet finally made up his mind how he was going to dispose of his material, and it is difficult to read. A comparison with two articles of the author's on which the chapter is largely based (*St. Robinson* 2.918ff, *Historia*, 1955, 464ff – reprinted in *Studies in Roman Government and Law*, 51ff, 67ff) indicates that while the basic argumentation is unchanged, the perfectly satisfactory arrangement of the earlier works has been abandoned, apparently in order to inject further material. The most that can be done here is to note some

points that might have become important contributions in a final revision.

It is postulated that the *iudicii publici exercitio* under which the emperor, the senate and the prefects judged criminally was created by *lex*; little more than the bare assertion is made, but evidence is adduced making it likely that if there was such a *lex* it was passed between 4 BC and AD 8. On balance, however, the theory is not cogent enough to displace positions such as those of Volkmann, Kelly and Bleicken. We might have liked to hear more about the greater efficacy of *provocatio* against *crimina extraordinaria* than against *crimina iudiciorum publicorum*; this might have been linked with the *cognitio extra ordinem*. More could profitably have been said about the transformation of *provocatio* into an appeal to the emperor (but what does 'the emperor as representing the people' mean?). There is an interesting account of the extraction of evidence by torture; it might have been combined with the discussion of *honestiores* and *humiliores*. And jurisdiction in the provinces is very well done; it might have benefited by being combined with the same topic in chapter two, although, as so often in a complex exposition, a topic may be equally at home under two heads but can only be allocated to one.

The work raises some difficulties of a general character. The author's acute reluctance to cite the modern literature is most disconcerting in so controversial a field. Only fourteen works are noticed, and of these four are general works of compilation or reference (*FIRA*, Ehrenberg & Jones, de Ruggiero and Broughton) and three are the author's own. When to this is added the absence of a bibliography (something might have been done editorially here), the task of the non-specialist who is struggling to keep up will be a formidable one. Very often he will not know that he is in the presence of a problem, let alone that a new solution is being offered. Nevertheless, this is a good book. It covers its field thoroughly, it blends erudition and speculation with caution and common sense, it clarifies much that was obscure and it integrates much that was not. It will stimulate renewed interest in the Roman criminal law.

University of Sydney

R. A. BAUMAN

Max Kaser, *Das römische Privatrecht*. Erster Abschnitt: *Das altrömische, das vorklassische und klassische Recht*. In: *Handbuch der Altertumswissenschaft* Band X.3.3.1. C. H. Beck'sche Verlagsbuchhandlung München, 2. neubearbeitete Auflage 1971. XXX, 833 Seiten. Leinen DM 148.—.

Der erste Abschnitt des grossangelegten Handbuches des Verfassers liegt nunmehr in zweiter, erheblich erweiterter Auflage vor. Seit im Jahre 1955 die Erstauflage erschien, hat die in dem angezeigten Werk gebotene Darstellung des römischen Privatrechts einen bedeutenden Platz in der dem römischen

ACTA CLASSICA



Acta Classica is published annually by the Classical Association of South Africa. The journal has been in production since 1958. It is listed on both the ISI and the SAPSE list of approved publications.

For further information go to:
http://www.casa-kvsa.org.za/acta_classica.htm