AMERICAN REMEMBRANCES OF A GERMAN TEACHER OF ROMAN LAW

It seems to be doubtful nowadays in what form the discipline of Roman Law may guard or recover the international character, by which it excelled for centuries in Germany. Hoping to make experiences for an answer to this question, I willingly accepted the opportunity of teaching the Roman Law at the Columbia University in New York during the winter of 1907-8.

Roman Law cannot play the same rôle among the different branches of legal studies in America as it does in our country. America does not ask for its study in the public examinations which lead to the position of a lawyer or judge. At the universities the faculties of law regularly exclude this subject from their special plan of education. So, for instance, at the Columbia University, the doctrine of Roman Law is assigned to the Faculty of Political Science. Nevertheless, this branch of science grows splendidly in America. That is the merit of some excellent American teachers of Roman Law, whom I will not name, because they are very well known to everybody. But besides that it is also the consequence of an increasing intelligence into the scientific worth connected with the subject of those learned aspirations. I esteem very highly this feeling, because it is not, as it may often happen in my country, created only by an unavoidable necessity for all people who desire to get into the bar or into the tribunals. In America it is only yielded by an impartial esteem towards a merely ideal goal.

Therefore, perhaps it will seem convenient to many people to consider the Roman texts only from the same point of view, viz: as a subject belonging to philological and historical study without any reference to the practical needs of the modern tribunals.

Certainly, I did not neglect either to explain the *Institutes* of the Emperor Justinian in this sense as a source of knowledge of Roman terminologies, and as a preparation for the study of the other books included in the so-called *Corpus Juris Civilis.*

This method seems even to correspond to the newer development in Germany, which, above all, has the intention to describe Roman Law as much as possible as a series of events which happened in the past. Therefore, German scholars are more inclined

to lay the principal stress on an earlier period than Justinian's. However, we must not forget that this learn-book which Justinian had edited under the name of *Institutes,* was only a new edition of the older book of Gaius, increased by later creations of law, which cannot be neglected by a beginner studying Roman Law.

This book surely does not contain the pure national law of the old Roman times, which has been changed by cosmopolitism even in the former centuries of the Roman empire. But this old Roman Law has not been delivered to posterity in a coherent description as the later law has.

Therefore, I took this old learn-book as text-book for my lectures. But I was not content with the intention to explain it, as it was to be understood in the times of its origin. My ambition was to introduce into America as much as possible the same method in which I myself was introduced into the science of Roman Law by Vangerow, Bruns, Jhering, Eck and other teachers.

The purpose of this method is not only to show what the Roman texts were for the Roman people, but what they can be for us for the present time, viz: for the modern lawsuits and the modern products of the legislative power.

This science has been called Pandekten, not very rightly, because the name pandects is derived from a part of Justinian's collection, which had not at all a similar intention as the beforenamed science had. The science of using old texts for modern needs is a product which is naturally younger than the Roman empire. It has been developed in the Middle Ages and the following centuries. By these intentions arose the art of adapting the Roman ideas to the needs of later times, cultivated by the so-called Pandectists. At the first glance it seems impossible to introduce the principles of this science into the American soil, because Justinian's collection has only been received as a civil code into Germany, but not into England, and, therefore, not into America, either. However, this argument proves only that the German method to make the Roman texts useful for later times cannot be transferred directly to the New World. Consequently, it would be a strange idea to repeat the theories of the doctrine of Pandects in New York. But in spite of this it must be regarded as totally impossible to imitate the method of this science according to the history of English and American Law.

From this point of view, I reflected that the Roman Law, although never adopted as a civil code by the English practice, has, however, been received in a more spiritual way as the source of terminologies and systematic ideas.[1] English-American law has been developed under the same Roman influences as the continental European Law, and has in many points the same origin as the latter.

In other points, especially in the construction of legal institutions or generally of the contents of law, which must be distinguished from the form of law, the English-American people has been less infected by the Roman influences than the laws of the continent.

As I was sent to America in order to work for a spiritual approximation of the ideas of Europe and of America, and as I knew that nothing brings two peoples nearer to a mutual understanding, I made up my mind to compare the different laws as much as possible.

I was of the opinion that such comparison would lead more and more to exchange of ideas useful to both parts. The English-American is not so developed (as far as the systematic forms are concerned) as the European continental is, and the latter needs an imitation of many new ideas begotten in England and America quite independent from the ideas of the times of antiquity.

But no comparison is fruitful if the two things compared have not a common element, which gives a point of view from which they can both be contemplated and understood.

Reflecting, too, that the common influence of Roman terminologies, exercised on the one side upon the Continental Laws, and on the other side upon the English-American Law, is such a point of view, I came to the result that the *Institutes* of Justinian must be explained as the common source of fundamental ideas of the two branches of European culture, viz: the continental and the English-American Law.

I did so. I explained the texts in this way, unhappily not having had the full time for preparation, which was desirable in every case. But I preferred to perform an incomplete work rather than doing nothing in such a favorable situation as could never return to me.

I am sure that in future this use of the Roman texts as a

[1] *Anm. of H. Brunner v. Holzendorff's Encyklopädie der Rechtswissenschaft,* 5th ed. Leipzig, 1890. p. 340, about Bracton.

connection of the different doctrines of law within the European family, which are not yet so well united as would be useful for them, will be repeated by abler men, and with a better preparation.

I found even an interest for this matter in Asiatic students, who desired to penetrate into the spirit of European culture, which they can no longer neglect in consequence of their new politics of the open door. If the doctrine of civil law would use the same systematic forms and the same terminologies with the help of the old wisdom of Roman Law at first among the peoples of the European circle of law, I hope that also the scholars of the Mahometan and the Buddhistic circle of peoples will find an approximation to it, and that—even in a very distant time—the world could come together by working with united strength and exertions for the building up of a system of principles for the civil law of the whole world, common to the different branches of civilization. This system would be developed on the ground of the old Roman system, the old arsenal of scientific weapons for the whole world.

Perhaps such a dream will seem ridiculous to earnest, thinking people. But let me dream so.

I know very well that such hopes cannot be fulfilled for a long time, and that perhaps they will never be fulfilled totally. But however, such dreams have also a practical value. The old wandering peoples followed the way shown by birds flying so high, that they could not catch them. In the same way modern peoples follow ideal hopes, which cannot be caught, but, nevertheless, lead to a better land. Therefore, you will forgive my bold aspirations, and excuse them with the great kindness with which American peoples received my services done with weak strength but true devotion.

Let me add some examples in order to show in what way it seems to be advantageous to study the differences of Roman Law's influences on the mentioned nations.

One of the most important questions of the American political life is certainly nowadays the question how to behave with regard to the tendencies of centralizing the constitutional powers of the Union. The reader will know very much better this movement than a stranger, who observed it from a nearer point of view only for some months. However, it is not the proposal of science

to decide the political controversies of this kind. Science only explains, and does not propose new things. But science is able to instruct not only about the importance of a political question, but also about the ways in which it is possible to reach a goal following the experiences made in former times.

In this sense it is a scientific purpose to study the centralizing movements of the Roman Law, which conducted at first to the union of several commonwealths under the government of Italy, and at last to the Byzantine union of law, which has gone certainly very far in this way. It is worth while, indeed, to compare the reasons and the origin of this movement with a similar struggle, which arose within the German development, and led at first to the contrary goal, viz: to the overweight of the single states over the old German empire, which came into decline and fall by it. Naturally, also, the later reaction against this movement by the new German empire must be shown, which is a centralizing one, but goes not so far in this direction as Byzantium once did. On this point it is interesting to compare the different constitutions of the mentioned empires, and to explain by the American history why the United States came to an original middle-way between union and self-dependence of the commonwealth differently to how Germany did. German history, especially, is able to show the ways how to come to united laws, even in a time in which the central power could not perform them, viz., in the time of German Alliance (*Deutscher Bund*). Even then a common commercial code has been introduced by agreement of the single states, of which the alliance was composed. That the same way can be trod also by Americans, you have seen nowadays in the matter of negotiable instruments and the comparative history of law proves its value.

Another example of the worth of a comparison between different developments is given by the difference of law and equity. Roman history shows a similar distinction, viz: a double and parallel development by the laws on the one side and by the activity of the magistrates on the other. The tendency arose more and more to extinguish this difference by subduing the laws under a free interpretation, transforming their content into rules, which are according to the principles of equity and by regarding the former arbitrary decisions of the magistrates as intangible prescriptions, sacred by use, and esteemed as firmly established

as the laws themselves (Timothy Walker, *Introduction to American Law,* 11th ed., Boston, Little, Brown & Co., 1905; p. 56).

A similar gradual effacement of a contrast by approximation of two separated kinds of law can be explained within the German history, which showed a separation of theory and practice ending by degrees more and more into an amalgamation.

Even for the terminologies and for the systematic science a historical foundation, and a comparison between different nations can help to a better understanding. These terminologies make the greatest difficulties for the lawyer of the European continent who wishes to introduce himself into the world of English and American legal institutions. For instance, it is not easy for him to understand the full significance of the trusts, the estates, the devisees and other fundamental expressions. In such questions, the science of the old German Law will be more instructive than the study of Roman Law, becalse some ideas of the older German peoples have been better conserved in England than in Germany; for instance, the seizin (*Gewere*). But the modern method is to believe in a connection between the German and Roman forms of contemplating and denominating the different rights and forms of commerce. It leads to the conviction that the modern systematic science can only be performed by a combination of German and Roman terminologies to new conceptions, which are easily intelligible not only to the English, but also to the continental European peoples, and may be an indispensable instrument of forming a general science of private law for all peoples of the European kind of culture.

There is in our time a general tendency of approximation by comparisons of laws. But these comparisons must be extended to the very sources of the differences, which made them necessary. The differences of law are not so much created by the differences of inclinations and sentiments in the single peoples as in the variety of historical influences, which formed their law. By studying these varieties, every people will become conscious of their original propriety, which must be conserved and never be weakened by comparisons of the domestic law with a foreign one.

But certainly an approximation will arise by this intelligence, because every people at this opportunity can learn from the experiences which the other made on its long way through the centuries.

So I am sure that the European continent would learn by a progress of understanding many things from the English-American jurisprudence, because this branch of human civilization has gone a very special way, free from many influences of continental disasters, but also has been led to original desires and thoughts by their extraordinary geographical position, and especially by the early international relations, which obliged the Anglo-Saxon race to base the principles of their commercial life on a broad fundament, in a similar position as in old times the Roman people was obliged to. So it came to forms of law, which are useful to regulate the relations of a very variegated quantity of peoples.

Perhaps in the future the study of the English-American world will give for the continental peoples of Europe a valuable compensation for the uniting force, which in former times the study of the common Roman Law afforded them. In this way they will come to similar results of conciliation among the different forms of human culture as they are to be seen in the Roman history.

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