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Budaeus and Roman Law

Professor Donald R. Kelley is the foremost scholar of legal humanism in the English-speaking world. This fact has been recognised by the publication of the present collection of his articles in the Variorum Reprints Collected Studies Series under the title *History, Law and the Human Sciences. Medieval and Renaissance Perspectives* (London 1984). This volume contains fifteen articles published between 1964 and 1983, their scope ranging from antiquity to the 19th century. The majority of the articles are devoted to the 16th century and to legal humanism, some of them, as Kelley describes them in the Introduction¹, byproducts of his important book *Foundations of Modern Historical Scholarship* published in 1970². The publication of these articles in a single volume ensures that these two books will stand side by side on the shelf of the English-speaking historian as the fundamental guide to 16th century humanist scholarship on Roman law.

The title of the series is, in the present instance, a misnomer; the studies have not been collected, but rather selected. A cursory introduction of three pages by the author gives little guidance as to the rationale behind the selection of the articles. Certainly they are intended to illustrate a theme. Yet one might question whether it would not have been more useful to have a collection of all Kelley's articles on legal humanism rather than a medley which includes also articles on the Roman jurist Gaius, on the Middle Ages, and on Vico, Montesquieu, and Marx. These have supplanted such important studies as his article "Guillaume Budé and the First Historical School of Law"³, which contains more detailed analysis of individual humanist scholars than anything reproduced here. It is also disappointing that the author has not taken the opportunity to comment on the further development of

¹ p. ix.

² Columbia University Press, New York and London, 1970. Hereafter cited as "Foundations".

³ American Historical Review 72 (1967) 807-34. Hereafter cited as "Budé".

scholarship on legal humanism, both his own and that of others, and how it has affected his view of the articles now being reprinted. Have former positions been abandoned or found to require modification? Has it affected the selection of the articles?

Kelley's primary interest, underpinning the present articles, lies in the development of modern historical scholarship. He has set himself the task of writing the history of history. His point of departure is explained in the above-mentioned article⁴:

For at least a generation historians of science have been uncovering the roots of scientific thinking underlying the sensational achievements of the seventeenth century. It is time for historians to make similar excavations for their own discipline and to place the overcelebrated accomplishments of nineteenth-century historicism in some perspective.

The general thesis informing Kelley's treatment of legal humanism is evident from the title of his book: *Foundations of Modern Historical Scholarship. Language, Law, and History in the French Renaissance*. The origins of modern historicism Kelley discerns in the scholarship of the Renaissance: "... historical thought ... had its roots in the rich soil of Renaissance scholarship ... the sense of history in general was the product of Renaissance humanism⁵." More specifically, it was in the field of humanist scholarship on Roman law that the outlook and the techniques of the modern historian were first evolved: "... it was largely the influence of legal studies that revolutionized the theory of history, that is, the so-called art of history, in the sixteenth century⁶." In describing the present collection of essays Kelley writes:⁷

"My point of departure was the sixteenth-century phase of Renaissance humanism ... From this limited base I moved into other cultural contexts, especially Italian, German and English; ranged backwards and forwards in time from antiquity and the middle ages to the present century; and shifted emphasis from historiography to the European legal tradition, which has always seemed to me the principal vehicle of social and cultural thought."

As one contemplates the serried folio volumes of the Opera Omnia of even the most famous of the legal humanists, or looks within upon the dozens of legal and classical citations which crowd upon every closely-

⁴ Budé 807.

⁵ Foundations 7 and 11.

⁶ Foundations 9.

⁷ Introduction, p. ix.

printed and closely-argued page, one wonders at the description of this field as a "limited base". To look at legal humanism in such a light it is necessary first to have established a number of general propositions. At one point Kelley particularises what he considers to be the essential characteristics of legal humanism⁸:

... Valla set down in unmistakable fashion the primary themes of legal humanism. Of these the three most prominent were "anti-Tribonianism", that is, the critique of the scholarship (as well as the moral and religious failings) of the Byzantine editor of the *Digest*; "anti-Bartolism", the bitter and often exaggerated attack upon the tangled growth of Scholastic interpretation; and "juristic classicism", the judging of the *Digest* in terms of such literary "authorities" as Cicero and Ulpian, who provided a Latin standard (*norma latina*) for the detection of later "depravities".

The re-publication of many of Kelley's articles on legal humanism is perhaps an appropriate moment to consider the adequacy of this approach for an understanding of the work of the legal scholarship of the Renaissance. I should like here to offer some observations on Kelley's discussion of a single work which stands at the beginning of 16th century legal humanism, the *Annotationes in Pandectas* of Budaëus, first published in 1508. This is a key work in both the legal and classical scholarship of the Renaissance. I shall concentrate specifically on Kelley's analysis of Budaëus' thinking about Roman law, and the place of his thought in the development of legal humanism. Such a critique can best be accomplished by examining in turn each of Kelley's identified "primary themes" of legal humanism in relation to Budaëus' work.

1. *Anti-Tribonianism*

In the first half of the 15th century both Laurentius Valla and Maffeus Vegius isolate Tribonian as the ultimate cause of the contemporary malaise in legal studies⁹. They argued that the barbaric legal commentaries — Accursius, Bartolus, Baldus — had become necessary precisely because Tribonian had dissected the works of the classical Roman jurists in compiling the *Digest*. Valla's orientation was towards the classical jurists, and the work of Tribonian was therefore viewed only as destructive. Budaëus is seen by

⁸ Budé 816.

⁹ cf. D. MAFFEI, *Gli inizi dell'Umanesimo giuridico* (Milan 1956) 37-42.

Kelley as continuing this tradition of criticism of the work of Tribonian. He writes¹⁰:

Like Petrarch, Budé wanted to return to the "fathers of jurisprudence", but in the case of the *Digest* this was easier said than done. The trouble had started with Justinian's editors, under the direction of Tribonian, who "in the manner of brutal surgeons cutting into living flesh", said Budé, "gave us a *Digest* not assembled but rather dissected." Many passages in one title, Budé pointed out, "were written by Greek authors and so left by Tribonian, as may be seen by the style, which is sordid and obscure compared to that of the classical jurists, and which was not so much translated as twisted from the Greek without knowledge of either language." "Nor", he remarked elsewhere, "is the skill greater in many laws of the Code, as the style bears witness."

However, Budaëus' comments about Tribonian and the Greek passages in the *Digest* and Code have been misconstrued by Kelley. It is not a question of "Greek authors", nor is Tribonian being criticised for leaving such in the *Digest*. The relevant passage occurs during a discussion by Budaëus of the value of Greek studies¹¹. This, Budaëus suggests, extends also to the understanding of the law. He points out that there are many texts in the *Digest*, especially in the title *De excusationibus*, which contain passages of Greek, and which therefore cannot be properly understood without a knowledge of the language¹²:

Nisi vero credimus ducenta Pandectarum loca sine eius [scil. Graecae linguae] cognitione satis intellegi posse, aut nisi inficias ibimus totum paene titulum *De excusationibus* a iuris auctoribus Graece scriptum fuisse, sicque a Triboniano relictum; quod ipsum facile est cernere ex genere stili, qui sordidus et obscurus videtur cum stilo iurisconsultorum compositus, nex ex Graeco traductus sed extortus utriusque linguae ignorantia, quomodo et in multis aliis locis Pandectarum.

What Budaëus is therefore saying is that the passages were left by Tribonian in the original Greek, but translated into Latin in the Middle Ages, a fact which is easily discerned from the style of the Latin translation, which

¹⁰ Budé 818.

¹¹ Annotationes in Pandectas 110v-111r/286/214D-215A. References are given to three editions of the Annotationes: the 1st edition (Ascensius; Paris 1508), the last edition overseen by Budaëus himself (Stephanus; Paris 1535), and the edition published in volume III of the Opera Omnia (Episcopius; Basle 1557), reprinted by Gregg International Publishers Ltd. (Westmead, Farnborough, Hants. 1966). The text cited is that of the 1st edition, the spelling being standardised. Later revisions by Budaëus are reported in the footnotes.

¹² Annot. 111r/286/215A.

appears sordid and obscure compared to that of the classical jurists. Nor is Tribonian being criticised in the other passage cited with regard to the Code, for here Budaëus is making exactly the same point¹³:

Tribonianus enim ea quae a iurisconsultis Graece scripta invenit, eodem sermone transcripsit. Indoctiore vero saeculo quodam, cum pauci iam Graece scirent, in Latinum Graeca illa versa sunt, sed ab iis qui nec Graece nec Latine satis scirent. Huius generis est bona pars tituli *De excusationibus* et multa Pandectarum loca. Nec maior fuit solertia in multis legibus Codicis, quas stilus facile prodit.

Neither of these passages implies criticism of Tribonian, but rather the reverse. Since Budaëus is arguing for the value of Greek studies Tribonian is hardly to be condemned for including Greek in the Digest. Nor in fact is there any criticism of Tribonian in the third passage, which raises rather interesting questions.

According to Kelley the Digest compilers are likened by Budaëus to "brutal surgeons cutting into living flesh". What Budaëus wrote was this¹⁴:

Tribonianus enim et qui cum eo operam consarcinandis his libris navaverunt, immensam illam librorum multitudinem inclementiorum medicorum more ad vivum resecantes, accisas nobis Pandectas verius quam compendiosas dederunt.

Thus the surgeons are not "brutal" but *inclementes*, and their business is not "cutting into living flesh", but *ad vivum resecantes*. Thus the Digest compilers are characterised as being without pity or mercy, exercising their painful but necessary duty as surgeons of excising malignant tissue; this is really the reverse of the meaning attributed to the image by Kelley. Further, Budaëus' criticism of the result of their work is that the Digest is not *compendiosus*, not a true compendium or abridgement, rather than that it had not been "assembled". Both these points — the simile of the surgeons cutting out malignant tissue, and the question of a *compendiosus* legal code — recur throughout the *Annotationes* and are central to Budaëus' discussion of the law.

In his first extended criticism of *neoterici iurisconsulti* Budaëus already indicates his primary complaint about contemporary legal writings: their unmanageable size and number. Comparing modern lawyers with the ideal jurist, Servius Sulpicius, described by Cicero, Budaëus writes¹⁵:

¹³ Annot. 29r/76/57A.

¹⁴ Annot. 17v/44/33A.

¹⁵ Annot. 2r/4/4C. fuissent¹] extitissent profecto] om. Gallia] vita.

Huic si similes neoterici iurisconsulti fuissent, id est si tam aequi bonique studiosi quam iuris summi fuissent, nec magis se iuris quam iustitiae consultos videri et esse exoptassent, profecto immensa illa et numerosa commentariorum iuris volumina haudquaquam reliquissent, materiam et fomitem accendendarum litium, quibus nunc Gallia passim flagrat . . .

The sheer volume of contemporary legal writing is a recurrent complaint made by Budaeus throughout the *Annotationes*. Even to remember the names of the legal authors, he says, would require a *nomenculator*, a prompter¹⁶. No single lifetime would suffice to master all this material; even the best intellects would grow old trying to come to terms with the writings on one single technical subject¹⁷.

To describe the ceaseless growth of modern legal commentaries Budaeus adopts the metaphor of a malignant cancer. This he adapted from Juvenal who applies it to the writing of literature in general¹⁸:

— — tenet insanabile multos
Scribendi cacoethes.

Although, says Budaeus, Justinian's compilation and that of the canon law together constitute "satis numerosa volumina", the commentators have added "sexcenta certatim volumina"¹⁹, actually daring to attribute to them legal authority. There was only one solution for this misfortune²⁰:

Hoc igitur malum, id est prava pertinaxque ambitio, quae animis iurisperitorum nostri temporis penitus insedit, non aliter domari quasi *ulcus cacoethes* potest, quam si ferro cauterere percuretur, id est si *ad vivum usque resecetur*.

This cancerous growth can only be treated with the ruthlessness which must be applied in such dangerous cases²¹:

Verum ab isto *ulcere* manus abstinere nequeo, quod certe nisi manu valida et paeonia *ad vivum*, ut alibi diximus, *resecetur*, exacerbari magis tactu quam compesci aut leniri potest.

Only very few legal commentators could be considered part of the living flesh²²:

¹⁶ Annot. 2r-v/4/4C.

¹⁷ Annot. 6r/14/10D-11A.

¹⁸ Sat. VII.51-2.

¹⁹ Annot. 33r/86/65A.

²⁰ Annot. 33v/87/65B penitus] ac memoriae avorumque percuretur] percutiatur.

²¹ Annot. 51v/133/99A-B nequeo] identidem nequeo potest] continget.

²² Annot. 5v/13/10C ut . . . licuisset] attingere ea nulli oportuit licere.

Sin *ad vivum resecare* videor, post Bartolum certe et Baldum ut ne attingere ea cuiquam licuisset, ut certa fixaque aliquando iurisconsultorum dogmata essent.

Thus Budaëus likens the unending growth of legal commentaries to a malignant cancer which can only be treated by cutting back to the living flesh. This is intended by Budaëus to link up with the image he presents of Tribonian and the Digest compilers. They too acted "*inclementiorum medicorum more ad vivum resecantes*". In other words they performed for the writings of classical Roman law the very task which was now required for contemporary legal writings.

The parallel is taken further by Budaëus for he extends his comparison to the development of the classical Roman law itself. Budaëus presents the golden age of Roman law as that existing in the time of Augustus. At that point, however, Augustus sowed the seeds of future corruption by conceding to the jurists the right of interpreting the laws, the *ius respondendi*. Thereafter Roman law degenerated "*propter iurisconsultorum scribendi libidinem*", which was finally halted by Justinian²³:

... legum interpretatio iuris prudentibus olim concessa sub Augusto et eius successoribus, ab Iustiniano postea severissime interdicta est, ut labori studentium consuleretur.

In a rather different version of this conception the restoration of the uncorrupted state of the law is seen as beginning with the great jurists of the Severan age; even so, here again the important rôle of Tribonian is not forgotten²⁴:

Huiusmodi librorum bona ex parte nugatoriorum congerie prisca illa germanaque maiestas iuris prudentiae obruta est, primum circa tempora Alexandri principis, subinde Iustiniani auspiciis et Triboniani ductu atque opera restitui instaurarique tentata, verius quam instaurata.

The problem facing Roman law in the time of Justinian, and that facing contemporary law, were thus one and the same; the pristine majesty of the law had been overwhelmed by a vast mass of juristic writings which served only to obscure the law. The mania for juristic writing was a kind of cancer. In this respect the compilers of the Digest had acted as *inclementes medici* in dealing with the classical legal writings. The conclusion was plain: Tri-

²³ Annot. 112r/289/217A.

²⁴ Annot. 2v/4-5/4C [nugatoriorum] supervacaneorum [primum] primumque subinde] et subinde [tentata] coepta est.

bonian's work provided a model of what was required to solve the contemporary malaise in legal studies. What was needed was another Tribonian who would carry out a similar surgical operation to treat the cancer of contemporary legal writing²⁵:

Utinam vero prodeat nobis superstitibus Tribonianus alter qui cornicum oculos iurisconsultis nostri temporis configat, id est qui tot voluminum acervos quot ne Ptolemaei quidem bibliotheca caperet certo quodam numero circumscribat, sed ita ut *ad vivum resecet* . . .

This is not to say that Budaëus considered Tribonian's work as admirable in every respect. The task he accomplished may have been a necessary and inevitable one, but something was lacking in its execution. Hence under Justinian the majesty of the law "restitui instaurarique tentata (later changed to *coepta*), verius quam instaurata"²⁶. First there is the complaint of the scholar of antiquity, that by abbreviating the work of the Roman jurists a lot of historically interesting material had been lost²⁷:

Nimia enim religione verentes ne de faece, ut dicitur, duodecim tabularum hausisse viderentur, id est de prisca nimis et obsoleta antiquitate, dum de liquido tantum et nitido promere volunt, aridiora fortasse volumina nec sitim quorundam ex-
plentia reliquerunt.

Thus in his desire to create a modern legal codification Tribonian had cut out a lot of material of purely historical interest — too much for antiquarian taste. However, Budaëus' real complaint is that Tribonian and the compilers "accisas nobis Pandectas verius quam compendiosas dederunt"²⁸. The form of the Digest, a succession of fragments cut from the writings of the classical jurists, did not represent a true *compendium*, a true abridgement.

When outlining the degeneration of Roman jurisprudence following Augustus' concession of the *ius respondendi*, and the attempted solution of Justinian, Budaëus draws a parallel with the development of herbal medicine in antiquity²⁹. Starting from the same auspicious beginnings, he suggests, the practice of medicine had run to excess in precisely the same way, before being rescued by Asclepiades "qui novam medicinae rationem instituisse et

²⁵ Annot. 14v/37/27B.

²⁶ Annot. 2v/5/4C.

²⁷ Annot. 17v/44/33A-B volunt] verba iuris interpretationesque institerunt.

²⁸ Annot. 17v/44/33A.

²⁹ Annot. 111v-112r/288-9/216D-217A.

ad *compendium* artem redegeisse dicitur". He continues with this Ciceronian prescription⁸⁰:

... ita legum interpretatio iuris prudentibus olim concessa sub Augusto et eius successoribus, ab Iustiniano postea severissime interdicta est, ut labori studentium consuleretur. Et ut herbariae medicinae inventa nimia magorum vanitate abrogata sunt qui vires herbarum supra fidem traderent, sic iuris interpretandi spes omnibus abscissa sub Iustiniano principe propter iurisconsultorum insanam scribendi libidinem, qui stilo temperare non posse videbantur.

He finishes by pointing out the parallel between the ancient development and the current situation⁸¹:

... Quod rursus idem facere pergunt nostri saeculi iurisperiti, multo tamen antiquis illis deteriores.

What was required now was a more appropriate kind of codification drafted by a compiler who "non iam centones ut olim Tribonianus (vir alioqui doctissimus sui saeculi si Sudaë credimus) sed iuris artem componat"⁸².

A specific defect of compiling a legal code by means of a cento was that inevitably a number of contradictions between different legal views would creep into the text. Budaëus cites one such *antinomia* detected by Valla, and continues⁸³:

Nonnulla tamen et alia loca in Pandectis adnotasse mihi videor, in quibus consarcinandis Tribonianus dormitasse deprehenditur.

The use of the word *dormitare* cannot but recall Horace's famous line; if, like Homer, Tribonian could nod, this only served to emphasise the generally admirable character of his work.

2. *Anti-Bartolism*

On Budaëus' criticism of medieval jurisprudence Kelley writes⁸⁴:

If Budé was critical of Tribonianism, he was outraged at Accursianism (Accursianitas). He adopted the bad manners and the bias of his Italian predecessors to-

⁸⁰ Annot. 112r/289/217A traderent] tradebant abscissa] abscissa est non posse videbantur] iam non posse cernebantur.

⁸¹ Annot. 112r/289/217A.

⁸² Annot. 4r/9/7B.

⁸³ Annot. 137r/351/265A.

⁸⁴ Budé 818.

ward both the glossators (Accursiani) and the commentators (Bartolisiti), who in his opinion were the essence of anti-intellectualism (verborum contemptores, Priscianomastiges) . . . Roman laws, Budé concluded, "were propagated by men ignorant of Latin, and so it is not surprising that they have been covered by many layers of errors, some permanent . . ., some correctable, unless one believes that the authority of Accursius is sacrosanct — which I, as a disciple of the ancient jurists and as a grammarian [literator], am not accustomed to do."

Budaeus' assault on the Accursian Gloss, though far from original, was to become fabled, and one certainly also finds much invective against the school of the Commentators in the *Annotationes*. However, there are important qualifications to Budaeus' criticism of both, one of which has been obscured in Kelley's translation of the passage quoted above. Budaeus writes³⁵:

Pandectarum enim libris a Iustiniano ad Accursium per multa ignorantiae saecula per alios atque alios exemplarium traduces deinceps propagatis, et (quod super omnia est) manibus Latine nescientium, nihil magnopere mirandum multas mendorum labe inolevisse, partim ita indelebiles ut quo magis attingantur eo illustriores fiant, partim facile eluibiles, quae potissima pars est, nisi forte auctoritate Accursii agnoscentis sacrosanctae factae esse credantur.

In this passage Budaeus is discussing not the legal interpretation of the Digest, but the cause of corruptions in its text. Some of these corruptions are insoluble, Budaeus suggests, although others can easily be emended unless they are believed to have been rendered sacrosanct by the authority of Accursius, who was content to interpret a word which in reality was corrupt. Then Budaeus adds an important qualification to this criticism of Accursius when he says, "Cuius ego iurisperiti auctoritatem sequi, non litteratoris, soleo"³⁶: I am accustomed to follow the authority of Accursius the jurist, but not Accursius the *litterator*, Accursius as an interpreter of classical antiquity. In other words, Budaeus' criticism of Accursius is directed not towards his legal methodology, but is confined to his misunderstanding of the background of classical antiquity from which the legal texts spring.

Budaeus viewed the Digest as a specimen of Latin literature, to be set beside Cicero or Livy, Pliny or Suetonius, and was concerned particularly with its Latin usage and the occurrence of interesting or unusual words or phrases. In defining such words and phrases it was impossible for him to fail to notice the erroneous definition these were often given in the Accursian

³⁵ Annot. 143r/367/277B.

³⁶ Annot. 143r-v/367/277B iurisperiti] ut iurisperiti litteratoris] ut litteratoris.

Gloss, universally printed alongside the text. His criticism of the Gloss was directed solely to this point: its misapprehension of the meaning of these Latin words and its general ignorance of ancient history. This important distinction emerges from his criticism at a number of other points. Thus he writes³⁷:

Nugatur hoc in loco Accursius, ut fere *in iis locis* solet quae ab antiquitate rependa sunt.

Where modern lawyers are to be criticised is not for following Accursius on questions of law, but for accepting his pronouncements on Latin language and history, matters on which he was clearly uninformed. Thus Budaëus condemns³⁸:

... eorum stultitiam, qui ipsum ut magnum auctorem laudant *earum rerum* quarum inscius plane fuit.

In short, Accursius is to be recognised as an authority on questions of law, not on questions of Latin language and legal history³⁹:

cuius ego iurisperiti auctoritatem sequi, non litteratoris, soleo.

The same lack of interest in technical legal dogmatics informs also his criticism of the contemporary school of legal interpreters, the Commentators. Although Budaëus is strongly critical of their work in general terms, he makes no specific complaint about their legal method. Moreover, there are once again revealing qualifications to his general criticism. As we have seen, Budaëus describes the work of the Commentators collectively as a malignant cancer. He condemns them as a "Gothica gens", of which "nemo non infantissimus in verbis etiam iuris fuit⁴⁰". Some of the most famous Commentators he dismisses as having succeeded only in covering the law in Cimmerian darkness⁴¹:

Quemadmodum igitur Pythagorici αὐτὸς ἔφα dicebant, id est *ipse dixit*, sic *Alexander*, sic *Paulus Castrensis*, sic *Fellinus dixit* inquirunt, sic denique unus quisvis ex illa turba scriptorum qui luculentis priscorum consultorum scriptis Cimmerias, ut dicitur, tenebras offuderunt.

³⁷ Annot. 53r/138/103A.

³⁸ Annot. (16v)/42/32C (added after 1st edn.).

³⁹ Reference as note 36), supra.

⁴⁰ Annot. 10v/26/20C.

⁴¹ Annot. 6r/14/11A offuderunt] multis in locis offuderunt.

And yet Budaeus' position as an anti-Bartolist is not as absolute as this general condemnation would suggest. For the name of Bartolus himself appears in the *Annotationes* for one purpose alone: to exclude him, always, from this general condemnation. Budaeus' ideal for the reformation of the law was a legal code; he hoped for a compiler, "Bartolo aut alioquo primi nominis viro iurisperitia non inferior"⁴². Some works of the Commentators were to be preserved⁴³:

... ne aeternum hoc regnum perferamus istorum qui citandis Bartolo, Baldo, Alexandro, Panormitano, Barbatio, caeterisque quos hiantes distentisque buccis occinere solent, cum domini etiam, si diis placet, praefatione, arcem se litterarum tenere indoctis stupentique ad haec verba turbare persuaserunt . . . *Quibus ubi Bartolum et Baldum ademeris*, ad infantiam reductos ne hiscere quidem videbis.

Elsewhere, too, he explicitly exempts Bartolus and Baldus from his condemnation of the work of the commentators⁴⁴:

Sin ad vivum resecare videor, *post Bartolum certe et Baldum* ut ne attingere ea cuiquam licuisset, ut certa fixaque aliquando iurisconsultorum dogmata essent.

Indeed, his ideal law code would be compiled⁴⁵:

... ex quinquaginta Pandectarum libris et duodecim Codicis eorumque appendicibus, adde etiam si placet *ex Bartoli, Baldi reliquorumque paucorum amplissimi nominis* commentariis . . .

It was thus the quantity of Bartolist legal writings, rather than any specific point of technical method or objective, which was the object of Budaeus' condemnation. In his utopian vision law was essentially clear and simple, and it was only lawyers who rendered it complex by deliberate obfuscation for their own profit. Hence his ideal legal code would be accompanied by a prohibition of all commentaries just as Justinian had decreed for the *Corpus Iuris*⁴⁶; legal commentaries only spread confusion where previously all was clarity and light. Thus Budaeus' criticism of contemporary lawyers represent not the technical observations of a jurist, but the time-honoured allegations of avarice and corruption, directed equally, in the case of Budaeus, against the clergy, courtiers, and high state functionaries.

⁴² Annot. 4r/9/7B alioquo] alio quopiam.

⁴³ Annot. 14v/37/27B-28C regnum] taedium istorum] hominum ineptorum caeterisque . . . solent] collectimque caeteris iuris interpretibus litterarum] doctrinae ad haec verba] om. reductos] redactos.

⁴⁴ Annot. 5v/13/10C ut . . . licuisset] attingere ea nulli oportuit licere.

⁴⁵ Annot. 4r/9/7B amplissimi nominis] amplissimi nominis et primariae auctoritatis.

⁴⁶ Annot. 4r-v/10/7B-8C.

3. *Juristic Classicism*

A characteristic feature of the juristic classicism of the Renaissance legal humanists is their interest in the detection of interpolations. Through philological and historical analysis the humanists set out to discover the changes introduced into the classical legal texts by the compilers of Justinian's Digest. The phenomenon of interpolation itself was not unknown in previous ages. Indeed, Justinian had actually emphasised in the preface to the Digest that although the texts bore the names of the classical jurists, they had nevertheless been substantially altered to serve the purposes of the new codification⁴⁷:

... unusquisque eorum, qui auctor legis fuit, nostris Digestis inscriptus est; hoc tantummodo a nobis effecto, ut, si quid in legibus eorum vel supervacuum vel imperfectum vel minus idoneum visum est, vel adiectionem vel deminutionem necessariam accipiat et rectissimis tradatur regulis. Et in multis similibus vel contrariis, quod rectius habere apparebat, hoc pro aliis omnibus positum est, unaque omnibus auctoritate indulta, ut quidquid ibi scriptum est, hoc nostrum appareat et ex nostra voluntate compositum, nemine audente comparare ea quae antiquitas habebat et quae nostra auctoritas introduxit, quia *multa et maxima sunt* quae propter utilitatem rerum *transformata sunt*.

This evidence lay before every reader of the Digest. As a result it is even possible to discern an awareness of the phenomenon of interpolation in the 13th century Gloss of Accursius. Nor is the distinction between the *ius vetus* of the classical lawyers and the *ius novum* of Justinian lacking in the work of subsequent legal commentators.

The awareness of the phenomenon of interpolation and the techniques applied in investigating it had, of course, undergone a transformation by the time of Cujacius or Faber. What is the place of Budaëus in this development? In his article Kelley states that Budaëus "played enthusiastically that humanist game, the hunt for interpolations"⁴⁸. For his book the same passage was altered to read, "entered with great relish into that increasingly popular humanist sport, the hunt for interpolations"⁴⁹. However, it seems in fact to be the case that there is not a single suggestion of interpolation throughout the *Annotationes in Pandectas*. The position was, I believe, accurately described by Palazzini Finetti in his history of interpolation research when he

⁴⁷ C. Tanta 10; C.1.17.2.10.

⁴⁸ Budé 820.

⁴⁹ Foundations 71.

wrote, "Il carattere più letterario che giuridico della sua opera impedì tuttavia al Budé di giungere alla ricerca delle interpolazioni"⁵⁰.

Kelley provides only a single example of Budaëus' suggested interpolation hunting. He writes, "A famous example of a Tribonianism was the substitution of 'annua die' for Ulpian's conventional legal phrase 'annua bima trima die'"⁵¹. However, the passage of Budaëus relied upon cites the Digest text as follows: "Si annua bima trima die XXX stipulatus fuero . . ."⁵² There is therefore no evidence for the substitution of the phrase *annua die*. The suggestion of interpolation in this case arises from a misunderstanding. The phrase *annua die* means one year hence, whereas *annua bima trima die* means in three annual instalments. The two expressions thus mean quite different things; the former is not a Byzantine substitution for a conventional legal phrase of classical jurisprudence. The passage of Budaëus cited here seems to have been conflated with a much later treatment of a legal question involving the same expression⁵³. This concerns Franciscus Balduinus' treatise in four books entitled *Justinianus sive de iure novo*, published in 1560 more than fifty years after the appearance of Budaëus' *Annotationes*. Research on the text of the Code of Justinian had by then gone a long way to restoring the subscriptions bearing the precise date of the individual constitutions. Balduinus was therefore able to reconstruct in strict chronological order all the constitutions of Justinian's reign which are contained in the Code. From this base he goes on to study the relevant passages of the classical jurists preserved in the Digest in an attempt to discern how these must have been altered by the compilers to bring them into line with the new legislation.

The present case concerns a change made by Justinian in the law relating to the restoration of dotal property on divorce. In classical law fungible things had to be restored to the wife under the *actio rei uxoriae* in three annual instalments: *annua bima trima die*. This rule was abrogated by Justinian who decreed that land had to be restored at once, and all other property within one year: *annua die*. The change introduced by this constitution of Justinian is outlined by Balduinus⁵⁴:

⁵⁰ L. PALAZINNI FINETTI, *Storia della ricerca delle interpolazioni nel Corpus Iuris giustiniano* (Milan 1953) p. 54.

⁵¹ Foundations 69.

⁵² Annot. 94r/244/183A-B (citting D.13.7.8.3).

⁵³ cf. Budé 830.

⁵⁴ Lib. II (Oporinus; Basle 1560) p. 223 (citing C.5.13.1.7a).

Quintum huiusce constitutionis caput narrat olim ex stipulatu agenti ilico fuisse dotem restituendam, actione vero rei uxoriae experienti non nisi annua bima trima die, si quidem res dotalis pondere, numero, mensura constaret. Iustinianus hoc delictum sublato vult rem dotalem, si mobilis vel incorporalis sit, annua die reddi, rem immobilem statim post dissolutum matrimonium.

In this case the nature of the change in the law was actually stated in the constitution of Justinian. However, the original form of the classical law was also available to Balduinus from a different source. In 1549 Joannes Tilius had published the pre-Justinianic legal source known as the *Tituli ex corpore Ulpiani*. A passage in this collection preserves the relevant rule of the classical law⁵⁵. Accordingly, Balduinus was able to confront a text of Ulpian, as transmitted in the Digest, with a pre-Justinianic text by the same author. He was thus able to deduce how the text of Ulpian must have been altered by the Digest compilers⁵⁶:

Ulpianus in *tit. vel fragm.*:

Dos (inquit) si pondere numero mensura contineatur, annua bima trima die reddetur, nisi si ut praesens reddatur convenerit. Reliquae dotes statim redduntur.

Idem Ulpianus in Pandectis ait *dotem annua die praestari* (l. i. de do. praeleg.). Sed recte annotatum est illud *annua die* potius esse Tribonianum ad Iustiniani constitutionem ius accomodantis, Ulpianum vero scripsisse *annua bima trima die*.

Thus Budaëus' object was to explain a Latin usage occurring in the Digest by reference to its use in works of classical Latin literature. Balduinus, on the other hand, is concerned with interpolation, and operates through a historical reconstruction of imperial constitutions and comparison with pre-Justinianic legal literature. The two works are separated by more than fifty years of change and development. Kelley's conflation of the two passages derives from the prior generalisation of a concept of juristic classicism as illustrated by interpolation research. Even laying aside the misapprehension in this instance, it would hardly, in any case, represent sufficient grounds for claiming that Budaëus devoted himself "enthusiastically" to the study of interpolations. One must further question the reason for the alteration of the description of Budaëus' supposed interpolation research from "that humanist game" to that "*increasingly popular* humanist sport". Is this intended to indicate a real growth in humanist interest in interpolation research

⁵⁵ *Tit. Ulp.* VII.8.

⁵⁶ ed. cit., p. 223 (citing *Tit. Ulp.* VII.8 and D.33.4.1.2).

at the beginning of the 16th century, or is it in fact no more than a literary flourish?

The point is not, I think, unimportant. It makes a vital difference to our perception of Budaeus' work to know whether he took a great interest in Justinianic interpolation or broaches the subject not at all. The answer will affect our whole perspective on the objectives of his work, and his attitude to Roman law and its scholarship. And this in turn has important implications for our general picture of the development of legal humanism, and the place of Budaeus within that development, which Kelley is seeking to portray.

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The three themes isolated by Kelley and discussed above together go to the heart of his conception of Budaeus' approach to Roman law. This is summed up in the view attributed to Budaeus that, "In short, Roman law had become an intricate palimpsest that only the most skilled philologist could decipher"⁵⁷. In Kelley's analysis Budaeus is an anti-Tribonianist because he is essentially a historian of classical Roman law. The commentaries of Bartolus and Baldus are worthless since they serve only to obscure the classical texts. Budaeus is interested in interpolations because that is a route to the historical reconstruction of classical Roman law.

These are all themes which are no doubt found during the course of the 16th century, but not, I think, in the work of Budaeus. Budaeus was not a pure historian of Roman law, a "juristic classicist" interested in a philological and historical deconstruction of Justinian's *Corpus Iuris* in an attempt to uncover the classical Roman law of the 2nd and 3rd centuries. He had no conception of penetrating below the façade of the Digest in order to lay bare the classical law from which it was constructed. Indeed, for Budaeus the excessive number of commentaries of the classical Roman jurists represented just as much a cancer as those of their contemporary counterparts. The Digest, by contrast, he described as "*Latinissima Pandectarum scripta*"⁵⁸. When revising the *Annotationes* he took the trouble to attribute to Justinian the epithet "*legum sanctionumque genius*"⁵⁹, and to insert the adjective "*sacrosanctae*" before "*Pandectae*"⁶⁰. Indeed, the whole object of

⁵⁷ Budé 819.

⁵⁸ Annot. 54v/141/105B.

⁵⁹ Annot. (109v)/283/213A.

⁶⁰ Annot. (125v)/324/243B.

the *Annotationes* was "ut Pandectae emendatius atque intellegentius legerentur"⁶¹. For Budaëus there was no contradiction between interpreting the Digest in the light of the history, languages, and literature of antiquity, and in regarding it as a work of authority. As he saw it, it was the Corpus Iuris of Justinian, together with the commentaries of Bartolus and Baldus, which must form the basis of the contemporary legal system.

It thus seems to me that Kelley's identification of general themes of legal humanism, such as anti-Tribonianism, anti-Bartolism, interpolation research, which are intended to cover the whole course of legal humanism from Valla through the 16th century, is not adequate to reflect the individuality or depth of Budaëus' thinking about law. Such themes, applied in a general fashion to the legal humanism of the 16th century, are not sophisticated enough to account for the multitudinous differences of time, place, and individual scholar. The result in the case of Budaëus is, I believe, a serious distortion of his position in the development of legal humanism. Attempting to depict the detail of humanistic studies with so broad a brush is itself in danger of becoming unhistorical. As Kelley himself states in the preface to his book, "... the transcendent impulse, the tendency to impose premature and procrustean patterns upon the past, operates as a limit upon strictly historical investigation"⁶².

Discernible here is a real difference in the conception of legal-historical scholarship between Kelley's "Anglo-American" approach and that of continental legal historians. This point is well illustrated by a statement of Abbondanza in which he outlines the required approach of scholarship, as he conceives it, for a proper understanding of the work of Budaëus' contemporary, Alciatus. He writes⁶³:

L'œuvre juridique d'Alciat est immense. Des cinq tomes in folio qui constituent l'édition des *Opera Omnia* parue à Bâle en 1582, seule une partie minime... pourrait être mise à part, si l'on voulait se limiter rigoureusement à la production historico-juridique et juridico-positive de notre auteur. Mais les milliers de colonnes très serrées qui restent encore hérissées de dizaine de milliers de citations juridiques abrégées selon le système du droit commun, citations qui doivent être élucidées préalablement par tout chercheur sérieux, ces milliers de colonnes exigent, pour

⁶¹ Annot. 7r/17/13B.

⁶² Foundations 13.

⁶³ Premières considérations sur la méthodologie d'Alciat, in *Pédagogues et Juristes. Congrès du Centre d'Etudes Supérieures de la Renaissance de Tours: Été 1960* (Paris 1963) pp. 107-8.

arriver à une vision d'ensemble qui soit fondée, un travail de plusieurs années et surtout un travail qui fasse appel simultanément à différents chercheurs . . . Pour mettre en relief la nouveauté d'une affirmation et la façon de poser le problème, il faut examiner, et c'est une entreprise de longue haleine, une très vaste littérature de commentateurs qui remonte au Moyen-Age . . .

Nothing daunted, four years later Kelley began his survey of Alciatus' work with the words, "About Alciato's scholarly credentials there is no doubt"⁶⁴.

Nobody, certainly, would deny the need in scholarship for wide-ranging overviews and panoramic surveys. However, if they are to reflect more than the ephemeral intellectual environment from which they themselves emerge they have to be based on detailed studies of the sources themselves. If such studies are unavailable then the call must be to join the workers in the field; the general survey is premature. Ultimately progress in our understanding of legal humanism — and speculation on its place in the development of modern historical writing — will depend on closely observed studies of the work of individual legal humanists. For the achievement of that objective, as Abbondanza wrote in 1957 in a rather different context, "Altra è la via da battere: ricerche con oggetti più delimitati nello spazio e nel tempo, ma ricerche più approfondite"⁶⁵.

⁶⁴ Budé 826.

⁶⁵ Review of L. Palazzini Finetti, *Storia della ricerca delle interpolazioni nel Corpus Iuris giustiniano* (Milan 1953) in *Annali di Storia del Diritto* 1 (1957) 557-60, at p. 560.