

Cicero's Conception of *iurisprudentia* (*)

by Ludovico V. CIFERRI

(Pavia - Dublin)

*Aggrediar non tam perficiendi spe quam
experiendi voluntate (Or. 2).*

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*) I should like to acknowledge the help of the following persons, to whom I am most grateful: Professor Ferdinando BONA (Università di Pavia) and Professor Thomas Noël MITCHELL (Trinity College, Dublin) for their invaluable assistance and teachings; and the late Professor John KELLY (University College, Dublin) who greatly encouraged my work during my stay in Dublin.

two examples, particularly in the perspective of Cicero's plan of the "*ius civile in artem redigere*". 1.5 Conclusion.

This paper is devoted to the study of Cicero's conception of jurisprudence as the activity of the *iuris consulti*, the practitioners of his time.

The term 'jurisprudence' may be used in various senses, yet for the purpose of this study the meaning considered is the study and the knowledge of law in its widest sense, that is synonymous with the broadest sense of the syntagma 'legal science'. The actual notion of legal science is what the ancient Romans called *iuris scientia* or *iuris peritia*; and it was the activity of the *iuris consulti*. Therefore, at this juncture the terms '*iuris consultus*', '*iuris peritus*', '*legum inventor*' are considered as synonymous with '*iuris prudens*', and the result of their activity, the '*iuris consulere*', is called '*iuris prudentia*'. The terms were synonymous also in Cicero's convictions. A proof of the equivalence of these terms is provided by the study of a relationship between the images of the *iuris consultus* and that of the *orator*, as shall be pursued later in this paper. This relationship is of crucial importance because it embodies the relationship that existed between *eloquentia* and *ius respondendi* in the forum, and more widely, the relationship between

eloquentia and practical knowledge, topics discussed from the Greeks onward and fundamental in Cicero's thought (1)

In Cicero's age, the distinction between jurisprudence at a practical level and jurisprudence at an ideal level was not clear. In Republican times jurists belonged to senatorial families and often held offices as praetor and consul. They were called either *iuris periti*, or *iuris prudentes*, or *iuris consulti*, terms used in Roman law of persons who 'advised', 'assisted' and 'gave opinions'. Earlier jurists were orators no less than *legum inventores*. The breach between the two activities appeared in the last century of the Republic and it seems that it was embodied by Cicero's distinction between *iuris prudens* and *orator*. The activity of the *iuris periti* remained a profession while that of the orators was enhanced to the level of an art.

The study of the differences between the images of the *iuris periti* and that of the orators is, in short, the expression of what Cicero thought of the *iuris consulti* of his age. Some years after the *Pro Murena*, Cicero reaffirmed the distinction, by stating that the *orator* did not need a wide knowledge of law (2). In stating this Cicero implied that a difference existed between the *iuris consulti* and the orators.

The jurist could be either versed in public law, or in private law, or in both. About the jurists of public law there is little to be

1) In this paper the syntagmas ' *ius respondendi* ' and ' *de iure respondere* ' will be regarded as synonymous.

2) *Orat.* 1.234-6.

said, because (a) their activity was cramped by the long constitutional crisis ; and (b) because the unique place *ius civile* occupied at Rome overwhelmed any other possible branch of law (3). Therefore when Cicero wrote *iuris consulti*, he meant the jurists devoted to private law.

Cicero described the figure of the *iuris consultus* through the words of Antonius in *de Oratore*. The jurist has to be skilled in both "*respondere*", "*agere*", and "*cavere*": *sin autem quaeretur, quisnam iuris consultus vere nominaretur, eum dicerem, qui legum et consuetudinis eius, qua privati in civitate uterentur, et ad respondendum et ad agendum et ad cavendum peritus esset* (4). The definition of what a *iuris consultus* ought to be, is also indicated in some examples Cicero gives : *et ex eo genere Sex. Aemilium, M'. Manilium, P. Mucium* (5). Among these men, Publius Mucius Scaevola, *pontifex maximus* and *consul* in 133, has to be considered.

First of all it has to be explained why Cicero does not mention a jurist of his time. The reason is as follows : although the *de Oratore* was written in 55, its setting is placed in 91. Therefore Cicero could not refer to any of his contemporaries, otherwise the fictional setting would have been broken. Secondly, the importance of Publius Mucius Scaevola goes

3) For some hints of the contemporary lawyers' new approach towards the study of Roman public and particularly penal law, see M. HUMBERT; *La justice dans l'Antiquité, Le Courier du C.N.R.S.*, 75 (1990), pp. 63-4.

4) *Orat.* 1.212.

5) *Orat.* 1.212.

further. He was a member of a great Roman family that gave to Rome two other eminent jurists : Quintus Mucius Scaevola the augur (consul in 117), and Quintus Mucius Scaevola, *pontifex* and *pontifex maximus* (consul in 95). Cicero knew and mentioned both of them in his works : Quintus Mucius Scaevola the augur who is one of the characters of *de Oratore* and Quintus Mucius Scaevola the *pontifex* who, although not a character of *Brutus*, is frequently referred in that work and occupies an important position in the development of Cicero's argument. There Cicero defined him as a man very skilled in "*iuris civilis magnum usum*" (6). In the Scaevolae's activity as jurists there was a tradition and a continuity : they were the genuine expression of the empiric and casuistic method on which Roman law was based. The very method Cicero openly contested in the *de Legibus* when he said that his aim was to take law away from the hands of the experts.

The *iuris consultus* was not an advocate as evidenced by the fact that in the Republic the clients on trial were usually defended by orators and not by *iuris periti*. The orators usually asked the *iuris periti* for *consilia* on the juridical question in advance, but in the *forum* they defended their clients adjusting their *ars rhetorica* to the needs of the moment. At this point it is important to recall the procedure of a legal case in Rome. During the Republic, two kinds of courts developed. One was endowed with the legitimacy to deal especially with penal trials ; the other to deal with *ius civile* : these latter were the Centumviral Courts which sat in the

6) *Brut.* 152.

Basilica Julia (7). The jury was composed of 105 esteemed persons in public life, yet none of these was a jurist. The verdict they delivered was not technical. The advocates were not *iuris consulti*: they were orators. In defence of their clients, they gave speeches intended to gain the favour of men not versed in law.

Once the case came to the attention of the court, it had already passed through several stages of the procedure. The trial took place mainly in two parts: one of justice and the other of evidence. The first part took place in front of the *praetor*, a judge but not the final and decisive judge. He represented the authority of justice, and his main duty was to choose the *formula*, i.e. the form for the proceeding act, later used as blueprint for the process.

The second part of the trial took place in the forum and involved the "judges" of the jury, the orators, the clients, the witnesses, and the public. In that part of the trial the juridical evidence and the content of the acts were no longer important. The task frequently consisted of convincing either an incompetent

7) *Iudex unus* and *recuperatores* were also very important, and they had a competence wider than that of the *centumviri*. The lack of description of the criminal courts and their procedures reflects Fritz SCHULZ's belief that "about the jurists of public law there is little to be said. As previously, they were to be found among the senators and magistrates" (*History of Roman Legal Science*, Oxford, 1946, p. 46). As a matter of fact, none of the jurists Cicero depicted in the works here considered, acted in criminal courts, they instead dealt extensively with *ius civile*. For reference on the topic anyway, see A.H.M. JONES, *The Criminal Courts of the Roman Republic and Principate*, Oxford, 1972, p. 1-89.

judge or a jury of one hundred incompetent popular "judges". In attempting that task, a *iuris consultus* was doomed to fail, while the orators could brilliantly succeed.

Most of the technical aspects of the case were dealt with at preliminary stages of the process, consequently, at the start of the procedure, the *iuris peritus* was indispensable. As he was asked to suggest which *formula* should be used, to draft it and eventually to modify it for the trial of actions, his function was to a certain extent preliminary to the discussion of the case. On some occasions he was even requested to assist with the technicalities of the case at the trial. When this happened, he usually spoke prior to the orators who gave the final pleading.

The *iuris periti* practised their activity in their houses, delivering *consilia* and *responsa prudentium* which commonly influenced even the judges. Their houses were also the places in which the *iuris consulti* provided a legal education to young men aspiring to legal or administrative careers. The only possible way to learn the *ius* was in fact to listen to the *responsa* given by the *iuris consulti*. The situation remained the same until the second century when a new class of professional and bureaucratic *iuris consulti* took the place of the old one, and eventually the two activities were divided (8). Cicero was aware of the situation, and wrote that the houses of the *iuris consulti* were the places in which they practised their activity of '*respondere*' and

8) Pomponius, *Digestum* 1.2.2.37.

'*docere*' (9). In the late Republic some jurists did not "teach" any longer in their houses, yet their *responsa* still constituted a teaching, as clearly implied in Cicero's description about Quintus Mucius Scaevola's (the *augur*) activity (10).

The function of educating and training the *adulescentulus* in the *ius civile* was of primary importance in Roman society. An apprenticeship in the house of a *iuris prudens* was also of primary importance for every young man seeking success in a political career. Cicero's parents were aware of it and sent their son, Marcus, to the house of Quintus Mucius Scaevola the *augur*. There Cicero received his legal education along with Servius Sulpicius Rufus, one of his best friends, but at one stage a dire enemy. Cicero himself was conscious of the importance of such a background: there are several memories of that experience scattered in Cicero's writings. In one passage using the words "*nusquam discedere*", Cicero remembered how close was the relationship with the *iuris consultus* (11). The *adulescens* who decided to learn *ius* by imitating the *senes* established a relationship with the *iuris consultus* that was personal and private (12).

Cicero recalled his relationship with Quintus Mucius Scaevola the *augur* when he said that he was a witty and polite

9) *Orator* 142-3.

10) *Brut.* 306.

11) *Orat.* 1.97; *Lael.* 1.

12) *Off.* 1.122-3; 2.46.

raconteur, that he spoke "*memoriter et iucunde*", and that he was called "*ioculator senex*" (13). In Cicero's reminiscences, Quintus Mucius Scaevola's activity is described from dawn to dusk (14). In another of these passages from *de Oratore*, Cicero described the house of a *iuris prudens*: the house of Quintus Mucius Scaevola the augur, a house he knew well and declared it "*sine dubio ... totius oraculum civitatis*" (15). The passage is in accordance with that confirmed later by Cicero in *de Officiis* about the importance of the house in the achievement of *dignitas*. There he wrote that "*ornanda enim est dignitas domo ... sed domino domus honestanda est*" (16). For his legal apprenticeship, Cicero also attended at the house of Quintus Mucius Scaevola the *pontifex* whose activity was not different from that of the elder Quintus Mucius Scaevola the augur, and at the house of Caius Livius Drusus (17).

The activity of the *iuris prudens* was basically concerned with three functions: *cavere*, *agere*, and *respondere* (18). The action of *cavere* mainly consisted of drafting wills and contracts, and it was quite important as confirmed by Cicero in *de Oratore* through

13) *Lael.* 1; *Att.* 4.16.3.

14) *Lael.* 1.2; *Orat.* 1.200; *Phil.* 8.31.

15) *Orat.* 1.200. *Contra* A. WATSON, *Law Making in the Late Roman Republic*, Oxford, 1974, p. 104.

16) *Off.* 1.139.

17) For the Mucii: *Brut.* 211; *Lael.* 1-2. For Drusus: *Brut.* 129; *Tusc.* 5.112.

18) *Orat.* 1.212.

the words of the orator Lucius Licinius Crassus (19). There it is described how Manius Manilius walking across the *forum* does a remarkable thing that was "*facere civibus omnibus consilii sui copiam*" (20).

The action of *agere* essentially consisted of the application of cautelary jurisprudence to litigation (21).

The action of *respondere* was of great importance consisting of the *responsa* or *consilia* the *iuris consultus* gave ; and, in Cicero's time it underwent a great change. The activity of *respondere* to the ordinary people passed into the hands of minor *iuris consulti* while the great *iuris consulti* were asked to *respondere* only on unusual cases when their friends or important people requested them to do so.

Thus having delineated the three main directions in which the activity of the *iuris consulti* expanded, it now remains to understand how Cicero viewed and judged their activity. When Cicero portrayed himself as an advocate, he said : "*omnis cura et opera posita sit in hominum periculis defendendis*" (22). It is

19) 140-91 B.C.

20) *Orat.* 3.133.

21) For a full account, see F. SCHULZ, *Op. cit.*, pp. 49-51. On the function the jurists had in the late Republic, see A. WATSON, *Op. cit.*, pp. 101-10. For a full account on the jurists' functions throughout Roman history, see B. BIONDI, *Storia di Roma. Il diritto romano*, Bologna, 1957, pp. 211-59.

22) *Cluent.* 157. For a discussion of the influence of Cicero's activity as an advocate in the history of legal trials, see J.N. GROSS, *Ein berühmter Rechtsanwalt : Marcus Tullius Cicero, N.J.W.*, 6 (1988), pp. 302-7.

suggested however that Cicero did not consider himself as an advocate. He acted in the forum, and the impressive record of the speeches he gave there reveals that this was his primary activity at that time. However most of his speeches were concentrated in the 70's and in the 60's ; in the following years his activity in the forum greatly declined, especially from the time of the composition of *de Oratore* onwards, when it became a minor activity in Cicero's life. The reason for this apparent lack of interest in forensic activity lies in the gradual realization by Cicero that neither the activity of the *orator* nor that of the *iuris consultus* on their own could prevail any longer in the forum : they were mutually dependent. In the years of his intense activity in court, he was not concerned with theoretical problems because he was still gaining experience. Once he realized how much more importance a *iuris consultus* could gain than an *orator* in his career, he understood that the best way to secure a future for the *orator's* caste was by designing a new figure of '*iuris consultus*' (23). That was his real task when he attempted to lay down "*ius civile* into a dialectical system" because he secretly thought that he himself was to be the first of that new breed (24).

23) Cf. T. P. WISEMAN, *New Men in the Roman Senate 139 B.C. - A.D. 14*, London, 1971, pp. 118-20 ; M. BREONE, *Tecniche ed ideologie dei giuristi romani*, Napoli, 1982, pp. 116-20. Also see A. SCHIAVONE, *Giuristi e nobili nella Roma repubblicana. Il secolo della "rivoluzione scientifica" nel pensiero giuridico antico*, Roma and Bari, 1987, p. 205 note 66.

24) Cf. F. BONA, *L'ideale retorico ciceroniano ed il "ius civile in artem redigere"*, *S.D.H.J.*, XLVI (1980), pp. 351 ff.

At this point in the discussion, one should not overlook Cicero's ability to make the characters of his speeches voice his own opinions, and his ability to use arguments freely without consistency in his speeches (25). Keeping this in mind and remembering the suggestion that the plan of the '*ius civile in artem redigere*' was intended to show that the only man capable of dealing at high level with both *ars rhetorica* and *ius* was Cicero himself, this study now focuses on the description Cicero gave of two of the most eminent jurists of his time : Quintus Mucius Scaevola the augur, and Servius Sulpicius Rufus.

Quintus Mucius Scaevola was "*hominem acutissimum*" with a great expertise in *ius civile*. He had excellent diction and delivery and he could be severe and affable at the same time : in describing him Cicero wrote "*multa in severitate non deerat tamen comitas*" (26). As a consequence, he had been defined "*iuris peritorum eloquentissimus*" (27). Cicero had drawn this clear picture of Quintus Mucius Scaevola's skills in *Brutus* when comparing him with Lucius Licinius Crassus in the context of the *causa Curiana* and of the arguments they used in that trial (28). The *causa Curiana* was a famous trial mentioned by Cicero at

25) For the dialogues, see F. BONA, *Op. cit.*, p. 269 note 61. For the speeches, see L. CIFERRI, *The Spectre of Contradiction in Cicero's Orations. A Study Based On His Conception of 'Jurisprudence' and Some Other Speeches*, forthcoming.

26) *Brut.* 145-8.

27) *Brut.* 145.

28) For a full account of the *Causa Curiana*, see F. WIEACKER, *The "Causa Curiana" and Contemporary Jurisprudence*, *The Irish Jurist*, n.s. 2 (1967), pp. 151-64.

least fourteen times in his works (29). Its importance was due to the fact that Lucius Licinius Crassus and Quintus Mucius Scaevola were the two advocates, and that, although Quintus Mucius Scaevola had greater expertise in *ius civile* than Lucius Licinius Crassus, the latter won the case (30).

Quintus Mucius Scaevola was certainly not the kind of *iuris consultus* described by Cicero in *de Oratore*, when he wrote that: "the learned lawyer, in and by himself, is nothing but a circumspect and sharp kind of pettifogger, a crier of legal actions, a chanter of legal formulas, a trapper of syllables" (31). In the same passage continuing through the words of Antonius addressing Crassus he wrote "*sed quia saepe utitur orator subsidio iuris in causis, idcirco istam iuris scientiam eloquentiae tamquam ancillulam pedisequamque adiunxisti*" (32). However, when in *Brutus* Cicero ended the comparison between Quintus Mucius Scaevola the augur and Lucius Licinius Crassus, he began a new comparison between Quintus Mucius Scaevola the augur and Servius Sulpicius Rufus. This is where the picture of Servius's expertise is brighter. He is described as a man who devoted much time to the study of *eloquentia* so that he could

29) *Inv.* 2.122-3; *Orat.* 1.180, 1.238, 1.242-4, 2.24, 2.140-1, 2.220-2; *Brut.* 144-5, 194-8, 256; *Top.* 44; *Caec.* 18.53, 24.67, 24.69.

30) On the origin of Quintus Mucius Scaevola's arguments, see F. BONA, *Cicerone e i "libri iuris civilis" di Quinto Mucio Scevola, Questioni di Giurisprudenza tardo-repubblicana*, Milano, 1985, pp. 205-79.

31) *Orat.* 1.236, trad. E.W. SUTTON, *Cicero. De Oratore*, London & New York, 1967.

32) *Orat.* 1.236.

have become a very important *orator*, but he decided that "*in secunda arte primus esse maluisse quam in prima secundus*" (33). He had *magnum usum* and *ipsius iuris scientia*, something that placed him at a higher level compared with that of the other *iuris consulti*, skilled only in practical use of the *ius civile* (34). He had reached that level of knowledge of *ius civile* because he employed the techniques of *dialectica* along with *litterarum scientiam et loquendi elegantiam* (35). Servius was wiser than Crassus and Quintus Mucius because he was the only one who "very wisely conducted himself so as to be supreme in the one, and from the other to borrow as much as was needful to sustain the honour of the civil law and to advance himself to consular dignity" (36). Servius's portrait is completed by a reference to his legal expertise in *de Legibus* and by a human touch in a moving letter to Atticus where Cicero described Servius as a rather desperate man (37). Finally, in the words of the funeral *oratio* : "... he was no greater as a master of jurisprudence than of justice ; and thus he always referred provisions derived from

33) *Brut.* 151.

34) *Brut.* 151. For an analysis of the relationship between Cicero and Servius in the light of *Pro Murena*, see R.A. BAUMAN, *Lawyers in Roman Transitional Politics*, Munich, 1985, pp. 15-24.

35) *Brut.* 153.

36) *Brut.* 155, trad. H.M. HUBBEL, *Cicero. Brutus*, London & New York, 1926.

37) *Leg.* 1.17, also, see : *Off.* 2.65 and *Phil.* 9.10.17 ; *Att.* 10.14.

statutes and from the civil law to a standard of lenient interpretation and equity" (38).

Quintus Mucius and Servius Sulpicius did not naturally represent the normal level of the *iuris consulti* of their times. It is still a matter of discussion whether they truly reached such a high level of expertise in law, especially in the case of Servius who was skilled even at a theoretical level. Perhaps, Cicero portrayed them in such a favourable light simply for his own purposes. However, behind these pictures lay the reality of *iuris consulti* like Caius Trebatius Testa, Caius Aquilius and others, whose knowledge of *ius* developed only at a practical level reaching, nonetheless, such a considerable level that Cicero could write : ... "*existimo, iuris civilis magnum usum et apud Scaevolam et apud multos fuisse*" (39).

Undoubtedly Cicero exaggerated Servius' skills and to a lesser extent those of Quintus Mucius Scaevola. The reason is that his plan of the '*ius civile in artem redigere*' had to be based on solid ground, and the most solid ground was provided by the *iurisprudentia* at its highest level. It is not fortuitous that he portrayed at great length the two most eminent jurists of his time. That he placed Servius at a higher level to Quintus Mucius is indicative of Cicero's aim to take the attention away from the field of the pure *iuris prudentia*, (where Quintus was "master"), to focus it on *iuris prudentia* enlightened by the instruments of the

38) *Phil.* 9.10, trad. C.A. WALTER, *Cicero. The Philippics*, London & New York, 1926.

39) *Brut.* 152.

ars rhetorica, (where Servius was "master"). Cicero believed that Servius was the closest to the model of a *perfectus orator*, which Cicero believed himself to be (40).

In the perspective of Cicero's plan for the "*ius civile in artem redigere*", the link between the two examples, Servius and Quintus, was the relationship between the old *iuris prudentia* and a new developing *iuris prudentia*. This was not the only relationship between the two jurists, but it was the most important in Cicero's perspective. This explains why in Cicero's works there are not extensive descriptions of what was the actual status of *iuris prudentia* at his time, but only short descriptions of several minor jurists scattered in several different contexts. It had never been Cicero's aim to portray the history of the *iuris prudentia* in Rome through the description of the figures of the most relevant jurists, as he brilliantly did for the *ars rhetorica* in *Brutus*. His aim was to portray a new *iuris prudentia* closely connected to *eloquentia* and less important than the oratory. While Cicero was neither a lawyer nor a historian of law, when he attempted to deal with law and the history of law, he had another aim clearly in mind : to show the superiority of oratory compared to *iuris prudentia* (41).

40) Cf. F. BONA, *L'ideale retorico ciceroniano ed il "ius civile in artem redigere"*, pp. 351 ff. ; R.A. BAUMAN, *Op. cit.*, p. 23 although it seems he does not agree with the idea of the plan. Also, see A. SCHIAVONE, *Op. cit.*, pp. 38-49.

41) Cf. G. PUGLIESE, *Cicerone tra diritto e retorica, Studi in onore di A.C. JEMOLO*, pp. 563-87.

Cicero's aim is better understood in the broad perspective of *de Oratore*, a work whose main theme is oratory. His most important argument here is his attempt to reconcile knowledge and eloquence; for him true *eloquentia* must proceed from *scientia* and in reference to law it must proceed from *iurisprudentia*, enough understanding of the details of the law. In his opinion the great orator speaks with knowledge, so that the learned who cannot speak is only "half-complete": *ars rhetorica* is therefore the most important instrument his ideal politician should employ to govern the republic. Eloquence proceeds out of knowledge and the knowledge is the *scientia* Cicero emphasizes in *de Oratore*. In our case this *scientia* is the *iuris prudentia* and consists of the knowledge of law as Cicero describes in book I, particularly in 152-9 and 166-203.

This explains why Cicero devoted so much attention to the most relevant *iuris prudentes* of his time and so little concern for the situation of the practitioners of his age. Finally, in Cicero's opinion *iuris prudentia*, a practical activity, when enlightened by *ars rhetorica* was little more than a part of the knowledge required to gain the skill of oratory.