

# QUINTILIAN AND ROMAN LAW

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I. This paper is about Quintilian's *Institutio oratoria*, a work dating from the end of the first century AD which, until now, has been considered unimportant by Romanists. I would like to argue that this work is important for our knowledge and understanding of Roman law. First I will deal with the main reason why Romanists have considered Quintilian's work as unimportant, and then I will try to show that this source is valuable because it contains reliable information on Roman law as it was practised in the first century BC and in the first century AD.

II. The main reason why the *Institutio oratoria* has been disregarded by Romanists is, that the work is about rhetoric. The general view is that law and rhetoric have nothing in common; on the contrary, they are incompatible. Modern Romanists base their view on what Schulz wrote about it in his *Roman Legal Science*<sup>1</sup>. However, his standpoint was not new : it had already been defended by Beseler, Albertario, and others.

It was around 1930 that the relationship between law and rhetoric became an issue. The reason was the publication of an article by Stroux in 1926. It was called '*Summum ius, summa iniuria*. Ein Kapitel aus der Geschichte der *interpretatio iuris*'<sup>2</sup>. It is a well-known article, which you may have read. In this article, Stroux maintained that, in Rome in the late republic, the rhetoric

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<sup>1</sup> F. SCHULZ, *History of Roman Legal Science*, Oxford 1946.

<sup>2</sup> J. STROUX, *Summum ius summa iniuria. Ein Kapitel aus der Geschichte der interpretatio iuris*, intended for the *Festschrift P. Speiser-Sarasin*, Leipzig 1926, which never appeared in its entirety. The work was reprinted in *Römische Rechtswissenschaft und Rhetorik*, Potsdam 1949, 9ff.

that had originated in Greece provided the archaic formalistic Roman law with a much-needed method to construe an interpretation that fitted in with the ideas of the time. In other words, Roman law was renewed under the influence of Greek rhetoric. According to Stroux, law and rhetoric were not separate disciplines but supplemented each other and were practised by the same group of people. Of crucial importance was the introduction of the concept of *aequitas*. Stroux referred to the *causa Curiana* and Cicero's speech *pro Caecina* as classic examples of how this new method of interpretation was applied.

This article triggered all kinds of reactions among Romanists because it was involved in their discussion about interpolation research. The relationship between Roman law and rhetoric was interpreted by each camp in its own way and was used as a decisive argument in this discussion. Supporters of interpolation research, such as Beseler and Albertario, considered that references to *aequitas* and *voluntas* in the juridical sources were additions dating from the time of Justinian<sup>3</sup>. In their opinion, these were rhetorical concepts that had nothing to do with classical Roman law. Riccobono, on the other hand, followed Stroux: he took the view that these concepts had been incorporated into Roman law in the 2nd century BC under the influence of Greek rhetoric<sup>4</sup>. Riccobono initially won considerable support. He was followed by, for instance, Maschi and later even by Wenger<sup>5</sup>. However, in the end, he lost the debate. The prevailing view became, and still is, that, as disciplines, Roman law and rhetoric were worlds apart.

One might conclude from this story that the idea to separate law and rhetoric dates from the beginning of the 20<sup>th</sup> century, but this is only half the story. Interpolation criticism originated in the

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<sup>3</sup> G. BESELER, *Beiträge zur Kritik der römischen Rechtsquellen* IV, Tübingen 1920, 197 and *Juristische Miniaturen*, Leipzig 1929, 53; J. HIMMELSCHN, *Studien zur antiken Hermeneutica iuris*, in *Symbolae Fribourgenses in honorem Ottonis Lenel*, Leipzig 1935, 391ff.; E. ALBERTARIO, *Studi di diritto romano* V, Milan 1937, 91ff.

<sup>4</sup> S. RICCOBONO in his preface for the Italian edition of Stroux' monograph in the *Annali del Seminario giuridico dell'Università di Palermo* I, Milan 1938, also (in German) in the re-edition mentioned in note 2, 69ff.

<sup>5</sup> C.A. MASCHI, *Studi giuridici sull'interpretazione dei legati*, Milan 1938, 38ff. and L. WENGER, *Die Quellen des römischen Rechts*, Vienna 1953, 235ff.

Historical School, which was established at the beginning of the 19th century.

Savigny, the founder of this School, promoted 'historical legal science'<sup>6</sup>. For him, historical legal science meant the practice of positive German law and the study of legal history. The distinction that he made between historical and non-historical legal science was prompted by his opposition to French rational, natural law. Unlike French law, German law was not artificially constructed but had grown gradually from Roman and Germanic law in the course of history.

According to Savigny, when practising this historical legal science, one had to follow a historical-philosophical method, the word 'historical' implying 'grown in the course of history' and 'philosophical' implying 'dogmatic-organic'. On the one hand, legal science had to be a historical discipline in the sense that every institution had to be studied right back to its origins. On the other hand, one also had to study law 'philosophically', i.e. dogmatically, because law, according to Savigny, consisted of a number of interlinked institutions which gave rise to the rules of law which had to be applied to actual cases. A study of law had to include a study of the systematic and organic links between the various institutions. Legal Science had to be an autonomous discipline, separate from all other disciplines. The fundamental principle governing the practice and application of law was logic.

The development of legal history as a separate discipline was simply a by-product of the Historical School. Legal history was concerned primarily with dogmatics because it was recognised as a means of understanding the organic coherence of the legal institutions that had grown in the course of history. The legal historians benefited greatly from the classical philology that was developing at the time. However, the fact that the 19<sup>th</sup> century legal historians concentrated on dogmatics set them apart and prevented them from participating fully in the historical scholarship of their day. Their main object was to reconstruct

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<sup>6</sup> See in this connection the clearly written monograph by W. WILHELM, *Zur juristischen Methodenlehre im 19. Jahrhundert*, Frankfurt/Main 1958. Regarding the Historical School see also F. WIEACKER, *Privatrechtsgeschichte der Neuzeit*, Göttingen 1967, 348ff.

classical Roman law. It was only to be expected that, in doing so, they would take over the ideas of the Historical School with regard to law and legal science. For this reconstruction procedure, they used particularly the *Corpus Iuris* and the Institutions of Gaius. Other sources were regarded as non-juridical and therefore of secondary importance. Rhetorical works like those by Cicero and Quintilian were classified as non-juridical sources, because these Romanists believed that rhetoric had nothing to do with classical law.

It will now be clear that the idea to separate Roman law and rhetoric, which emerged in the Romanist literature around 1930, did not originate around that time. The separation was the direct result of interpolation criticism, but the basis for the separation goes back to the beginning of the 19th century and the founding of the Historical School. Since the Roman sources do not separate law and rhetoric and this separation fits in with the way scholarship was practised in the 19th century, I conclude that this contrast must be regarded as anachronistic. Therefore it is time to reconsider the relationship between Roman law and rhetoric and to reconsider the value of the so-called non-juridical sources.

In the last five years or so, my husband Jan Willem and I have published several articles in which we tried to show that Cicero's so-called rhetorical works, e.g. his speeches and his books *De oratore* and *Brutus*, contain extremely valuable information on the Roman law of the late republic<sup>7</sup>. Before that, Jan Willem did the same regarding the letters of Pliny the Younger<sup>8</sup>. So far, we have never caught Cicero or Pliny lacking in knowledge or understanding of Roman law. The other day we finished an article on the *causa Curiana* in which we were able to give a new interpretation of this famous lawsuit just by looking very carefully at what Cicero says about it in his *De oratore* and in *Brutus*. Today

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<sup>7</sup> J.W. TELLEGEN, *Savigny's System and Cicero's Pro Caecina*, in *OIR* 2 (1996) 86ff.; O.E. TELLEGEN-COUPERUS, *La loi Rupilia et l'édit 'si qui perperam iudicasset' de Verrès*, in *OIR* 4 (1998) 85ff.; O.E. TELLEGEN-COUPERUS and J.W. TELLEGEN, *Vrouwenvoogdij: Nihil hoc ad ius, ad Ciceronem*, in *Een Rijk Gerecht, Opstellen aangeboden aan prof. mr. P.L. Nève*, Nijmegen 1998, 431ff.

<sup>8</sup> J.W. TELLEGEN, *The Roman Law of Succession in the Letters of Pliny the Younger I*, Zutphen 1982.

I want to leave Cicero alone and turn to Quintilian, who is also regarded as an author of so-called non-juridical literature.

III. In my view, Quintilian's *Institutio oratoria* is a very useful book for Romanists, because the book contains a lot of information on Roman law as it was practised in the first century BC and the first century AD and because this information is reliable. I have three arguments to support my view. The first argument concerns the author, the second one concerns the way in which the book has come down to us, and the third and of course most important argument is the content of the book.

a. M. Fabius Quintilianus was a Roman citizen who was born in Calagurris, a town in Northern Spain, about 35 AD<sup>9</sup>. He was sent to Rome for his education, where, like all boys from the upper class, he was trained in rhetoric and law. He then went back to Spain. There he had a successful career, probably as an advocate. Anyway, he made a very good impression on one of the Roman governors of Spain, Ser. Sulpicius Galba. This is the same Galba who, after the death of Nero in 68, became emperor of the Roman Empire, but only for a short time. It was Galba who brought Quintilian to Rome.

In Rome, Quintilian had a successful career as an advocate in civil and criminal cases. He must have acquired an excellent reputation, for, a few years later, Emperor Vespasian appointed him as the first professor of Latin rhetoric who was to receive a salary from the imperial treasury. He had this job for 20 years. Among his pupils were Pliny the Younger and probably also Tacitus. It is more than likely that also some of the people whom we know as jurists were taught by him, because they all had important political careers, and in order to do so, they had to learn how to speak well in public. Anyway, after 20 years of teaching, Quintilian was especially honoured when Emperor Domitian, who had adopted his two grandnephews, asked him to educate them. It was at this time that he also wrote his *Institutio oratoria*. Quintilian died approximately 100 AD, maybe in 96.

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<sup>9</sup> Cf. G. KENNEDY, *Quintilian*, New York 1969.

It is obvious that a person who had a very successful career in Rome not only at the bar but also as a teacher of future politicians, who had to establish a reputation as good advocates and good speakers in public, must have had a thorough knowledge of Roman law. Therefore, when composing his *Institutio oratoria*, he knew what he was doing.

b. My second argument for the reliability of Quintilian's *Institutio oratoria* is the fact that it has come down to us directly and completely. The book seems not to have been popular in Antiquity; it was probably regarded as too old-fashioned and too scientific<sup>10</sup>. Maybe that has saved it from being tampered with. Whereas the texts of the classical jurists have been rearranged and partly rewritten by Justinian's compilers to make them fit into the Digest, the *Institutio oratoria* was left alone. Rhetoric was also popular in the eastern part of the Roman Empire, but there students will have preferred Greek textbooks (e.g. Libanius). So Quintilian will only have been read in the western part of the Empire. We know that, in the 6th century, after the fall of the Western Empire, Cassiodorus had a copy in his library and a few centuries later, in the Carolingian period, some French monasteries played an important part in the transmission of Quintilian's work<sup>11</sup>.

It was not until the 14th century that it really became popular, thanks to the enthusiasm of Petrarch, although he had only a fragmentary text at his disposal. In the 15th century, a complete manuscript was discovered by Poggio, a secretary to the pope, who during the Council of Konstanz (1414-1417) had the opportunity to visit the monastery of Sankt Gallen to search for classical texts. Ever since, it has had a lot of influence on rhetoric and education and even on literature. I do not know what influence it had on law, but it has been taught at the universities in Europe to students in law and theology. At the beginning of the 19th century books on rhetoric were published in Germany, Britain and France, the authors of which were obviously familiar with Quintilian's

<sup>10</sup> See J. ADAMIETZ, *Quintilians 'Institutio oratoria'*, in ANRW II, 32, ed. W. HAASE, Berlin-New York 1986, 2226ff., in particular 2266.

<sup>11</sup> See L.D. Reynolds and N.G. Wilson, *Scribes and Scholars. A Guide to the Transmission of Greek and Latin Literature*, 3rd edition, Oxford 1991, passim.

*Institutio oratoria*<sup>12</sup>. However, the early 19th century also saw the rise of the Historical School, and it is not surprising that, ever since, lawyers have no longer been interested in a book on rhetoric. There have been attempts to revive interest for rhetoric in the 20th century – we all know the names of Perelman and Viehweg – but they have had hardly any success with the Romanists.

The point I want to make is that, because the *Institutio oratoria* has come down to us directly and completely, we can trust that the text has not been tampered with and that it still contains Quintilian's words as he wrote them.

c. The third argument to support my view that the *Institutio oratoria* contains valuable information on Roman law is the content of the book. It has not been composed as a regular textbook, but it propounds for an orator a training in character and oratory from birth. The work contains 12 books. In the first book, Quintilian presents his views on the education of children. In books 2-11, he deals with the five tasks an orator has to fulfil, in exactly the same way as the Sophists had done hundreds of years earlier. First he must find out what he wants to say, i.e. he has to find his arguments (*inventio*). Then he must establish the order in which he wants to present these arguments (*dispositio*). Thirdly he must determine which style and figures of speech he has to use to enhance the effect of his arguments (*elocutio*). Then he must learn his speech by heart (*memoria*). And finally he must prepare the presentation (*actio*). In the last book, book 12, Quintilian discusses the concept of the *bonus vir*. Here he deals with questions like: is a *bonus vir* allowed to lie? Quintilian was realistic enough to answer this question in the affirmative: in some cases, the advocate is allowed to conceal the truth from the judge (*Inst.or.*12.1.36).

For Romanists, books 4, 5 and 6 (on *inventio*) seem to be the most interesting ones because they contain a lot of legal reasoning. Still, the other books are interesting as well because Quintilian

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<sup>12</sup> K.S. ZACHARIA, *Anleitung zur gerichtlichen Beredsamkeit*, Heidelberg 1810; H. BLAIR, *Lectures on Rhetoric and belles lettres*, 3 vols., London 1812. DELAMAILLE, *Essai d'institutions oratoires à l'usage de ceux qui se destinent au Barreau*, 2 vols., Paris 1816. In the Netherlands one of the leading lawyers, Johannes VAN DER LINDEN, wrote a booklet called *De ware pleiter*, which was published in 1827 and reprinted The Hague 1989.

illustrates his statements all the time with examples from legal practice. Of course the large criminal trials and the trials which took place before the *centumviri* feature most because it was in important trials that an advocate could display all his talents and establish his reputation. Besides, these examples were easily available because, like in the days of Cicero, the leading advocates used to publish their speeches.

Quintilian often refers to lawsuits in which Cicero acted as an advocate, particularly to the *pro Milone* and the *pro Caecina*, and to trials in which Cicero acted as prosecutor, for instance to the speeches against Verres and against Catiline. He admired Cicero as the greatest Roman orator ever. By comparing these texts with the speeches as they have come down to us, we can establish that Quintilian did render Cicero's words properly even though not always literally. Sometimes he also quotes arguments put forward by Cicero's opponents, for instance in the trial against Milo. Since only Cicero's speeches have come down to us, it is all the more exciting to get a glimpse of the arguments of the other side, to be able to '*audire et alteram partem*'. Finally, he sometimes quotes from one of Cicero's speeches, which have not survived. We know, for instance, only some fragments from his *pro Gallio* thanks to Quintilian.

Of course Quintilian does not limit his examples to trials which took place in the first century BC. He also gives examples of trials which took place in his own time, but much less frequently. He mentions Domitius Afer as one of the great orators whom he himself had seen in action. He also quotes orators like Gaius Cassius and Publius Celsus, but they are not 'our' jurists Cassius Longinus and Iuventius Celsus *pater*. This brings me to another striking point, namely that Quintilian does refer to jurists living at the time of the late Republic, for instance to Quintus Mucius Scaevola, Cascellius and particularly to Servius Sulpicius Rufus, but that he does not mention any jurists of his own time; he only occasionally refers to the jurists in general, e.g. '*inter consultos*' (*Inst.or.*7.6.1).

Despite the fact that Quintilian gives examples of lawsuits which took place before or in his own time, Romanists do not attach much value to his work because - they say - he makes mistakes. In



their view his examples are unreliable and are therefore of very dubious worth as evidence for legal practice in the late Republic and the early Empire. One of the Romanists who hold this view is Olivia Robinson. In her book on the criminal law of ancient Rome, she refers to Quintilian several times. The first time she does so, she immediately adds that he is not altogether reliable. In a note she gives an example, namely that 'he talks sometimes of a husband's right to kill his adulterous wife, a non-existent right since such killing was specifically forbidden in the *lex Iulia*'<sup>13</sup>. Of course she refers to the *lex Iulia de adulteriis coercendis* made by Augustus in 18 BC. She does not mention any texts from the *Institutio oratoria*, but there are several places where Quintilian refers to this subject, i.e. *Inst.or.*3.11.7, *Inst.or.*5.10.104, and *Inst.or.*7.1.7. Here I will discuss only the first one and I will argue that Quintilian's references to the rules on adultery correspond perfectly with the texts of the classical Roman jurists on this subject.

In book 3.11, Quintilian deals with the way in which one can determine the question on which the case turns. 'We ask whether a thing has been done, what it is that has been done, and whether it was rightly done.' The next step is how to defend the accused, in particular when he has admitted the act. Quintilian calls the method by which an admitted act is defended, *ratio* or motive. He refers to other authors who think there may be more motives to one question, and that in such cases the judge will have to decide on as many points as the number of alleged motives for the deed. However, according to Quintilian, it can also be the other way around : one motive may also involve several questions. He then illustrates his view with an example, which turns on a case of adultery. The text - with my own translation - runs as follows :

*Inst.or.*3.11.7

*Sed et una causa plures habere quaestiones et iudicationes, ut ego arbitror, potest: ut in eo, qui cum adulteram deprehensam occidisset, adulterum, qui tum effugerat, postea in foro occidit; causa enim est una: adulter fuit; quaestiones et iudicationes, an illo tempore, illo loco licuerit occidere.*

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<sup>13</sup> O.F. ROBINSON, *The Criminal Law of Ancient Rome*, London 1995, 7 with note 75 (on p.108)

But one motive may, in my opinion, also involve several questions and points for judgement, as, for instance, in the case, where he who catches an adulteress and kills her, later kills the adulterer who had escaped earlier, in the market place ; then there is only one motive : he was an adulterer. But the questions and points for judgement are whether it was lawful to kill him at that time, at that place.

Robinson is right when she states that the *lex Iulia de adulteriis coercendis* forbade a husband to kill his wife caught in adultery, but that is not the whole story. Actually the law begins by stipulating that a father has the right to kill his daughter when caught in adultery, if she is in his *potestas* or if he had conveyed her into the *potestas* of her husband. He was also allowed to kill the adulterer but only if he catches them in his own house or in that of his son-in-law and if he kills him right away, together with his daughter. This is stated explicitly by the jurists Papinian, Paul, and Ulpian in their respective books on the *lex Iulia de adulteriis* and has been described in detail by Robinson herself in her book on Roman criminal law<sup>14</sup>. The texts by Papinian and Ulpian have come down to us via the Digest, Paul's texts via the *Collatio* and the *Pauli Sententiae*<sup>15</sup>. The *Collatio* text is the more detailed one, so I will reproduce the relevant clause from that collection, again with my own translation.

#### Collatio 4.2.3

*Secundo vero capite permittit patri, si in filia sua, quam in potestate habet, aut in ea, quae eo auctore, cum in potestate esset, viro in manum convenerit, adulterum domi suae generive sui deprehenderit isve in eam rem socerum adhibuerit, ut is pater eum adulterum sine fraude occidat, ita ut filiam in continenti occidat.*

But in the second chapter it [i.e. the law] allows a father who has his daughter in his *potestas* or who has brought about her passing into the *manus* of a husband when she was in his *potestas*, and who has caught her in adultery in his own house or in that of his son-in-law or if the latter has to that end brought in his father-in-law, it allows this father to kill this adulterer without risk, provided that he also immediately kills his daughter.

<sup>14</sup> O.F. ROBINSON, *The Criminal Law of Ancient Rome*, London 1995, 60f.

<sup>15</sup> Pap., D.48.5.21 and 23 ; Ulp., D.48.5.22 and 24; Coll.4.2; Paul.Sent.2.26. Coll.4.2 also contains a number of texts by Papinian.

Now let us return to the text where Quintilian is referring to this matter. He does not specify the relationship between the person who kills and the adulterers. Still, both the English and the German translators of Quintilian's work explicitly translate, or should I say interpret, the killer as the husband<sup>16</sup>. So does Robinson and she concludes Quintilian is wrong. When one interprets the text in this way, it does not make sense indeed. However, it does make sense when one assumes that it was the father who killed the adulterers. Angelika Mette-Dittmann has already pointed this out in her book on the marriage laws by Augustus<sup>17</sup>. Quintilian takes it for granted that the person who kills the adulterers was allowed to do so. This person can only be the father of the adulterous woman. What is interesting for Quintilian is the question of whether the father would still go unpunished if he killed the adulterer later, after he had run away from the house, and in a different spot. These were the two questions as a result of one act, to be decided by the judge.

I hope I have made it clear that what Quintilian wrote about the rules on adultery is perfectly in accordance with Roman law as described by the Roman jurists. Both here and elsewhere, he stresses that it was important that the killing took place immediately, at the moment of discovery and at the place of discovery<sup>18</sup>. This was also the purport of the law in question. I think we may conclude that the *Institutio oratoria* is a reliable and therefore valuable source of information on Roman law.

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<sup>16</sup> H.E. BUTLER, *The institutio oratoria of Quintilian* I, London 1920 (reprinted 1980) 525; H. RAHN, *Marcus Fabius Quintilianus. Ausbildung des Redners I*<sup>2</sup>, Darmstadt 1988 (reprinted 1995) 395.

<sup>17</sup> A. METTE-DITTMANN, *Die Ehegesetze des Augustus. Eine Untersuchung im Rahmen der Gesellschaftspolitik des princeps*, Stuttgart 1991, 118 note 463.

<sup>18</sup> See also Quint., *Inst.or.* 5.10.104 and 7.1.7.