

## BOOK REVIEW

*Tamás Nótári: Jog, vallás és retorika. Studia Mureniana* [Law, Religion and Rhetoric. *Studia Mureniana*]. Lectum Kiadó, Szeged, 2006. 322 pp.

It was three decades ago when Alfons Bürge analysed the *Pro Murena* by Marcus Tullius Cicero from a legal point of view in the professional literature of the last few *decennia*.<sup>1</sup> Bürge closely examined the paragraphs dealing with the *contentio dignitatis* of the *oratio*, which he called *Juristenkomik* (Cic. *Mur.* 22–30). After such an antecedent, it is no easy task to analyse the same speech from the perspective of legal history. After exploring the legal, historical and rhetorical background of the *Pro Murena*,<sup>2</sup> the work of Tamás Nótári (associate professor of the Károli Gáspár University) aims to analyse paragraphs twenty-six and twenty-seven, primarily from the aspect of legal history, and due to the character of the source, in light of religious history and the history of rhetoric as well. Because of the interdisciplinary nature of this study, its subject and aim—and therefore its methodological approach—are on the one hand made narrower, while on the other hand wider and more arborescent than Bürge’s monography. It is narrower because after giving a more general overview of the historical and legal background of the *Pro Murena* in the first chapter, it outlines the career of the strategist, lawyer and orator, reviews the opinions appearing in the *Corpus Ciceronianum* and presents the theoretical and practical aspects of the Ciceronian sense humour, but does not analyse the whole *oratio*, not even the entire *contentio dignitatis*, focusing only on paragraphs 26 and 27—i.e. the eleventh *caput* of the speech. It is wider since the analysis is not devoted strictly to textual content, but also takes into consideration the questions arising in connection with it.

Following the historical, legal and rhetorical background outlined in the first chapter, the core issue dealt with in the second and third chapters concerning paragraphs twenty-six and twenty-seven is conservatism in the forms of law in the Archaic Age, which is described by Cicero—in accordance with the

<sup>1</sup> Bürge, A.: *Die Juristenkomik in Ciceros Rede Pro Murena*. Zürich, 1974.

<sup>2</sup> The Hungarian translation of the *Pro Murena* see Nótári, T. (ed.): *Cicero–Négy védőbeszéd. (Cicero–Four speeches of defence.)* Szeged, 2004. 73–132.

rhetoric situation rather than his own conviction—in a way that provokes a smile. More precisely, its austere and pragmatic adherence to the texts of legal acts, which sometimes opposes the real life situations and the *ius*, is designed to create the idea of justice. In searching for the source of this rigorousness—which deeply interpenetrates the whole of Roman intellectual life—and exploring Cicero’s attitude to the literal interpretation of a statute or its interpretation based on equity, the thesis makes several side-tracks that do not belong to the survey of law, or legal history, but rather to the history of religion and literature. The analogies and the consequences that can be drawn from these, however, lead to a better understanding of the structure of different legal institutions (e.g. the *legis actio sacramento in rem*)<sup>3</sup> and of how they are embedded in the antique world of thinking and belief, which explains the wide-ranging complexity of the subject matter and methodological approach in the present paper. As the survey progresses, these seemingly scattered threads meet in the end to form a concise, organic synthesis. The widely laid theme springs from and returns to the analysis of one single source—coherence assured by the source analysed, the two Ciceronian paragraphs. Naturally, the limits of this study do not allow for a full-length presentation of the antique sources related to each question and legal institution in addition to various opinions appearing in literature, nor do they allow to argue for or against these, which in many cases did not even seem to be necessary since our aim was not to exceed the limits of the dissertation by exploring every detail of these questions and legal institutions, but to create an overall picture from their structural outline—as the author confesses in his *Preface*.<sup>4</sup>

In the first chapter, Nótári attempted to outline the historical background of the *Pro Murena*, comparing the opinions drawn up in other parts of the *Corpus Ciceronianum* in order to draw a line between the political-rhetorical situation and statements originating from personal conviction. During this process, the author tried to pay close attention to some of the means of the Ciceronian *eloquentia*. Lucius Licinius Murena and Decimus Iunius Silanus, brother-in-law of Marcus Porcius Cato, won the elections for *consulship* in 63 BC. They also had two rivals: Servius Sulpicius Rufus, the most excellent jurist of the age, and the notorious Lucius Sergius Catilina. 63 BC was one of the most critical periods of the Roman Republic, because it was the time of the second Catilinan conspiracy. As *consul*, Cicero could have been motivated to accept

<sup>3</sup> Cf. Földi, A.–Hamza, G.: *A római jog története és intézményei* (History and Institutes of Roman Law). Budapest, 2005. 167. sqq.

<sup>4</sup> Nótári: *op. cit.* 7. sqq.

the defense of Murena against his friend, Servius Sulpicius, primarily by the fact that in early 62 BC it would have meant extreme danger to the state if only one *consul* had taken over control of state affairs.<sup>5</sup> Elections were necessarily accompanied by *ambitus*, a form of corruption that was first sanctioned in 432 BC. Acceptance of the *lex Tullia de ambitu* was forced through by Cicero himself in 63—encouraged by Servius Sulpicius among others—in order to sharpen the sanctions. It penalized corruption during elections by banishing the guilty party from the *senatus* and denied his right to participate in future elections in addition to imposing ten years of exile.<sup>6</sup>

In the *Pro Murena*, Cicero gives primacy to Murena in opposition to both the *iurisprudentia* and the *eloquentia*. The question arises, however, as to what extent these statements reflect his own personal convictions. Therefore, after sketching the career of L. Licinus Murena, it seemed worthwhile to the author to have a quick look at the evaluation of the *res militaris* in the *Corpus Ciceronianum*. He concludes that Cicero generally did not find the *gloria militaris* more valuable or useful to the state than leading the peaceful life of a citizen and hence the heroic task of serving the public. The career of Servius Sulpicius Rufus is remarkable considering his far-reaching work and his pioneering methodological activities, not only from the point of view of the analysis of the *Pro Murena*, but also in terms of jurisprudence at the end of the republic. In the *Pro Murena*, the orator does not wish to degrade the merits and knowledge of Servius Sulpicius against Murena. Disconnecting this from the personality of the two candidates, he instead compares the merits of the general with those of the jurist and decides to the benefit of the former, not so much in keeping with his personal opinion but rather because the historical and rhetorical situation forces him to do so. The author had also a brief look at the “*Cicero iuris consultus*” or Cicero’s relation to *iurisprudentia*.<sup>7</sup> He concludes, that many of Cicero’s works testify to his deep and overall legal knowledge,

<sup>5</sup> Nótári: *op. cit.* 15. sqq.

<sup>6</sup> Nótári, T.: *Quaestio de ambitu. Collega* 2001. 5. 43. sqq.

<sup>7</sup> Nótári: *op. cit.* 29–52. About the topic *Cicero iuris consultus* see also Hamza, G.: *Das Vorbild des Rechtsgelehrten bei Cicero. Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae Sectio Juridica* 24. 1982. 57. sqq.; Hamza, G.: *Ciceros Verhältnis zu seinen Quellen, mit besonderer Berücksichtigung der Darstellung der Staatslehre in De re publica. Klio* 67. 1985. 492. sqq.; Hamza, G.: *Riflessioni sulla teoria ciceroniana dello Stato. Il pensiero politico* 29. 1996. 83. sqq.; Hamza, G.: *Bemerkungen über den Begriff des Naturrechts bei Cicero. In: Nozione formazione e interpretazione del diritto dall’età romana alle esperienze moderne. Ricerche dedicate al professore Filippo Gallo. vol. I. Napoli, 1997. 349. sqq.*

and he was convinced that knowledge of *iurisprudentia* was a necessary tool for an *orator*.<sup>8</sup> Given the fact that in the *studiorum atque artium contentio* Cicero applies the oratorical means of humour, Tamás Nótári also deemed it necessary to briefly examine humour and irony in light of antique rhetoric, and especially in theoretical works by Cicero.<sup>9</sup>

In connection with paragraph 26 of the *Pro Murena* as a source to be analysed, the author attempted to find an answer to problems related to the structure of the *legis actio sacramento in rem* in the second chapter. In view of the history of Roman religion and the field of *ius sacrum*, he tried to exploit the conclusions that could be drawn from these fields. As the height the *Juristenkomik*, Cicero describes one version of the *manum consere* ceremony applied to the *legis actio sacramento in rem* plots of land. After placing the act of *manum consertum* within the organisational procedure of the *legis actio*, it seemed useful to the author to observe how, why, and to what extent the preoccupation with text so mocked by Cicero characterised Roman (legal) thinking. Beginning with the well-known fact that one lost a lawsuit if he made even a single verbal mistake in his speech during the process of the *legis actio*, the author has examined many examples to observe the power of verblativity, more precisely that of the spoken word, to create reality, as manifest in the *ius sacrum* and in religious thinking. From these, one can gain a clear picture of the neurotically rigorous connection between Roman religion and jurisprudence of the Archaic Age and the spoken word. While conducting research into the symbolic meaning behind use of the rod instead of the lance as the symbol of ownership in the *legis actio sacramento in rem*, the author observed many cases of the application of the rod and lance and their relation to the *dominium* and the *imperium*, he paid special attention to the *lituus* of the *augur*, the *commoetaculum* of the *flamen Dialis* and the *fascis* of the *lictores*.<sup>10</sup>

From all of this, it can clearly be drawn the conclusion, that the rod and the lance served as generally accepted symbols of power in Roman culture, not only in rituals connected with the *legis actio sacramento in rem* ceremony,

<sup>8</sup> Nótári, T.: *De oratoris perfecti institutione*. *Collega* 2003. 3. 47. sqq.

<sup>9</sup> See also Nótári, T.: *Studiorum atque artium contentio* (Cic. Mur. 22–30). *Aetas* 1999. 1–2. 224. sqq.; Nótári, T.: *Jogtudomány és retorika – Cicero pro Murena 26*. *Jogtudományi Közlöny* 2001. 12. 470. sqq.

<sup>10</sup> See also Nótári, T.: *On Some Aspects of the Roman Concept of Authority*. *Acta Juridica Hungarica* 46 (2005) 95. sqq.; Nótári, T.: *Festuca autem utebantur quasi hastae loco*. *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae*. 51. 2004. 133. sqq.; Nótári, T.: *Remarks on the Origin of the legis actio sacramento in rem*. *Acta Juridica Hungarica* 47 (2006) 133. sqq.

which belongs to the *ius privatum*, but also in the case of many procedures and institutions belonging to the *ius publicum* and the *ius sacrum*. The *ius fetiale* (the archaic law of war and peace) and the *legis actio sacramento in rem* offered many parallels, and there were many features common to the structure of the *vindicatio* and also to one of the plots in Plautus' comedy, *Casina*, in which the right of disposition over a slave girl was decided through battle accompanied by an ordeal. These examples and the accompanying arguments lead the author to the following—quite convincing—theory. Opinions formed in opposition to one another, and which search for the origin of the *legis actio sacramento in rem* either in the realm of private battle or in sacredness, serve to strengthen each other and reach the same conclusion, and can therefore be integrated into a single theory. The sacred element can be clearly traced in the procedure of the *vindicatio*, either from the oath, the *sacramentum*, or in the form of literal compliance with the *carmen* to be pronounced. One can find the motive for the battle either in the etymology of the *vindicatio* or in the application of the lance, but it was the *hasta* that held an additional sacral content in the imagination of the Romans, which cannot be neglected in the case of archaic civil law either. Applying the rules of this genre, Plautus presents a sort of a property case, the result of which was determined by a supernatural decision,—meaning the outcome of the controlled and restricted private battle defined by *sortio*. On this basis, the author assumes that the procedure of the *legis actio sacramento in rem* as we know it today was originally an ordeal fought with arms.<sup>11</sup>

In the third chapter the author studied paragraph 27 of the *Pro Murena*, beginning with the notes related to marital law, after which he tried to find the place of the statement “*in omni denique iure civili aequitatem relinquerunt, verba ipsa tenuerunt*” in the context of legal history and Cicero's works. Observing the *confarreatio* among the acts that the *manus* originates from, and the marriage ceremonies, one could clearly see that in the example the *orator* cited, Cicero made an ironic reference to the sentence “*ubi tu Gaius, ego Gaia*”—which corresponds with the argumentation and translation of Gary Forsythe<sup>12</sup>—a sentence the author interpreted as meaning “*where thou art happy, I am happy*”. In the course of these examinations, Nótári devoted some time to the presence of *flamen Dialis* in the *confarreatio*, and concluded—with the help of the parallels drawn from the cult of Zeus Naios of Dodona—that part of the

<sup>11</sup> Nótári: *op. cit.* 53. sqq.

<sup>12</sup> Forsythe, G.: *Ubi tu gaius, ego gaia*. New Light on an Old Roman Legal Saw. *Historia* 45 (1996) 240. sq.

instructions regarding the *flamen* and the *flaminica Dialis* hide hierogamic notions, which must have had a great significance in the ritual guarantees of fertility in marriage.<sup>13</sup> When talking about the *status* of women Cicero mentions that women were generally placed under power. It seemed logical, therefore, to more thoroughly examine certain institutions of the *manus mariti* and also of the *patria potestas*—because of the analogies based on the character of the sources.<sup>14</sup> Regarding the question of whether the *uxor in manu* is a member of the *agnatio*, the author followed the observations of Róbert Brósz and gave a negative answer.<sup>15</sup>

In the second part of this chapter the author discussed at length the aspect that archaic law insisted on the precise order of the pronounced words regarding the clarification of Cicero's comment "*in omni denique iure civili aequitatem relinquerunt, verba ipsa tenuerunt*". Considering that Cicero placed emphasis on the contradiction between *verba* and *aequitas*, as a guideline Tamás Nótári tried to trace developments in the meaning of the expression *interpretatio*, during which the *interpretatio* merged aspects of the religious sphere and grammar and eventually reached the meaning of interpretation that was determinant in the Classic Age. The author then studied the proverb "*Summum ius summa iniuria*", which became known in Cicero's works and occupied a significant place among the maxims of the logic of law that functioned as a means of legal interpretation, by examining its appearance in antique literature, such as in the works of Terence, Columella and Cicero. The meaning of proverb crystallized in the writings of the latter, according to which it signifies the over-extended application and enforcement of law in bad faith within the process of the *interpretatio iuris*, playing off the word of the law against its meaning. The sentence "*ius est ars boni et aequi*", in harmony with the spirit of Cicero in the *Pro Murena*, formulates one of the most comprehensive fundamental principles of the *interpretatio*, which aims to offer protection against the extreme literal interpretation and application of the

<sup>13</sup> Cf. Nótári, T.: The Function of the Flamen Dialis in the Marriage Ceremony. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae Juridica* 45. 2004. 57. sqq.

<sup>14</sup> Nótári, T.: De iure vitae necisque et exponendi. *Jogtudományi Közlöny*, 1998. 421. sqq.; Nótári, T.: De matrimonio cum manu. *Jogtörténeti Szemle* 2005. 2. 52. sqq.; Nótári, T.: Quelques remarques sur le ius vitae necisque et le ius exponendi. *Studia Iuridica Caroliensia* I. 2006. 169. sqq.

<sup>15</sup> Nótári: *op. cit.* 101. sqq. See also Brósz, R.: Ist die uxor in manu ein Agnat? *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae Juridica* 18. 1976. 3. sqq.

*summum ius*. During the interpretation of this sentence, the author concluded that it became a significant means of legal development as an interaction of *iurisprudentia* and *eloquentia*.<sup>16</sup>

Finally, while examining the historical background of *Pro Caecina*, and some sources connected to the *interdictum de vi armata*, the *interdictum uti possidetis* and the *deductio*, the author studied the disposition used by Cicero in the *oratio*, which exploited the opposition between *verba* and *aequitas*, and between *scriptum* and *sententia*. The author observed the way in which Cicero regulated his argument according to the actual situation and the interest of the trial rather than according to abstract principles. In doing so, the *orator* managed—with unprecedented rhetorical genius—to make the literal interpretation of law triumph by using tools of oratory that were created precisely for application against the literal interpretation of law.<sup>17</sup>

At this stage, an explanation must be given for the title “*Law, religion and rhetoric. Studia Mureniana*”. The speeches of Cicero had practical motivations. The lessons that can be drawn from them concerning law and order and the legal procedure of the given age are necessary consequences, and the legal themes outlined in them are the means rather than the aims of the *orator*. When examining these speeches, one cannot make a strict separation between legal and philological questions. Favouring one aspect exclusively to the detriment of the other would mean destroying the organic and structural unity of the source, and this approach would also oppose the thinking of Cicero, who always aimed at complexity. In Rome, especially the Rome of the Archaic Age, legal and sacred beliefs formed an organic unity. According to today’s taxonomy, it would be justified to draw a distinction between the two, but the dangers present in the unjustified application of these modern categories in the Antique Age could hardly be avoided. If the author tries to accept this complexity, the reader might come nearer to the thinking of the Romans, who made almost no distinction between religion and politics. This is especially true in light of the fact that the examples cited in Cicero’s *Pro Murena*—which refer to the moments of the *legis actio sacramento* and *coemptio*—originate from the organic unit of the *ius* and the *sacrum*. Tamás Nótári adjuncted the notes containing valuable informations at the end of the main part of his text,<sup>18</sup>

<sup>16</sup> See also Nótári, T.: *Summum ius summa iniuria*—Comments on the Historical Background of a Legal Maxim of Interpretation. *Acta Juridica Hungarica* 45 (2004) 301. sqq.

<sup>17</sup> Nótári: *op. cit.* 137. sqq.

<sup>18</sup> *Ibid.* 155–233.

and accomplished his monography not only with lists of the abbreviated antique sources and modern bibliographical references, but also with two indices of quoted sources and subjects.<sup>19</sup> On our part we would regard it as most desirable, if the author published the whole monography—useful both for historians and lawyers—in English.

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<sup>19</sup> *Ibid.* 235. sqq.