
QUINTUS MUCIUS SCAEVOLA ONCE AGAIN

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1. The reception of Roman law, main theme of this collection of essays, nearly always had an ideological basis. In the Middle Ages it was the idea of *translatio imperii*¹ and later, in the 17th and 18th centuries, it was the idea that the main part of Roman law was the *ratio scripta*.² One of the implications of the reception of Roman law has further been that the profession of a jurist has always been modeled after the example of Roman jurists. Also here a hidden agenda or at least an implicit ideology could easily have played a role. An interesting article, in which this last hypothesis was dealt with, was published last year by the Finnish Romanist Kaius Tuori.³ In Tuori's view, the idealization of Roman jurists, especially that of Quintus Mucius Scaevola, had since the 19th century had an at least implicit ideological purpose and reflected by no means necessarily a historical reality. The "invented tradition" of a founding father of the legal science could strengthen the position of the legal science amidst sciences with better paradigmatical equipment.

These assertions go against some of our own earlier conclusions and are not in accordance with well-established research by academics such as Schulz,⁴ Wieacker,⁵ Behrends,⁶ Nörr⁷ and Talamanca.⁸ Tuori's views also contradict, at least in my view, one of the earliest treatises ever on legal history, the *Enchiridium* by Pomponius, of which fragments are handed down to us in *Digest* 1,2,2,41. Here Pomponius says:

Post hos Quintus Mucius Publii filius pontifex maximus ius civile primus constituit generatim in libros decem et octo redigendo.

* This article is a somewhat elaborated version of a brief note published in Dutch in the studies devoted to Raf Verstegen: "Een kanttekening over Quintus Mucius Scaevola en de systematisering in het Romeinse recht", in: "*Ad amicissimum amici scripsimus*" – *Vriendenboek Raf Verstegen*, K. Geens e.a. (eds.) (2004) 382–385. I thank my friend Tammo Wallinga for his kind help.

1 Paul Koschaker *Europa und das römische Recht* (⁴1966) 37–47.

2 See G.C.J.J. van den Bergh *Geleerd recht* (⁴2000), 85–90, where further references are given.

3 K. Tuori "The myth of Quintus Mucius Scaevola: Founding father of legal science?" 2004 *Tijdschrift voor Rechtsgeschiedenis* 243–262.

4 F. Schulz *Geschichte der römischen Rechtswissenschaft* (1961/1975) 76ff.

5 F. Wieacker "Vom Verhältnis der römischen Fachjurisprudenz zur griechisch-hellenistischen Theorie", 1969 *IURA* 448–477.

6 O. Behrends, *Die Wissenschaftslehre im Zivilrecht des Q. Mucius Scaevola Pontifex*, (1976) [= *Nachrichten der Akademie der Wissenschaften in Göttingen, philologisch-historische Klasse* (1976) 265–304]. Behrends emphatically stresses the Stoic influences on Quintus Mucius.

7 D. Nörr, *Divisio et partitio* (1972).

8 M. Talamanca, "Lo schema 'genus-species' nelle sistematiche dei giuristi romani" in: *La filosofia greca e il diritto romano II*, (1976).

If there is an “invented tradition” about Mucius Scaevola being the first “scientific” jurist, it is certainly a very old one! The Amsterdam School of Roman Law, guided by Hans Ankum, and of which both Eric Pool and I formed part for so many years, always emphasized the individuality of each Roman jurist and never adhered to the Historical School's paradigm that Roman jurists were “*fungibele personen*”.⁹ It is therefore worthwhile to continue the discussion on Quintus Mucius with Tuori and formulate a few provisional conclusions.

In doing so, I came across a few interesting texts on which my dear friend Eric Pool and I have both written earlier. It is needless to say that we came to different conclusions. Our debate may also reflect a period of seventeen years, during which we shared a room at Amsterdam University. It is with great pleasure that I dedicate the following thoughts to him at the occasion of his retirement from Amsterdam University and the Free University in Brussels.

2. Tuori is well aware that the sources of our knowledge of Quintus Mucius' accomplishments in jurisprudence are rather scarce, being limited to Cicero and Lenel's *Palingenesia*. However, Tuori did not deal with the details of concrete examples. It is therefore questionable whether the two chosen examples could be used as sustainable arguments in favour of Tuori's opinions.

3. We start with the fact that according to Pomponius, Quintus Mucius Scaevola was the first jurist who used the scheme *genus–species*. This is generally conceived as the first application in the legal sphere of this scheme which had its origin in Aristotelian philosophy. This topic has extensively been dealt with in the works of Wieacker, Talamanca and Nörr referred to above and may be substantiated by Quintus Mucius' division of the *genera possessionis*. This appears from a passage of Paul where he criticizes Quintus Mucius in an unusually vehement way. Shortly before, in his commentary on the Edict, Paul had made the division between possession in good faith and in bad faith. Then he continued as follows:

Digest 41,2,3,23: quod autem Quintus Mucius inter genera possessionum posuit, si quando iussu magistratus rei servandae causa possidemus, ineptissimum est,

9 See, for earlier views, the Roman jurists as “fungibele Personen”, F.C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, (³1892), 18 and 96 (in the 1814 edition: 29–30, resp. 157); see also F. Schulz, *Prinzipien des römischen Rechts*, (1934/1954), 72–73.

Earlier I have tried to show that the order of the *causae possessionis* in the titles of book 41 of the *Digest* (*pro emptore, pro herede vel pro possessore, pro donato, pro derelicto, pro legato, pro dote* and *pro suo*) still reflects an order established by Quintus Mucius. Paul's sharp criticism of Quintus Mucius is caused by the fact that in classical Roman law, apparently after Quintus Mucius Scaevola, a sharp distinction was made between *possessio civilis* and mere *detentio*, something to which Mucius referred.¹⁰ Eric Pool briefly analyzed this same text in his book on *causa*,¹¹ where he started with the following text:

Digest 41,2,3,4 Paulus XLIV ad Edictum. Ex pluribus causis possidere eandem rem possumus, ut quidam putant et eum, qui usuceperit et pro emptore et pro suo possidere: sic enim et si ei, qui pro emptore possidebat, heres sim, eandem rem et pro emptore et pro herede possideo: nec enim sicut dominium non potest nisi ex una causa contingere, ita et possidere ex una dumtaxat causa possumus.

An ingenious and meticulous translation of this text brought him to the conclusion that nearly every preceding Romanist was wrong, either by assuming interpolations or by assuming a divergence of opinions between Roman jurists. He further showed that Paul wanted to stress that property could only have one *causa* whereas *possessio* can have more *causae*. This insight has various consequences, also for our text in which Quintus Mucius is criticized. The interpretation by Eric Pool is fully convincing and makes what I have written earlier on both these texts at least partly "zu Makulatur".¹² But regarding *Digest 41,2,3,23* one may say that even if Paul's criticism is appropriate, we clearly see here one of the first attempts at a legal application of the differentiation between *genus* and *species*. This was an accomplishment in the history of the development of legal science in accordance with Pomponius' fragment where it was said that Mucius was the first to deal *generatim* with legal phenomena.¹³

4. Another example of Scaevola's systematic innovation could be his being responsible for the first application of the three standards of liability: *dolus – culpa – casus*. Kübler¹⁴ has drawn the attention to the fact that most

10 L.C. Winkel, "Usucapio pro suo and the classification of the *causae usucapionis* by the Roman jurists", *New Perspectives in the Roman Law of Property, Essays for Barry Nicholas*, Peter Birks (ed.) (1989), 215-221, esp. 219ff.

11 E.H. Pool, *Een kwestie van titels, causa van bezit, verjaring en eigendom naar klassiek Romeins recht*, (diss. Amsterdam) (1995), 20, 102ff.

12 L.C. Winkel "Usucapio pro suo" 217.

13 M. Talamanca "Lo schema 'genus-species'" 273-274, n. 737.

14 B. Kübler "Der Einfluß der griechischen Philosophie auf die Entwicklung der Lehre von den Verschuldensgraden im römischen recht" in: *Rechtsidee und Staatsgedanken*, *Beiträge zur Rechtsphilosophie und zur politischen Ideengeschichte, Festgabe für Julius*

probably this distinction goes back to the Greek scheme ἀδικία-ἁμαρτία-ἀτυχία. In its turn this scheme may be found in the anonymous *Rhetorica ad Alexandrum*, and Aristotle took it up in the fifth book of the *Nicomachean Ethics*. David Daube¹⁵ has doubted these parallels with the Greek, mainly because the Greek scheme has a background in criminal law, whereas the Roman context is private-law liability, more specifically, in the law of delict. As far as I can see these criticisms by Daube are not fully convincing and it is not without reason that scholars like Crook¹⁶ and Schofield¹⁷ criticized this part of Daube's brilliant book. References to Quintus Mucius Scaevola's attempts at systematization are found in:

Digest 9,2,31 Paulus X ad Sabinum. Si putator ex arbore ramum cum deieceret vel machinarius hominem praetereuntem occidit, ita tenetur, si is in publicum decidat nec ille proclamavit, ut casus eius evitari possit. Sed Mucius dixit, etiam si in privato idem accidisset, posse de culpa agi; culpam autem esse, quod cum a diligente provideri poterit, non esset provisum aut tum denuntiandum esset, cum periculum evitari non possit.

The important point in the text is that the application of this scheme *dolus* – *culpa* – *casus* is incongruent with *iniuria* as found in the first and third chapters of the *Lex Aquilia*, a Roman *plebiscitum* traditionally dated 286 BC. Elsewhere I have tried to argue that a date about 200 BC would be more in accordance with economic history.¹⁸ Quintus Mucius Scaevola apparently classifies liability for *iniuria*, literally without a right, with reference to the new standards of liability, as liability for *culpa*. According to our text, liability in such cases (before Quintus Mucius) was dependent on the criterion whether the gardener was on his own or on public premises. Only on public ground there was liability for *iniuria*, when tree branches were dropped. Quintus Mucius Scaevola makes the gardener only liable when there is an objectified form of *culpa*: The measure being the careful gardener. This is also the case in Aristotle, who defines liability with reference to objective standards of good behaviour. The interpretation of Scaevola has prevailed in classical Roman law, which follows

Binder, K. Larenz (ed.) (1930) 63-76.

15 D. Daube *Roman Law, Linguistic, Social and Philosophical Aspects* (1969), 138ff.

16 J. Crook "A Roman candle" 1970 *Classical Review* 361–363.

17 M. Schofield, "Aristotelian mistakes", 1973 *Proceedings of the Cambridge Philological Society* (19), 66-70.

18 L.C. Winkel, "Das Geld im römischen Recht", in: *Roman Law as Formative of Modern Legal Systems, Studies in Honour of W. Litewski*, II, J. Söndel e.a. (eds.) (2003), 251-258.

from a much later text by Ulpian in which *iniuria* is explained according to its etymology¹⁹ and is explained as synonymous with *culpa*:

Digest 9,2,5,1 Ulpianus XVIII ad ed. Iniuriam autem hic accipere nos oportet non quemadmodum circa iniuriarum actionem contumeliam quandam, sed quod non iure factum est, hoc est contra ius, id est si culpa quis occiderit: et ideo interdum utraque actio concurrit et legis Aquiliae et iniuriarum, sed duae erunt aestimationes, alia damni, alia contumeliae. Igitur iniuriam hic damnum accipiemus culpa datum etiam ab eo, qui nocere noluit.

An obvious difficulty with the equation *iniuria* = *culpa* is that not *culpa*, but *dolus* is the normal standard of liability in the Roman law of delict. Hence expressions like *sciens prudensque*, *sciens dolo malo*, *ope consilio*ve that play a role in liability: for example in the case of *furtum*.²⁰ However, liability for *furtum* is not based on a written statute like the *Lex Aquilia*, but on older, partly unwritten, customary law articulated by the Roman jurists with some very imprecise provisions of the *Law of the XII Tables* as a starting point.²¹ Therefore the problems of interpretation of the terms of the *Lex Aquilia* do not occur in cases of *furtum*. Honsell showed that a rather strict interpretation of statutes has been the dominating tendency in classical Roman law.²²

A secondary problem here relates to the history of the way in which we learnt something of the original text of the *Lex Aquilia*. We know it only indirectly through the commentaries of Ulpian in the 18th book on the *Edict*, incorporated in *Digest 9,2*, through Gaius in the third book of his *Institutes* (G. 3,210ff.) and incidentally from other, always indirect, sources. It cannot be totally excluded therefore that the word *iniuria* has been added later through interpretation of the first and third chapters of the *Lex Aquilia*. Hausmaninger, however, is of the opinion that the word *iniuria* already appeared in the original text of the first and the third chapters.²³

Interesting is Quintus Mucius' definition of *culpa*, namely not to foresee what an intelligent man should foresee. According to Kunkel²⁴ there is a clear

19 I refer with pleasure to an article of our former colleague Berthe Bergsma–van Krimpen, "Etymologische verklaringen in de *Instituten* van Gaius", 1972–1973 *Hermeneus, Tijdschrift voor de Antieke Cultuur* (44), 189–201.

20 Cf. my article "Sciens dolo malo/ope consiliove, Ancêtres des conceptions modernes?" in: *Mélanges F. Wubbe*, J.A. Ankum e.a. (eds.) (1993) 571–585.

21 Leg. XII Tab. 8, 14–17.

22 H. Honsell, "Gesetzesverständnis in der römischen Antike" in: *Europäisches Rechtsdenken in Geschichte und Gegenwart [= Fs Helmut Coing]* I, N. Horn (ed.) (1982) 129–148, esp. 141.

23 H. Hausmaninger, *Das Schadenersatzrecht der Lex Aquilia* (5th 1996) 7–8.

24 W. Kunkel, "Diligentia" 45 *SZ Rom.Abt.* 286, 344.

parallel here with Aristotle's expatiations on the ἀνὴρ σπουδαῖος (EN 1113 a 29). We hesitate to follow Kunkel here. The time in which Quintus Mucius lived was too early to assume a direct influence in Rome of Aristotle's third book of the *Nicomachean Ethics*. Elsewhere we have tried to make plausible that most of Aristotle's ethical theory became accessible in Rome only in the course of the first century BC, and not at the beginning of this century. This influence was then possible, first through the *Rhetorica ad Herennium*, secondly through a survey of ethical theory by a philosopher at the court of August, Arius Didymus, and thirdly by a paraphrase of the *Nicomachean Ethics*, sometimes attributed to Andronikos of Rhodos.²⁵

Moreover, the Aristotelian influence is not the only possibility here. Stoic influence cannot be excluded either. Kunkel²⁶ already referred to a text by Stobaeus, *Ecloga* II, 99, a text generally considered as Stoic.²⁷ However, this text is not very different from Aristotle and without raising all the difficult problems of the Aristotelian textual transmission it is difficult to say whether Scaevola's definition is indeed purely Aristotelian or mixed with Stoic thought. Kunkel assumed an interpolation here.²⁸ According to him, the compilers of Justinian in this case would have added the whole explanation of *culpa*. We are, however, nowadays much more reticent in assuming interpolations, especially "additive" interpolations.²⁹ It is not completely sure whether Mucius Scaevola or Paul is explaining *culpa*. In the first case the text could well reflect Mucius' Stoic education,³⁰ in the latter case the text could also be genuine and in accordance with the history of the transmission of Aristotle, because there is at least one more text by Paul in which there is possibly an Aristotelian influence, namely *Digest* 22,6,9,2 and 3.³¹

Yet there is room for more doubt. Daube refers to a text in the *Institutes* of Justinian in which we find another explanation of *iniuria* (*Inst.* 4,4pr.):

25 See my book *Error iuris nocet, Rechtsirrtum als Problem der Rechtsordnung, I: Rechtsirrtum in der griechischen Philosophie und im römischen Recht bis Justinian*, (1985), 72-73 esp. nn. 29 and 31; this *Paraphrasis* was printed in 1607 (not: 1617 as I wrote earlier) by Daniel Heinsius, a friend of Hugo Grotius; Grotius wrote to Heinsius on this matter on November 11, 1606; see P.C. Molhuysen, *Briefwisseling van Hugo Grotius I* (1928) n° 87, 73.

26 W. Kunkel, "Diligentia" 286, 344-345.

27 Hence H. von Arnim took it as *Stoicorum Veterum Fragmenta* III, 567.

28 W. Kunkel, "Diligentia" 285-286, 299; according to K. Visky, "La responsabilité dans le droit romain à la fin de la République" 1949 *RIDA* 3 (= *Mélanges F. de Visscher* II) 437-484, esp. 447-448, this passage on *culpa* is not interpolated; cf. A. Watson, *The Law of Obligations in the Later Roman Republic* (1965/1984) 238; G. MacCormack "Aquilian *culpa*" in *Daube Noster*, A. Watson (ed.) (1970), 213ff.

29 E.H. Pool *Een kwestie van titels* 19, with further references.

30 See O. Behrends *Wissenschaftslehre*, 19ff., 281ff.

31 L.C. Winkel *Error iuris nocet*, 68ff.

Generaliter iniuria dicitur omne quod non iure fit: specialiter alias contumelia, quae a contemnendo dicta est, quam Graeci ὑβριν appellant, alias culpa, quam Graeci ἀδίκημα dicunt, sicut in lege Aquilia damnum iniuria accipitur, alias iniquitas et iniustitia, quam Graeci ἀδικίαν vocant ...

In the second meaning of *iniuria* = *culpa*, a reference to ἀμάρτημα instead of ἀδίκημα would have been correct. So Daube says that when the scheme *dolus* – *culpa* – *casus* is wrongly equated with the Greek equivalents even in the time of Justinian, there is no reason for the assumption that Quintus Mucius would have adopted the Greek scheme. The correctness of Daube's opinion depends heavily on the assumption that Justinian's compilers, like some earlier classical jurists, were acquainted with Aristotelian ethical treatises. This assumption is denied by Kübler. On the one hand, the 6th century is the golden age of the commentators of Aristotle's *Ethics*, and on the other hand there is a parallel of the equation of *culpa* with ἀδίκημα in the *Collatio legum Mosaicarum et Romanarum* (2,5,1)³² and in the *Paraphrasis* of the *Institutes* by Theophilus. Although there still remain valid reasons for doubt, this cannot be further elaborated on here.

5. However, it is important to note that in a later decisive stage of classical Roman law we see with even more probability the introduction of non-legal, philosophical distinctions. Two hundred years after Quintus Mucius Scaevola, after renewed attempts at systematization by Masurius Sabinus,³³ Gaius, in his *Institutes*, divides the obligations into *obligationes ex contractu* and *obligationes ex delicto*.³⁴ It has been remarked earlier already that this division must stem from the Aristotelian distinction between voluntary and involuntary synallagmata.³⁵ In humanist jurisprudence Grotius already saw this in *De iure praedae*.³⁶ In the neo-humanist approach to Roman law one may refer here to Fritz Schulz.³⁷ He writes: "Gaius probably read Aristotle's text either in Aristotle's work or in an intermediate source." An important remark indeed, albeit that the history of the textual transmission of the fifth book of the *Nicomachean Ethics* is far less complicated than the transmission of the text of

32 From this fragment we know that Paul was the author of the whole text which is similar to the fragment of the *Institutes* of Justinian, (*libro singulari et titulo de iniuriis*).

33 Cf. O. Lenel, *Das Sabinussystem* (1892).

34 Gaius III 88.

35 See Aristotle, *Nic. Ethics* V 1131 a 1ff.

36 Hugo Grotius, *De iure praedae*, ed. Hamaker (1868), 15. I have not yet been successful in tracing back this observation to the humanistic literature of the 16th century. It could not be found in Cujacius, *Observationes et Emendationes*. It may possibly be attributed to Donellus.

37 F. Schulz, *Classical Roman Law* (1951/ 1992) 468.

the third book.³⁸ Anyhow, this division has had a far-reaching influence in every codified system of private law. It is a well-known fact that this division did not fit perfectly into legal reality, hence the eventual introduction of obligations *quasi ex contractu* and *quasi ex delicto* in Justinian's *Institutes*. It should be borne in mind that already Gaius created an extra category in his *Res cottidianae*. All attempts at systematization in the law of obligations attempt to harmonize two fundamentally different grounds for an obligation with mixed forms of liability in legal reality (see e.g. problems of delictual or contractual liability in pre-contractual situations). Only in the development of modern private law – according to some scholars – do we see an approach between the liability for contracts and liability for delicts.³⁹

6. Nevertheless, these examples may suffice to show that coherent philosophical theory, if introduced in law at all, has always been “patchwork” and has hardly led to a systematic approach to all legal phenomena. Even Leibniz in the 18th century was not able to present legal science in a completely systematic (axiomatic) system.⁴⁰ Maybe this explains why nowadays in the Netherlands the scientific basis of legal science is questioned from time to time.⁴¹

We may conclude that Quintus Mucius Scaevola, even if he was not beyond criticism, possibly was responsible – as far as textual evidence can be given – for at least one major attempt at systematization which is still visible in modern law. This, in my view, is not in accordance with the previously mentioned opinions of Tuori. Although Tuori did thorough research, especially collecting older 19th century literature on the history of Roman legal science from Gustav Hugo onwards, he runs the risk of reviving the old, mostly abandoned, idealization of the independent genius of the Roman jurist as was done in the Historical School. As far as I am concerned we are left here with only two options: Either one follows this old opinion or one admits that Roman science, also legal science, developed by following Greek philosophical and rhetorical

38 See L.C. Winkel *Error iuris nocet*, 68ff.

39 Cf. the problems of classification of cases of *culpa in contrahendo* as delictual or as contractual obligations, on which my article “*Culpa in contrahendo* in Roman law and in some modern Dutch court decisions” in: *Viva Vox Iuris Romani, Essays in Honour of Johannes Emil Spruit*, L. de Ligt e.a. (eds.) (2002) 149-157.

40 Cf. F. Sturm *Das römische Recht in der Sicht von Gottfried Wilhelm Leibniz* (1968).

41 C.J.J.M. Stolker “Ja geléerd zijn jullie wel”, *Over de status van de rechtswetenschap*, 2003 *Nederlands Juristenblad* 766-778.

models.⁴² Regarding the latter, and bearing in mind the process of acculturation, one may rightly ask: "Who was the first Roman jurist?" Already Pomponius was curious about this question.

I trust that this conclusion will fit into a collection of essays devoted to the problems of the reception of Roman law. May it please a scholar who so systematically and thoroughly analyzed basic problems of classical Roman law – Eric Pool.

42 Some new literature on the topic of philosophical influence on Roman law, not quoted by Tuori: P.A. van der Waerdt "Philosophical influence on Roman jurisprudence? The case of stoicism and natural law" *ANRW* II 36–7, H. Temporini (ed.) (1994) 4851–4900; M. Ducos "Philosophie, littérature et droit à Rome sous le Principat", *ANRW* II 36–7, H. Temporini (ed.) (1994) 5134–5180; L. Winkel, "Le droit romain et la philosophie grecque, quelques problèmes de méthode" 1997 *Tijdschrift voor Rechtsgeschiedenis* 373–384.