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THE DEATH PENALTY, THE “MARRIAGE PENALTY” AND SOME REMARKS ON THE UTILITY OF SENECA RESEARCH IN THE STUDY OF ROMAN LAW¹

According to the general view of the Romanists, the profession of the jurist and of the orator seem to delineate the strict boundary² between a proper, which means legal, and an improper, which means non-legal attitude towards the knowl-

¹ The term “marriage penalty” might be a little misleading. While looking for an inspiration for a title of this article, I was surprised to discover that in the United States, as a consequence of a tax reform of 1969, an increased tax burden was introduced for married couples who file a joint tax return, compared to the single individuals with exactly the same income. The situation where the change in marital status negatively affects the tax liability is called the “marriage penalty”. This is, however, the only mention about the tax law in the whole article, since, in the scope of it the term “marriage penalty” is interpreted more literally and means simply... a marriage. To see justice done, I refer you to the clarifying article by K. Pomerleau, *Understanding the Marriage Penalty and Marriage Bonus*, “Tax Foundation Fiscal Fact” 2015, issue 464, http://taxfoundation.org/sites/taxfoundation.org/files/docs/TaxFoundation_FF464_0.pdf (visited November 20, 2018).

² As Przemysław Kubiak convincingly suggests, the origins of the division took their beginning from the reactions to the article by J. Stroux *Summum ius summa iniuria*, where the author expressed the opinion that both the jurists and the declaimers were practitioners of the same discipline. The article addresses the issue of the authenticity of sources and the study of interpolations. Hence, it is not surprising that it echoed back from the world of Roman law researchers. See P. Kubiak, *Kilka uwag na temat znajomości prawa u mówców republikańskiego Rzymu*, „Krakowskie Studia z Historii Państwa i Prawa” 2015, issue 8.1, p. 2 *et seq.*; J. Stroux, *Summum ius summa iniuria. Ein Kapitel aus der Geschichte der interpretatio iuris*, (in:) Festschrift Paul Speiser-Sarasin zum 80. Geburtstag, Leipzig-Berlin 1926, pp. 5-46. As for the reactions and the scientific discussion see R. A. Bauman, *The „Leges iudiciorum publicorum” and their Interpretation in the Republic, Principate and Later Empire*, “Aufstieg und Niedergang der Römischen Welt” 1980, issue 13.2, p. 113. O. Tellegen-Couperus, on the other hand, sees the beginnings of the division in the thought of the German Historical School of Jurisprudence. See O. Tellegen-Couperus, *Quintilian and Roman Law*, „Revue Internationale des Droits de l’Antiquité” 2000, issue 47, pp. 169–171. Whatever the origins are, they dominated the way of thinking of the Romanists for many years.

edge about the Roman law. The main responsibility lies with the *controversiae* – speeches for the prosecution or defence in imaginary³ court cases that became the specialty of the rhetoricians. The Roman law researchers often perceive them as a final proof of the differences between the work and the background⁴ of a jurist and an ancient orator in the Roman legal practice⁵. On the other hand, the classical philologists see this type of sources to be of almost entirely juridical nature and often outside of their field of research.

Taking all the above into account, there is nothing more to do than to commiserate with the work of Seneca the Elder⁶, that seems to situate itself just in the middle of this conflict. The work constitutes a compilation of the finest declamatory speeches from the turn of the 1st century AD and was preserved in the manuscripts under the title *Oratorum et rhetorum sententiae, divisiones, colores*⁷.

Far be it from me to say that this rhetorical work is omitted by the researchers⁸. Though, Seneca Maior is usually compared with other rhetoricians and quite

³ At this point, it should be also noted that one cannot be sure that all the cases cited by the jurists were always authentic. On the other hand, O. F. Robinson states that „the jurists’ imaginary cases were lifelike, unlike the rhetorical exercises of Quintilian and others, which read like fairy-tales”. See O.F. Robinson, *The Sources of Roman Law: Problems and methods for ancient historians*, London 1997, p. 88. Although the opinion of the author does not seem to be favourable, given the right (which also means distanced) approach, one can treat it as a huge incentive to read the declamatory speeches.

⁴ This categorical division between law and rhetoric, as well as a negative approach to the declaimers from the period of the Roman Republic and the Principate, is particularly surprising since the path of education in the limit between law and rhetoric was the typical one for the intellectual elite. The decision in terms of education was not, therefore, an alternative between law and rhetoric, since these skills were the domain of the same people. See J.A. Crook, *Legal Advocacy in the Roman World*, London 1995, p. 158. About the path of education see P. Kubiak, *Kilka uwag...*, p. 4 *et seq.* along with the cited literature.

⁵ One can obviously cite numerous works that represent a different approach, among them F. Lanfranchi, *Il diritto nei retori Romani: contributo alla storia dello sviluppo del diritto romano*, Milano 1938; E.P. Parks, *The Roman Rhetorical Schools as a Preparation for the Courts Under the Early Empire*, Baltimore 1945; S.F. Bonner, *Roman declamation in the late Republic and early Empire*, Liverpool 1949.

⁶ The alias “Maior” was given to Seneca the Rhetorician in order to distinguish him from his son, also Lucius Annaeus Seneca, who is known as Seneca the Younger or the Seneca the Philosopher.

⁷ As for the manuscript tradition, see a great study by B. Huelsenbeck, *The rhetorical collection of the Elder Seneca: Textual tradition and traditional text*, „Harvard Studies in Classical Philology” 2011, issue 106, pp. 229–299.

⁸ Here one should cite at least the following works: Ch.W. Lockyer, *The Fiction of Memory and the Use of Written Sources: Convention and Practice in Seneca the Elder and Other Authors*, Princeton 1971; L.A. Sussman, *The Elder Seneca*, Leiden 1978; L.A. Sussman, *The Elder Seneca’s discussion of the decline of Roman eloquence*, „California Studies in Classical Antiquity” 1972, issue 5, pp. 195–210; J. Fairweather, *Seneca the Elder*, Cambridge 1981, reprint 2007; E. Migliario, *Retorica e storia. Una lettura delle Suasoriae di Seneca Padre*, Bari 2007; E. Berti, *Scholasti-*

rarely analysed as an autonomous author. This is why one can get the impression that the value of that source is often underestimated. Given also that the great number of comprehensive studies about the Roman rhetoric makes it almost impossible to quote them all, it seems that the next reasonable step should be a careful and detailed analysis of each of the individual controversies. The general aim of this paper is to prove that such an attitude would allow us to dive into the cultural and intellectual world of Romans even more deeply.

The problem in the fifth *controversia* from the first book of the Seneca's work is presented as follows⁹:

Rapta raptoris aut mortem aut indotatas nuptias optet. Una nocte quidam duas rapuit; altera mortem optat, altera nuptias¹⁰.

One can already see that like in each and every other declamatory speech, here also occur some issues that could disqualify this *controversia* as a valuable source in the eyes of the researchers of Roman law. Among possible claims, the debated topic itself takes over the front because the matter of rape¹¹ in the Antiquity constitutes a problematic research issue. At those times, one could hardly have separated sexual reality from such issues like honour and reputation. It is, however, not the dignity of the woman that comes into question, but rather the good name of the family and, therefore, especially of the head of the household.

corum studia. Seneca il Vecchio e la cultura retorica e letteraria della prima età imperiale, Pisa 2007; É. Rolland, *De l'influence de Sénèque le Père et des Rhéteurs sur Sénèque le Philosophe*, Ghent 1906, reprint 2018.

⁹ All passages are taken from the famous edition by L. Håkanson. See L. Annaeus Seneca Maior, *Oratorum et rhetorum sententiae, divisiones, colores*, recensuit L. Håkanson, Leipzig 1989. I also decided to add the translations of the quotations. All of them were prepared by M. Winterbottom. See Seneca the Elder, *Declamations*, Vol. 1, *Controversiae*, Books 1-6, with an English translation by M. Winterbottom, Cambridge-Massachusetts-London 1974, pp. 120-135.

¹⁰ “A girl who has been raped may choose either marriage to her ravisher without a dowry or his death. On a single night a man raped two girls. One demands his death, the other marriage”.

¹¹ The Romans described the act of rape as *stuprum cum vi* or *per vim*. On the other hand, the concept of *raptus ad stuprum* meant kidnapping in order to commit rape. The meaning of the term *raptus* acquires a similar meaning only in the times of Constantine the Great, the Roman emperor ruling in the years 306-337. He decided to regulate this issue separately and this is when the *raptus* actually became *crimen publicum sui generis*. Many works have already been written on the subject. For the general overview of the issue see N. L. Nguyen, *Roman Rape: An Overview of Roman Rape Laws from the Republican Period to Justinian's Reign*, “Michigan Journal of Gender and Law” 2006, issue 13.1, pp. 75-112. The Polish literature also deserves a special recommendation. See J. Wiewiórowski, *Małżeństwo przez porwanie w antyku. Ustawa Konstancyjna I (CTh. 9.24.1) w świetle psychologii ewolucyjnej*, (in:) Z. Kalinowski, D. Próchniak (eds.), *Bitwa przy Moście Mulwijskim. Konsekwencje*, Poznań 2014, pp. 295-319; Z. Kalinowski, *Porywanie kobiet jako zjawisko społeczne w późnym antyku. Moralność i prawo*, (in:) J. Banaszkiewicz, K. Ilski (eds.), *Homo, qui sentit. Ból i przyjemność w średniowiecznej kulturze Wschodu i Zachodu*, Poznań 2013, pp. 197-219.

Just like in case of sexual offences¹², also *raptus* was not directed against the woman herself, yet brutally invaded either the parental authority (*patria potestas*) or the authority of the husband (*manus*)¹³. Here, however, on the one hand, the declaimers are dealing with an act opposable to the will of the *paterfamilias*. After all, at the very beginning, Latron calls for the revenge of fathers, brothers and husbands (Sen., *Contr.* I 5.1 *vindicate patres, vindicate fratres, vindicate mariti*¹⁴). On the other hand, the occurrence of a forbidden act between a woman remaining under the authority of another man does not result in an extension of the competences of the father or the husband. Meanwhile, in the light of this *controversia*, the privilege that is absolutely dominant is the right of option granted to the raped women¹⁵. The declaimers proceed under the declamatory law referred to as the *lex raptarum*, under which a woman could choose between the death of the ravisher or her marriage with him, but without providing him with a dowry. What is striking, in any other circumstances she could never be entitled to choose her husband freely, i.e. regardless of her father's will, or even against it¹⁶.

¹² It is doubtful if one can classify *raptus* as a sexual offence, since for the existence of it the sexual act was not necessary. Cf. D. 48.6.5.2 as well as F. Botta „*Per vim inferre*”. *Studi su stuprum violento e raptus nel diritto romano e bizantino*, Cagliari 2004, pp. 81-95. This is why the use of this term might seem imprecise for the researcher of the Roman law. From the content of the *controversia*, it is evident that in this case, sexual violence was to occur. Cf. Sen., *Contr.* I 5.1 *Stupro accusatur, stupro defenditur*. (“He is accused of rape – and he makes rape his defence”). One has to turn a blind eye on this lack of terminological precision that one can also encounter in other declamatory speeches. This problem has already been noted in G. Brescia, *Ambiguous silence: stuprum and pudicitia in Latin Declamation*, (in:) E. Amato, F. Citti, B. Huelsenbeck (eds.), *Law and Ethics in Greek and Roman Declamation*, Berlin, Munich, Boston 2015, p. 83, fn. 41.

¹³ D. 48,6,5,2 *Qui vacantem mulierem rapuit vel nuptam, ultimo supplicio punitur et, si pater iniuriam suam precibus exoratus remiserit, tamen extraneus sine quinquennii praescriptione reum postulare poterit, cum raptus crimen legis Iuliae de adulteris potestatem excedit*. (“Anyone who has raped a single or married woman is punished by the extreme penalty, and even if the woman's father, moved by entreaties, forgives the injury done to him, yet a third party may still charge the guilty man outside the five-year limit, since the crime of rape exceeds the scope of the *lex Julia* on adulterers”, transl. *The Digest of Justinian*, Vol. 4, transl. ed. by A. Watson, Philadelphia 1998, p. 330).

¹⁴ “Revenge, fathers! Revenge, brothers! Revenge, husbands!”

¹⁵ An interesting analysis is offered by G. Brescia, who also maintains that the right of option did not restrict the competences of the *paterfamilias*. See G. Brescia, *La donna violata. Casi di stuprum e raptus nella declamazione latina*, introduzione di M. Lentano, Lecce 2012, pp. 59-83.

¹⁶ Although one should not depreciate the role of the will of the spouses, the consent of the head of the household was, in fact, the key factor that determined the existence of marriage. In this regard, H. Insadowski uses the term “jedyna istotna zgoda” (“the only relevant consent”). See H. Insadowski, *Rzymskie prawo małżeńskie a chrześcijaństwo*, Lublin 1935, p. 171. A couple of years later a similar expression, “il solo consenso essenziale”, was used in P. Bonfante, *Corso di diritto romano*, Vol. 1, Milano 1963, p. 270.

The fact that the *lex raptarum* was a fictional regulation is, in principle, out of the question. Interestingly, S. F. Bonner¹⁷ holds an opposing opinion. He attempts to reconstruct the penalisation of the crime on the basis of the imperial constitution taken from the *Codex Iustinianus* and issued by the Emperor Justinian himself¹⁸. Since this is the only legal source that explicitly mentions the right of option, it is indeed difficult to reliably reconstruct the character of this institution. However, perceiving it as an instrument that was functioning merely in the world of rhetoric is an excessive generalisation¹⁹. The fact that this possibility is mentioned only in the sources from the 6th century AD is no proof that previously the right of option was not of interest to the jurists. Such a probability, of course, exists. However, it is just as probable as the fact that relating sources have been authoritatively removed by the compilers. The circumstance, however, that the Emperor Justinian himself invoked the right of option in the content of the constitution, seems to be a sufficient proof that this construction had a practical, and therefore a legal, meaning. The fact that it was probably applicable under the custom and not under the *lex* does not decrease its validity in any way²⁰.

If this perspective does not seem to be convincing, one can try to pay attention to another social aspect of the *lex raptarum*, which is stressed by R. A. Kaster²¹. According to this author, both punishments constitute a symbolic counter-

¹⁷ See *Roman declamation...*, pp. 90-91.

¹⁸ C. 9.13.1.2 *Nec sit facultas raptae virgini vel viduae vel cuilibet mulieri raptorem suum sibi maritum exposcere, sed cui parentes voluerint excepto raptore, eam legitimo copulent matrimonio, quoniam nullo modo nullo tempore datur a nostra serenitate licentia eis consentire, qui hostili more in nostra re publica matrimonium student sibi coniungere. oportet etenim, ut, quicumque uxorem ducere voluerit sive ingenuam sive libertinam, secundum nostras leges et antiquam consuetudinem parentes vel alios quos decet petat et cum eorum voluntate fiat legitimum coniugium.* (“Nor shall any never-married woman, widow, or any woman at all who has been abducted have the opportunity to demand her abductor as a husband, but their parents shall join them in lawful marriage to the man whom they (their parents) wish, with the exception of the abductor, because permission has in no way and at no time been conceded by Our Serenity for them to consent to those who in Our Commonwealth strive to marry by hostile means. For whoever wishes to marry a woman, whether free-born or freed, shall ask, consistently with Our laws and ancient custom, her parents or the other appropriate parties (in order to that) a lawful marriage comes about through their consent”, transl. *The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text. Based on a Translation by Justice Fred H. Blume*, Vol. 3, Books VIII–XII, B.W. Frier et al. (eds.), Cambridge 2016, p. 2327).

¹⁹ The opinion of R. A. Kaster seems to be a little bit too hasty in this regard. Cf. R. A. Kaster, *Controlling Reason: Declamation in Rhetorical Education at Rome*, (in:) Y. L. Too (ed.), *Education in Greek and Roman Antiquity*, Leiden 2001, pp. 328-329.

²⁰ The fact that the legal solution was derived from the customs of the ancestors seemed to be a sufficient explanation for the jurists. Cf. M. Kaser, 3. *Mores maiorum und Gewohnheitsrecht*, “Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung” 1939, issue 59, pp. 52-101.

²¹ *Controlling Reason...*, p. 329 et seqq.

weight to the violation of the woman's honour, that was based on the law of talion. Of course, the author does not take this matter literally, since the actual talion would have to take the form of some sexual coercion. Even if this concept is relatively humorous, it is hard to disagree that the consequence of such a punishment would be at least some loss of social status²². On the other hand, the rape would probably result in difficulties to find a suitable husband. Therefore, the *lex raptarum* proposes an alternative, which is an extremely pragmatic solution: a marriage with the rapist, but without the need to bring a dowry – an economically effective compensation.

Even if one must agree that, in the light of the preserved source material, both the right of option and the *lex raptarum* are quite controversial, one cannot deny that these institutions resulted in consequences having potentially a deeper meaning for the Roman citizens. Robert A. Kaster stresses that the committing of the rape caused a kind of confusion in the social sphere²³. What can be perceived as messier than the autonomy of a woman granted to her at the expense of the head of the household?

Here, then, occurs a real intellectual challenge for the declaimer, who must find a solution that allows to re-establish the social order. If the problem raised in this case is that someone abducted two girls during the same night and one girl wants to marry the abductor but the other wants his death, this *controversia* offers the exquisite interpretation of law. The question is if one of the women should be given priority and, if yes, which woman and why. Portius Latro puts the problem into words very aptly when he notes that the ravisher *cum altera rapta litigat, alteram advocat* (Sen., *Contr.* I 5.1)²⁴. One woman's desire to marry the abductor can be the only way to save his life. *Ergo*, there is a lot at stake.

The difficulty is, however, that the issue is unsolvable on the basis of a mere literal interpretation of the letter of the law. Consequently, the declaimers must take a broader perspective and grasp principles that were not explicitly pointed out. This is not anything new for the legal science. So, when the declaimers were facing the problem of interpretation and applicability of law, they simply had to employ the techniques of legal reasoning. At this point, there should be no doubt

²² This idea seems particularly interesting because, in the light of the Roman law, the civil death (*capitis deminutio maxima*) was almost synonymous with the actual death of a Roman citizen, since it resulted in losing the personality. H. Goudy offers quite an interesting description of the problem, see H. Goudy *Capitis Deminutio in Roman Law*, "Juridical Review" 1897, issue 9, pp. 132-142. Also the works of F. Desserteaux should be recommended, F. Desserteaux, *Études sur la formation historique de la capitis deminutio*, 1. *Ancienneté respective des cas et des sources de lacapitis deminutio*, Dijon, Damidot, Paris, Champion 1909; F. Desserteaux, *Études sur la formation historique de la capitis deminutio*, 2. *Évolution et effets de la capitis deminutio*, Paris 1919.

²³ *Controlling Reason...*, p. 328.

²⁴ "He is at law with one of his victims, and is using the other as his counsel".

that these procedures were not unique to the law itself. What is also important, the speeches of the declaimers are not flowery talks, full of rhetorical figures. In fact, they seek clarity by, firstly, presenting the question to be discussed, and then exposing the argument’s outline in a very structured way.

Porcius Latro²⁵ tries to solve the problem on the basis of the given legal text. Therefore, he wonders whose law is mightier. Firstly, he tries to take the broader perspective and to imagine what the solution would be if there would be a clash of the provisions between the two different laws (Sen., *Contr.* I 5.4):

Latro primam fecit quaestionem: non posse raptorem qui ab rapta mori iussus esset servari. Si legatus, inquit, exire debet, peribit; si militare debet, peribit; si ius dicere debet, peribit²⁶.

The declaimer has no doubts that once the woman chooses the death of the *raptor*, the man has to die. Latro states that even the public duties, such as administering the law or serving as a soldier or a legate, cannot save his life. This solution seems to be quite controversial from the practical point of view. In reality, such a rule probably could not be interpreted so restrictively, because it could be contrary to the interests of the Roman state. Latro, however, remains only in the theoretical reality, where it is absolutely acceptable to treat the right of option as some kind of *lex specialis*. Since he grants quite a substantial competence to each *rapta*, it leads him to this conclusion (Sen. *Contr.* I 5.4):

(...) si raptam ducere debet, aequè peribit. Si is te ante rapuisset et nuptias optasset, interposito deinde tempore antequam nuberes hanc vitiasset, negares illum debere mori rapta iubente? Atqui nil interest, nisi quod dignior est raptor morte cuius inter duos raptus ne una quidem nox interest. Si rapta nupsisses, deinde post tertium diem rapuisset aliam, negares illum mori debere?²⁷

²⁵ Latro falls in the first place among the four most outstanding speakers of those times. Cf. Sen., *Contr.* X pr. 13. Seneca praises many times his talents, especially in the introduction to the Book I. Cf. Sen., *Contr.* I 13-fin. Latro takes first chair in the entire work of Seneca and *divisiones* proposed by him are quoted in the content of almost every *controversia*. His way of thinking is elegant, simple and clear. This *controversia* provides another proof of this thesis. An excellent *divisio* is the core of the whole discussion, as well as a reference point for the statements of all the other orators.

²⁶ “Latro’s was: A ravisher who is ordered by his victim to die cannot be saved. If he has to go out on an embassy, he will die. If he has to serve as a soldier, he will die. If he has to administer the law, he will die”.

²⁷ “If he has to marry a girl he raped, he will die just the same. If he had raped you before and you had chosen marriage, then, in the interval before the wedding, had wronged this girl, would you say he ought not to die if the girl he raped demanded it? Yet there is no difference between the two cases – except that a seducer deserves to die the more when there is not even a single night to separate his two rapes. If you had married him after being raped, then two days later he had raped another, would you say he ought not to die?”.

Even if the rapist were to fulfil the request of one of the women and take her as a wife, he would have to die if the other woman demanded his death. Latro rightly points out that it does not matter how much time has passed between the two rapes. Whether women were raped during the same night or there was a three-day break between the two cases of violence, each of them has the right to choose.

Then, Latro wonders what is the nature of protection that *rapta* can provide for the *raptor* if she decides that she wants to marry him (Sen., *Contr.* I 5.5):

Alteram fecit: an rapta quae nuptias optat nihil amplius raptori praestare possit quam ne sua lege pereat, contra alienam legem nullum ius habeat. Optasti nuptias: non occidetur tamquam raptor tuus. At idem eadem nocte qua te rapuit <si> stationem deseruit, fuste ferietur; si sacrilegium fecit, occidetur. Licet tu dicas: “quid ergo? ego non nubam?” tu raptori praestas ut illum ipsa non occidas; non potes praestare ne quis occidat. Quomodo sacrilegus, quamvis a te servatus, periret, sic alterius puellae raptor, vel a te servatus, peribit²⁸.

The disclaimer rightly separates two legal realities. One is that the woman has the competence to save man’s life by choosing to marry him. This matter, however, cannot influence anyhow the consequences that other illegal activities might entail, such as deserting a post or committing a sacrilege²⁹. Consequently, the fact that two women have the right of option constitutes two different legal phenomena that do not affect each other. Latro understands that the right of option cannot provide a divine protection that would constitute a promise of avoiding the death under any circumstances. Any other interpretation would be not only illogical but also completely contrary to the spirit of the law, which is based on the principle that everyone has to pay the price for their actions.

²⁸ “The second point he made was: Can a victim of rape who chooses marriage grant her ravisher anything else but immunity under the law as far as she is concerned, having no power to thwart the law as it affects another? You chose marriage; he will not die for seducing you. If, on the same night that he raped you, he deserted his post, he will be beaten to death; if he committed a sacrilege, he will be axed. You may say: ‘Well? Am I not to marry?’ What you are granting your ravisher is that it is not you who are the cause of his death – what you cannot grant him is that he should not be killed. If he had committed sacrilege he would die however much you granted him his life: so will he as the ravisher of a second girl, even though you grant him his life”.

²⁹ The term *sacrilegium* should be understood as a public crime. The concept has been evolving in the course of the development of Roman law. Until the end of the Republic, this offence consisted mainly in the theft of things sacrificed to the gods or constituting the property of the temple, that is, outside the commerce under the divine law. However, due to the seriousness of the offence, it was punished more severely than an ordinary theft. Later, the meaning of the term *sacrilegium* was extended and used to describe all impious acts. For more information see A. Dębiński, *Sacrilegium w prawie rzymskim jako kradzież (furtum) rzeczy świętych (res sacrae)*, „Roczniki Nauk Prawnych” 1993, issue 3, pp. 87-107; A. Dębiński, *Sacrilegium w prawie rzymskim*, Lublin 1995.

The purpose of the third question that is posed by *Latro* is again to establish the hierarchy. This time, however, it is not about the priority of the provisions of the legal acts, but about the gravity of the choices made (*Sen., Contr.* I 5.6):

Tertiam fecit: cum quod utraque optat fieri non possit, an ea eligenda sit optio qua ultio ad utramque perveniat. Ait quae mortem optat: mea optio et te vindicat, tua me non vindicat; nec hoc tibi mea optio praestat quod mihi: ex occiso raptore invidiam. Illa respondet: Optio tua me non vindicat: vindictam tu meam putas, non fieri quod volo, fieri quod nolo? Etiam contumeliosum mihi erit te dignam videri in cuius honorem homo occidatur, me dignam non videri in cuius honorem servetur. Isto modo et mea te vindicat: nempe lex duas poenas scripsit vitiatori: alteram passurus est; non eris inulta, nam raptor non erit inpunitus: habebit poenam, indotatam uxorem. Respondet eodem modo: morietur <utrique, tibi servabitur> sed non mihi³⁰.

He does not have any doubts that in both cases the ravisher will be punished: either by death or by marriage without a dowry. However, when the declaimer tries to find the answer to the question, whether a decision that would avenge both of the women is possible, it seems that he cannot find a proper answer. In this respect, the deliberations led by *Arellius Fuscus*³¹ run to the rescue. The other rhetorician claims that only the decision to kill the rapist can avenge the wrongs done to both women (*Sen., Contr.* I 5.7):

Necesse est raptorem mori. Quare? utrique raptae ultio debet contingere. Utramque non potest ducere, utrique mori potest (...). Qui duas rapuit utique debet mori. Quare? dicam. Quod <quaeque> vult eligat: aut <mortem utraque aut> nuptias optabunt aut altera mortem, altera nuptias; si <aut> nuptias <utraque aut altera mortem, altera

³⁰ His third question was: Since it is impossible for the choice of both to be carried out, should the choice which gives both revenge be preferred? The girl who chooses death says: ‘My choice gets revenge for you too – but yours does not get it for me; nor will my choice give you what it gives me – unpopularity as a result of the death of the ravisher’. The other replies: ‘Your choice does not avenge me. Do you think revenge for me consists in what I want not happening, and what I do not want taking place? In fact, it will be an insult to me that you are thought to deserve the death of a man for your sake, while I am not thought to deserve his reprieve for mine. Now looked at like this, my choice avenges you also. Look, the law prescribed two punishments for the ravisher. He will suffer one of the two. You will not go unavenged, for the ravisher will not go unpunished: he will have his penalty – a wife without a dowry’. The first girl replies as before: ‘If he dies, he will die for both of us; if he is reprieved, he will be reprieved for you, but not for me’.

³¹ *Arellius Fuscus* is the other *rhetor* belonging to the *crème de la crème* of the declaimers. Cf. *Sen., Contr.* X pr. 13. He had the great respect of Seneca, who even stated that in the times of his youth there were not any better declamations than those given by *Fuscus*. Cf. *Sen., Suas.* II 10. On the one hand, he tends to give emotional speeches. Cf. *Sen., Contr.* I. 3.3; II 5.4. One can also cite numerous examples of very precise and reliable statements, strongly focused on the aim of reaching the equity. Such an attitude is also presented in the following *controversia*.

nuptias> optaverint, non poterit fieri quod utraque volet; uno modo poterit fieri quod utraque volet, si utraque mortem optaverit: ergo fiat quo uno duae vindicari possunt³².

Since the choices are mutually exclusive, it is impossible to happen what both women want. If the ravisher survived, one of the women would not take revenge for the insult she suffered. Fuscus points out correctly that the consequence of the act is not only the penalty imposed on the man but also the avenge for the violation of the rights of both women. Consequently, the only effective solution is the death penalty.

Finally, sticking to the strict rules of the formal logic does not seem to be sufficient for Porcius Latro. He decides to apply criteria which should complement and counterbalance juridical arguments that are sometimes very intuitive. In other words, he is thinking like that: according to my knowledge, not only about law and rhetoric but about life in general, taking into account all the consequences that this judgement might entail as well the public interest – which solution is simply better?³³

Quartam fecit quaestionem: si non potest utriusque rata esse optio, ultra quae valeat dignior sit. Ultimam non quaestionem sed tractationem <fecit: neminem> non raptorem impunitum futurum si haec via impunitatis monstraretur, ut qui plures rapuisset tutior esset; neminem non inventurum aliquam humilem quae se in optionem commodaret³⁴.

Latro excellently notices that it would be unreasonable for a man who has raped more than one woman to be more protected. Although Latro does not explicitly mention it, at this point immediately comes to mind the principle *ex iniuria ius non oritur*³⁵. This view is shared by Arellius Fuscus, who maintains that

³² “The ravisher must die. Why? Both girls must have their revenge. He cannot marry both, but he can die for both. (...) The seducer of two girls should certainly die. Why? I will tell you. Let each choose what she wants. Either they will both choose either death or marriage, or one will choose death, one marriage. If both choose marriage, or one marriage and one death, it will be impossible for the wishes of both to be carried out. Only if both choose death will the wishes of both be able to be implemented. Let us therefore follow the only route by which both can be avenged”.

³³ This path is also followed by Arellius Fuscus and Cestius. Cf. Sen., *Contr.* I 5.8 *Reliquam partem controversiae Fuscus in haec divisit: ultra optio honestior sit, ultra iustior, ultra utilior. Cestius hanc partem controversiae sic divisit: ultra optio dignior sit quae valeat; ultra optione raptor dignior sit.* (“The rest of the controversia Fuscus divided thus: Which choice is more honourable, which more just, which more expedient? Cestius divided this part of the controversia thus: which choice deserves to prevail? Which choice does the ravisher deserve?”).

³⁴ “He made the fourth question: If the choice of both cannot stand, which is the worthier to prevail? The last he made a development rather than a question: Every ravisher would go unpunished if this route to safety were signalled – the more girls raped, the safer the rapist. Everyone would find some low-class girl who would lend herself to make a choice”.

³⁵ A fascinating analysis of this principle is offered in M. Kuryłowicz, *Ex iniuria ius non oritur. Szkic do dziejów zasady*, (in:) T. Ereciński, J. Gudowski, M. Tomalak (eds.), *Ius est a iusti-*

in no case a custom allowing to rescue from the death of those who deserved it more than once, can be perceived as a useful one (Sen., *Contr.* I 5.8):

Hic tractavit: ne exemplum quidem utile esse non utique perire eum qui duas rapuerit; [ne] hunc morem perniciosissimum civitati introduci, ut aliquis propter hoc non pereat, quia perire saepius meruit³⁶.

The declaimers, therefore, deal with the matter not only from the perspective of the women and the men but also in general terms – from the point of view of the society. In addition, according to Latro, such a precedent could result in creating a grotesque way of defence that could lead to the impunity of the ravishers. As he suggests, every man could find a low-born girl who would save his life if necessary³⁷. Hence, it could result in an absurd situation where the ravisher would derive a significant right exactly because of committing the offence.

Quite a different approach as to the legal interpretation of this issue seems to be presented by Arellius Fuscus:

Lex, inquit, quae dicit: “rapta raptoris aut mortem optet aut nuptias” de eis loquitur qui singulas rapuerunt; non putavit quemquam futurum qui una nocte raperet duas. Non quaero quid optetis; quod severissime optare potestis occupo: necesse est raptorem mori³⁸.

He states that the law did not foresee a solution for someone who raped two women during one night and can be applied only for the rapers of one girl. As a result, he declares that the right of option cannot be entitled to the women. Hence, the only reasonable decision is the most severe one.

Different ways of reasoning led the speakers to the same conclusion: the ravisher was to be condemned to death. It is important, however, to realise that these

tia appellatum. *Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu*, Warszawa 2017, pp. 1239–1250.

³⁶ “Here his treatment was that it wasn’t a good precedent, either, that a man need not necessarily die after seducing two girls. That someone should not die just because he deserves to die more than once is a most pernicious custom to introduce into a state”.

³⁷ From the content of the *controversia*, one can conclude that also other declaimers shared these concerns. Cestius suggested that in such situations one should consider whether it was possible that the girl acted jointly and in agreement with the ravisher”. Cf. Sen., *Contr.* I 5.8 *Cestius et coniecturalem quaestionem temptavit: an haec cum raptore conluserit et in hoc rapta sit, ut huic opponeretur*. (“Cestius also had a try at the conjectural question, Did one girl connive with her seducer and was seduced just in order that she could be pitted against the other?”). One cannot ignore that this question contains a wider legal content. At this moment one should also consider if the second girl really was a *rapta* and, consequently, if she was entitled to make a choice.

³⁸ “The law that says a raped girl may choose her ravisher’s death or marriage to him is talking about ravishers of one girl. It did not imagine that there would be anyone who would seduce two girls on one night. I do not enquire what your choice is: I seize on the harshest choice open to you – the ravisher must die”.

conclusions do not constitute the final solution. In fact, Calpurnius Flaccus in the 51th *controversia* of his work entitled *Declamationes* presented a similar case, but with one significant difference – the magistrates decided to impose a milder penalty on the man³⁹.

This means that the discussion between the declaimers always remained open. This perspective seems to be even more intellectually exciting. As a matter of fact, in the content of the analysed *controversia*, we can also find nice examples of defence. Argentarius⁴⁰ as one of the few stood up for the man. He states: *non est invidiosa potestas quae misericordia vincit* (Sen., *Contr.* I 5.3)⁴¹. When other declaimers, remaining somewhat of the *dura lex sed lex* concept, postulate the strictness of the law, he, almost like a Christian philosopher, dares to oppose to this thinking, stating that the severity of legislation is not a value that must be protected at all costs⁴².

According to him, the priority should be given to the compassion for the other person. Moreover, these are not merely philosophical considerations. In support of his thesis, the orator cites an example of the right of opposition granted the tribunes (Sen., *Contr.* I 5.3 *ex tribunis potentior est qui intercedit*⁴³). Whenever the *tribunus* decided that the provisions of the legal act could have negative consequences for the plebeians, he could veto a law. This act was called the *intercessio*⁴⁴. Thus, Argentarius invokes an example of caring for another human being,

³⁹ Flaccus 51, *Quidam duas rapuit. Productae ad magistratus altera nuptias, altera mortem petit. Magistratus humaniorem sententiam secuti sunt.* (“A certain man raped two woman. When brought before the magistrates, one woman demands marriage, the other his death. The magistrates supported the more merciful course of action”, transl. by L. A. Sussman, *The Declamations of Calpurnius Flaccus: Text, Translation and Commentary*, Leiden, New York, Cologne 1994, p. 89).

⁴⁰ The speeches by a Greek orator Argentarius not infrequently are cited as an example of what not to do and of what not to say. Cf. Sen., *Contr.* I 5.3 but also II 5.7; IX 3.13. Sometimes it is difficult not to see his statements as rude ones. However, a person who would identify him only with a bad style and a banal way of thinking would be very mistaken. This *controversia* is a perfect testimony of the cleverness of his mind.

⁴¹ “A power that uses pity to accomplish its victory wins no unpopularity”.

⁴² *The misericordia*, which is the foundation of Christian ethics, does not seem to be entirely consistent with the Roman moral principles of those times. Seneca the Younger juxtaposes *clementia* and *misericordia*, stating that the former results in both equable and equitable judgement, whereas the latter, as distress, leads to compassion that prevents the judge from the reliable assessment. (Cf. Seneca, *De Clementia*, II 5.1; II 6.1; II 6.4; II 7.3). On the other hand, Cicero in one of his speeches praises *misericordia* as one of the highest qualities (Cf. *Pro Ligario*, 37). One can assume that there was a discussion in this field and the opinion of Argentarius, although not ultimately conclusive, seems to be an engaging part of it.

⁴³ “Among tribunes the one who proclaims the veto is the one who prevails”.

⁴⁴ In fact, *intercessio* was not only a great instrument against the abuse of power, but also a political measure used by the tribunes to achieve their private goals. For further information see

which became the reason for adopting particular solutions in the sphere of public law.

The other rhetorician who tries to defend a man is Silo⁴⁵. He questions the authenticity of the rape, suggesting that the despair of one of the women was simulated (Sen., *Contr.* I 5.2):

At quam bene mimum egit, quomodo raptam se questa est, qua vociferatione! quam paene illi optione cessimus!⁴⁶

He states that in this case we are not dealing with rape. Since one of the women expressed the desire to marry a man, no forbidden act could occur in such a situation. Certainly, this kind of defence cannot be classified as neat. Nevertheless, it exposes the subjective element in the form of a will which would fully release the man of the responsibility for committing an act of violence⁴⁷.

One should give recognition also to another concept put forward by Silo, suggesting that the man committed a double rape as a result of an error (Sen., *Contr.* I 5.2):

Postero die cum illi narratus esset nocturnus error, dum putat se in unam incidisse, huic priori supplices summisit manus, hanc prius deprecatus est, exoravit: propter hoc, puto, ista magis raptori irascitur⁴⁸.

Some dissonance, however, creates an attempt to justify this mistake. Silo suggests that the man did not know what he was doing because of the night time. Which should be understood as follows: the man did not recognize that he was imposing himself on two, not one woman, because it was dark, i.e. he did not see everything clearly. At this moment it is difficult to consider both the declaimer and the ravisher as reasonable ones.

Interestingly, however, according to this concept, the ravisher repents⁴⁹. One can also assume that he was probably asking for forgiveness of the other woman

M. Humbert, *Le tribunal de la plèbe et le tribunal du peuple: remarques sur l'histoire de la provocatio ad populum*, „Mélanges de l'École Française de Rome” 1988, issue 100–101, pp. 431–503.

⁴⁵ The general opinion about Pompeius Silo was not very favourable. He was quite often criticized by the other declaimers, especially because there was an opinion that he was not able to elaborate a coherent utterance. Cf. Sen., *Contr.* I 7.13; III pr. 11; VII 4.4; X 1.11. The image of his character in following *controversia* creates the impression that he has been given a relatively reasonable but quite an average mind.

⁴⁶ “But how well she acted out the farce, how she complained of rape, how she screamed! How near we came to letting her have her choice!”

⁴⁷ One should bear in mind that it results in not granting to the woman the right of option.

⁴⁸ “The day after, when he had his error of the night before explained to him – he thought he’d only encountered one girl – he lowered his hands in supplication to this girl first; she was the first he implored and won over – hence, I suppose, the other’s greater anger with her ravisher”.

⁴⁹ This is at least a partial exception to the idea of R. A. Kaster, according to which the subjective experience of the man and the woman are not available to the recipient. In this case, the man

because Silo claims that the reason for her anger is not the lack of apology but the order in which the apologies were made. Such a circumstance should also be considered as an attenuating factor.

Last but not least, Silo puts forward a fairly correct concept. If the injustices that the women suffered should not be subject to assessment, their rights also should not be classified. Their opinions are, therefore, equal. Hence, it is reasonable for the gentler to prevail (Sen., Contr. I 5.3 *inter pares sententias mitior vincat*⁵⁰).

The following *controversia* seemed to be worth of attention in regard to the fact that one can observe various problems concerning legal interpretation as well as numerous methods of dealing with them⁵¹. Some declaimers thought that there was a clash between two provisions of law (*leges contrariae*), some that there was a general absence of a norm, which required to apply a law regulating similar cases and to apply the rules of analogy (*ratiocinatio*). For a good measure, they had to take into consideration the tension between the text written down and the real intentions of the lawgiver (*scriptum vs. voluntas*).

It is, therefore, hard to deny the statement that it is the nature of the *controversia* to deal with the law⁵². If we overlook the fictitious character of the speeches, treating it simply as a feature of the genre, we can begin to understand how the rhetorical training contributed to the development of the Roman law. Hence, J. A. Crook rightly argues that for shaping the competence of argumentation, imaginary laws and fabricated legal problems could have been just as valuable as the authentic ones⁵³. Absurd examples, and maybe even especially them, were, after all, equally attractive motivation for trying to solve the intellectually demanding issues.

Particularly interesting in rhetorical reasoning is the moment when the declaimers consider both morality and ethics. One cannot resist the impression

almost ecstatically begs the woman to forgive him his mistake. In these circumstances, it can be concluded that we are dealing with a real expression of repentance, even if the motivation is not available to us. See *Controlling Reason...*, p. 327.

⁵⁰ “The votes are equal – let the gentler prevail”.

⁵¹ Here I should definitely recommend to become acquainted with the excellent research results by E. Berti about the theory of the *status legales*, i.e. the possible ways of dealing with the problems of legal interpretation. Berti shows how this theory was applied by the declaimers in the Seneca’s work and also offers an outstanding analysis of the following *controversia*, E. Berti, *Law in Declamation: The status legales in Senecan Controversiae*, (in:) E. Amato, F. Citti, B. Huelsenbeck (eds.), *Law and ethics in Greek and Roman Declamation*, Berlin 2015, pp. 7-34; E. Berti, *Le controversiae della raccolta di Seneca il Vecchio e la dottrina degli status*, „Rhetorica” 2014, issue 32, pp. 99-147; E. Berti, *Scholasticorum studia...*, esp. pp. 79-127.

⁵² At this point I wholeheartedly share the opinion expressed in J. D. Brightbill, *Roman Declamation: Between Creativity and Constraints*, Chicago 2015, p. 170, <https://knowledge.uchicago.edu/handle/11417/158> (visited November 20, 2018).

⁵³ See *Legal Advocacy in the Roman World*, London 1995, p. 165.

that the orators were able to solve even the most bizarre legal problems by applying extra-legal restrictions⁵⁴: the fundamental knowledge about the world and a reliable value system. In a situation of the conflict between *ius* and *aequitas*, the priority is given to the moral foundation of argumentation, that will convince every sensible man, not only the legal professionals. This aspect seems particularly important since the Roman civil trial was taking place in front of a private judge – a citizen of general respect, but not having any special legal background.

At this point, we can see the value of the Roman rhetoric from the point of view of a lawyer. It is hard to deny that the law has real binding power only when it is valued by society. Similarly, the decisions of the judges should have the same respect. However, this type of approval can only be obtained if the actions are in line not only with the formal logic and the economic needs but also with the cultural code of ethics. In this context, M. Lentano’s remark seems to be particularly valuable. He stated that in the form of imaginary acts, the declaimers were *de facto* discussing *mores*, that is, unwritten customs, legally binding, as respected by the society⁵⁵. Therefore, the rhetorical education guaranteed a very solid training in case of doubts that could not be solved only on the basis of the text of the legal act. It also provided the tools that could be used in the absence of legal solutions, but, if necessary, it allowed to call into question an incorrect decision, although consistent with the rules of formal logic, but contrary to common sense.

The *controversiae* evoke the idea of a moot court. They seem to have been an effective and comprehensive training that encouraged the students to take a realistic perspective on the way the law really should work. If we agree with the Senecan concept that good oratory depends on good morals⁵⁶ and add to it another one, maybe even more important, that the good law also depends on good morals, we can finally see the broader social context of the case. Therefore, for a legal historian, such a source of knowledge about the intellectual formation of legal practitioners like the work of Seneca the Rhetorician should be priceless. The profound analysis of the speeches might shed new light on the way how the law in practice really worked, which not always can be so evident if one pays attention only to the Roman law doctrine⁵⁷.

⁵⁴ The legal and the non-legal limitations, although representing two different realities, are naturally and immanently linked with each other. Cf Fritz Schulz, *Principles of Roman Law*, transl. by M. Wolff, Oxford 1936, p. 20 *et seqq.*

⁵⁵ M. Lentano elegantly describes this phenomenon as “giuridicizzazione dell’etica”. Cf. M. Lentano ‘*Un nome più grande di qualsiasi legge*’: *Declamazione latine e patria potestas*, „Bollettino de Studi Latini” 2005, issue 35.2, p. 566.

⁵⁶ Cf. Sen., *Contr.* I pr. 9. This concept obviously is not purely Senecan. In this passage Seneca quotes the opinion of Cato the Elder.

⁵⁷ It seems that this postulate is congruent with the one expressed by F. Schultz some time ago: “It is necessary to remove the skilfully erected boundaries of classical jurisprudence isolating

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Summary

The problem in the 5th *controversia* from the work of Lucius Annaeus Seneca the Elder, entitled *Oratorum et rhetorum sententiae divisiones colores*, is presented as follows: one man seduced two women during the same night. According to the law, which in the literature is referred to as *lex raptarum*, a woman who was kidnapped may choose between the death penalty for the ravisher or marrying him, but without giving him a dowry. Here, two women were granted the right of option and one of them demanded the death of the man, but the other wanted to marry him. The declaimers were trying to find an answer to the question: which solution is worthier to prevail? Since, in fact, the main problem raised in the *controversia* is the interpretation of law, it constituted quite a significant intellectual challenge. The declaimers employed very impressive legal reasoning techniques. This *controversia* constitutes then not only an interesting starting point to conduct the research on the borderline of law and declamation, but also might be a strong argument that the law and rhetoric, at least in some aspects, could have been complementary to each other.

KEYWORDS

Roman rape, *lex raptarum*, *controversia*, Seneca Maior, Roman Law, Roman Rhetoric

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gwałt, *lex raptarum*, *controversia*, Seneka Starszy, prawo rzymskie, retoryka łacińska