

Michael H. Frost:

*Introduction to Classical Legal Rhetoric. A Lost Heritage*

(Applied Legal Philosophy)

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In *Introduction to Classical Legal Rhetoric. A Lost Heritage*, Michael H. Frost compares the rhetorical works by Aristotle, Cicero, and Quintilian with modern, mainly American literature on legal writing. Frost's major conclusion is that "the classical authors provide what modern authors frequently lack: a clear, experience-based, theoretical framework for analysing and creating legal arguments". According to Frost, the classical works also "provide an exhaustive analysis of the roles that emotion and lawyer credibility play in legal argument". He therefore argues that inexperienced lawyers and law students should study Greco-Roman rhetoric (Preface, pp. vii). In this review I shall first summarise the content of the book, and then comment on Frost's purpose and approach.

The book consists of seven chapters, a bibliography, and a (general) index. The notes are included at the end of each chapter.

In the first chapter, "Greco-Roman Rhetoric: The Canon and its History" (pp. 1-22), the author describes the creation and evolution of legal rhetoric from its Greco-Roman beginnings to the present day (that is, in the USA). Aristotle, and Cicero and Quintilian are introduced as the leading teachers of legal rhetoric in Greek and Roman antiquity respectively. Frost then briefly discusses the traditional five parts of rhetoric as well as the three basic means of persuasion: logic (*logos*), emotion (*pathos*), and credibility (*ethos*).

The remaining part of the chapter considers the ups and downs of classical rhetoric after the collapse of the Roman Empire: many manuscripts were lost, but in the Renaissance they were rediscovered. Rhetoric was reintegrated into civic life, and, in England, classical rhetoric was frequently linked to both the study and practice of law (p. 9). However, in the seventeenth and eighteenth centuries, the growing interest in empirical science and formal logic made rhetoric – with its dependence on emotional arguments and probabilities – unpopular. It was only because two rhetoricians, George Campbell and Hugh Blair, tried to apply empirical science to rhetoric that the subject survived (that is, in Great Britain).

At that stage, rhetoric was introduced in America. In the nineteenth century, it was taught at the colleges and universities, but not as a discrete system. Instead it was divided among several departments and disciplines, with increased emphasis on writing. In the course of the twentieth century, at the Speech and English departments, rhetoric was again taught as a coherent system. Modern lawyers have also rediscovered legal rhetoric, but they tend to apply only some of the classical principles without referring to the overall classical system. Frost trusts that classical rhetoric will again become the educational tool geared to meet the practical demands of the legal profession.

The following six chapters deal with the three tasks of the orator that are relevant in written communication: invention, arrangement, and style. Throughout, Frost compares classical and modern rhetorical theory and practice. Most chapters close with a section called "Similarities and differences".

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In Chapter Two, “Greco-Roman Legal Analysis: The Topics of Invention” (pp. 23-43), Frost discusses invention, including a brief presentation of Aristotle’s two categories of reasoning (induction and deduction) and Hermagoras’s *stasis* theory (that is, the methodological way of analysing available arguments). Frost then arrives at the core of this chapter, the *topoi* or commonly used lines of argument. The Greco-Roman rhetoricians listed, described, and illustrated dozens of *topoi*. Frost distinguishes four categories: confirmation or affirmative arguments, deductive ‘proofs’, enthymemes, and refutation. In each category, several *topoi* are identified as particularly suitable in forensic discourse. For instance, in the case of affirmative arguments, the most suitable *topoi* include examples, existing decisions, and definition. According to Frost, existing decisions were comparatively unimportant because, under the Greco-Roman code-based systems, they were not sources of law. Nevertheless, classical rhetoricians compiled a nearly comprehensive catalogue of all the points that advocates must consider when making arguments based on precedent (pp. 28-29). Frost does not explain this inconsistency. He concludes the chapter by comparing classical and modern handbooks on legal analysis and arguments, claiming that the latter do not treat the topics of invention as thoroughly as the former.

Chapter Three, “Brief Rhetoric: The Organization of Argument” (pp. 44-56), is about arrangement. It describes the five-part structure for legal arguments used in antiquity and applies its principles to a high-profile US Supreme Court case, *Harper & Row Publishers v. Nation Enterprises*. It appears that the rules prescribed by the Supreme Court for content and order of appellate briefs correspond exactly to the classically approved five parts organisation of legal arguments. They only differ as to the conclusion: whereas, in classical antiquity, the orator is advised to indulge in drama, the Supreme Court allows only one or two sentences for describing the relief or remedy sought.

In Chapter Four, “Ethos, Pathos and Legal Audience” (pp. 57-84), Frost deals with two particular means of persuasion, namely emotion (*pathos*) and lawyer credibility (*ethos*). *Ethos* and *pathos* – as well as logical argumentation (*logos*) – were treated in detail by the classical rhetoricians. Although these authors all decried the effect emotion has on judges and juries, they nevertheless recommended advocates to appeal to the audience’s feelings of hatred or love, ill-will or well-wishing, fear or hope. According to Frost, this kind of advice shows that Greco-Roman audiences were insufficiently educated and trained (p. 58). The classical rhetoricians also placed much emphasis on *ethos*: the orator was to create the impression of himself as a good, just, and intelligent man in order to make the audience listen readily to his arguments. Even if modern legal rhetoric does pay some attention to audience assessment, advocate credibility, and emotional arguments, Frost finds the modern approach “sketchy and disorganised”, compared to the treatment of *ethos* and *pathos* in classical literature (p. 70).

Chapters Five and Six both deal with style or more precisely with the impact of sentence-level writing style on legal argument. Two figures of style are discussed. Thus, in Chapter Five, “Greco-Roman Analysis of Metaphoric Reasoning” (pp. 85-108), Frost focuses on the use of metaphors. The classical rhetoricians provided detailed discussions not only of the logical value of metaphors, but also of their persuasive and aesthetic impact. They even categorised them according to effect, suitability, proper placement, and persuasive value. Modern writers on legal rhetoric can be distinguished in two groups, one which disapprove of the use of metaphors on the grounds that they are imprecise and only fit for embellishing an argument, and one which rather considers metaphors and metaphoric reasoning an important, even central, cognitive factor in almost all legal reasoning. According to Frost, both groups ignore how metaphors evoke emotional responses and contribute to the speaker’s credibility. He suggests that modern analysts should be encouraged to examine more closely the way these two important aspects are dealt with in the works of the classical rhetoricians.

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Other sentence-level devices to be used in legal argument, recommended by both classical and modern rhetoricians, are antithesis and parallelism. These are discussed in Chapter Six, “Greco-Roman Elements of Forensic Style” (pp. 109-118). In antiquity, antithesis and parallelism were considered as schemes that could make arguments more coherent, memorable, and emotionally appealing. However, as the case of *Harper & Row Publishers v. Nation Enterprises* (mentioned above) may serve to demonstrate they are in fact equally prevalent and effective in modern legal argument. Nevertheless, Frost maintains that modern writers on legal rhetoric lack a comprehensive theoretical framework for their discussion of these important issues.

The final chapter, “The Rhetoric of Dissent: A Greco-Roman Analysis” (pp. 119-147), contains a practical demonstration of how to analyse modern legal discourse from a classical perspective. The focus is on the famous case of *United States v. Virginia* (1996) in which Justice Antonin Scalia gave an equally (in)famous dissenting opinion. Frost shows that while the logical arguments put forward by Justice Scalia are not new, his rhetorical strategies do in fact appear innovative. Scalia’s playing on the emotions of the audience (*pathos*) is successful in that he fully recognises and exploits the emotional content of the case; classical rhetoricians would have approved. However, Aristotle, Cicero, and Quintilian would have strongly disapproved of the impression Scalia gives of his own character, since this damages his *ethos* and thereby even his legal argument. According to Frost, we may ascribe Scalia’s failure to, among other things, an over-artful writing style, hyperbolic legal and factual claims, and ill-advised sarcasm.

In the remainder of this review I comment on Frost’s purpose and approach. Throughout the book, Frost argues that law students should study Greco-Roman rhetoric. However, it is not clear to me what he means exactly: should law students only read his book or should they also study the Greco-Roman literature on rhetoric? Both options are problematical, for two reasons. First, I am afraid that reading only Frost’s book would give the students a rather distorted view of classical rhetoric; second, I fear that what they read in the classical works will not be directly applicable to modern legal practice.

The first problem is caused by the sources. Frost suggests that the rhetorical works of Aristotle, Cicero, and Quintilian are comparable as to origin, content, and character. This is obviously not the case. Actually, his description that the “classical treatises offer detailed, practical advice on almost every aspect of legal discourse and the practice of law, covering everything from lawyer-client relationships to the smallest details of trial lore” (Preface, p. vii) holds for Quintilian’s *Institutio oratoria* only. Moreover, Frost suggests that the modern law students should study ‘the’ system of classical rhetoric. However, we have no direct evidence that there was one rhetorical system being taught in Greece or Rome; we can only reconstruct something like it on the basis of the few sources that have come down to us. Moreover, Cicero’s *De oratore* – the most authoritative book on rhetoric – states repeatedly and emphatically that rhetorical textbooks are not valuable in and of themselves, because this literature results from practice, and not the other way round. Finally, those students who want to read the quoted passages in their original context may have a problem. Frost does not indicate the book, chapter, and section number of a text, but merely refers to the page(s) of an English translation of it. When readers do not happen to have that particular translation at their disposal, they will only be able to find the original text with great difficulty, if at all.

The second problem concerns the direct applicability of classical legal rhetoric to modern legal practice. Frost has convincingly demonstrated that rhetorical devices do apply to modern legal discourse. However, for a proper explanation of classical legal rhetoric, in my opinion it is necessary to show how these devices were applied in classical legal discourse. Frost’s book contains no such attempt. Modern students reading the quotations from three or four classical rhetoricians will have no idea how the rhetorical devices under discussion worked in practice,

and they will have to guess how they should apply them in their own legal work. I do not think that “some adaptations for modern taste and modern legal practice” (Preface, p. vii) will suffice.

Because we know more about Roman law than about Greek law, the practice of Roman rhetoric should be studied on the basis of Roman legal sources. In this review, I will focus on one particular kind of legal source, namely the jurists’ opinions. They were collected in the first three centuries of our era but have come down to us only through a number of anthologies that were made, on the basis of these collections, in the fourth to the sixth centuries AD. They do not contain specific references to rhetoric, but seem to refer to legal practice. Nevertheless, Roman law scholars generally regard them as a product of legal theory. This view can only be explained by an historical excursus, starting in Rome and ending in nineteenth-century Germany.

In Rome, the administration of justice was not organised by the state. The judges were private persons, usually from the upper classes, and their judgments were not published by the state. What was published were so-called *responsa*, opinions of jurists (*iusprudentes*), that is, legal experts who acted as advocates, as legal advisors, or sometimes as judges. They all belonged to the Roman nobility and held high political offices. In their collections of *responsa*, they included opinions about legal problems, particularly those opinions that had been followed by a judge. They seldom mention the name of the judge, but I know of at least one case in which they did.<sup>1</sup> I believe that the jurists made these collections because they wanted to use the opinions/judgments again in similar legal problems and that, therefore, the *responsa* are comparable to the existing decisions or precedents referred to by Cicero and Quintilian.

In the fourth to the sixth centuries AD, anthologies were made on the basis of these collections, the most famous being the *Digest*. The East-Roman Emperor Justinian was the one who ordered his Minister of Justice to compile this work. It was introduced in Italy by that same emperor but, under Germanic rule it was soon forgotten. In the twelfth century, it was re-discovered and studied again in the law school of Bologna. The jurists of that school discovered all sorts of contradictions and inconsistencies in the texts. At the same time, they regarded the *Digest* texts as given by the Roman emperor and therefore as authoritative. They could not acknowledge any inconsistencies and therefore sought to explain them away by means of rational, scholastic methods of interpretation.

In later centuries, these texts came to be seen as historical sources. They would probably still have been regarded in this way if it had not been for the foundation, in nineteenth-century Germany, of C. F. von Savigny’s Historical School, which treated Roman law as the model of a legal system based on logic. Again, contradictions and inconsistencies were explained away. The *Digest* texts were regarded as scientific, theoretical sources. Any connection with rhetoric was denied.

Although the law schools of continental Europe have recently followed the Anglo-American universities in finally recognizing the relevance of rhetoric for modern legal discourse, Roman law scholars are still reluctant to do the same for classical Roman law. In their view, for every legal problem there was only one proper solution. Arguing *pro* and *con* is regarded as being contrary to Roman legal science. Even if, from the 1920s onwards, there were some Romanists, such as Johannes Stroux,<sup>2</sup> who acknowledged that Roman law and rhetoric were in fact closely linked, their opinion has not prevailed.

<sup>1</sup> See *Digesta* 24.3.66 pr. It is also possible that the names of the judges, like those of the parties, were included in the *responsa*, but that they have been left out in the course of copying and shortening the texts. In modern studies, the opinions are usually regarded as referring only indirectly to legal practice and even as dealing with hypothetical cases. See, for instance, B. W. Frier, *The Rise of the Roman Jurists* (Princeton: Princeton University Press, 1985), pp. 188-196, on the jurists developing a doctrine of ‘autonomous’ law.

<sup>2</sup> Stroux’s famous article, “*Summa ius summa iniuria*. Ein Kapitel aus der Geschichte der *interpretatio iuris*” was (re)printed in *Römische Rechtswissenschaft und Rhetorik* (Potsdam, 1949), pp. 9ff.

It is a well known fact that, in Greece, rhetoric was closely linked to philosophy. Aristotle's teacher, Plato, pleaded for a pure philosophy, divorced from rhetoric. In the second century BC, the most creative period of Roman law, two philosophical schools were at loggerheads, namely the Stoa and the New Academy. Romanists do acknowledge the influence of the Stoa on Roman law, particularly the logic of Chrysippus, but they deny any influence of the New Academy, particularly of Carneades. However, it is clear that Carneades's method of *in utramque partem dicere* and his doctrine of probability were directly applicable to legal practice.

I hope this short excursus makes it clear that the connection between Roman law and rhetoric is very complicated, and that Frost in his book is simplifying history by just ignoring it. At times, his approach has also kept him from properly explaining certain aspects of classical rhetoric. I will give three examples. In Chapter Two, Frost discusses the use of existing decisions as *topoi* in classical rhetoric.<sup>3</sup> In his view, the classical rhetoricians dealt thoroughly with precedents although they regarded them only as a "stylistic embellishment, not a substantive requirement" (p. 28). In a footnote, Frost refers to *Rhetorica ad Herennium* II.46 where previous judgments are mentioned as a form of embellishment. However, in my view, it is wrong to conclude from this text that previous decisions only served as embellishment. They were also useful to support a particular line of argument. For example, according to *Rhetorica ad Herennium* II.13-14, when the letter of a text appeared to be at variance with the intention of its author, both parties were to cite examples of previous judgments supporting their respective interpretations. Therefore it made sense for the rhetoricians to deal thoroughly with precedents.

The second example concerns the value of precedents in antiquity and in modern Anglo-American law. According to Frost, Greece and Rome had a code-based legal system, and therefore the 'precedential' value of existing decisions was limited. However, neither in Greece nor in Rome was the legal system based on codes. In Rome, there were a few laws (*leges*) on legal issues, but the making of law (*ius*) took place in legal practice. In fact, that is exactly the reason why the Roman legal system is often compared to the common-law system. Of course, the Roman lawyers were not constrained by the principle of *stare decisis* as are the modern lawyers in the common-law system, but they valued precedents just as much.

*Pathos* in Chapter Four provides the third example of misunderstanding Roman legal practice. Frost maintains that, in antiquity, audiences were insufficiently educated and trained in rhetoric and that they were therefore susceptible to emotional appeals. This may be true for Greece with its huge juries, but it is not true for Rome. There, the juries consisted of approximately fifty judges who all belonged to the upper class. They had been trained in rhetoric and law, and were highly capable of understanding and appreciating the speeches of the advocates.<sup>4</sup> It was thus even more important for the advocates to use *ethos* and *pathos* properly.

I have read Frost's book with mixed feelings. On the one hand, his initiative to write about the close connection between law and rhetoric deserves praise. We must be grateful to Frost for recovering the lost heritage of classical legal rhetoric. On the other hand, his approach to the subject is disappointing. I am afraid that incipient lawyers and law students will not learn much about Greco-Roman rhetoric by reading this book. However, it will certainly serve as an important source of inspiration.

<sup>3</sup> By the way, the four categories Frost uses to discuss the *topoi* do not constitute comparable entities: the first and the last categories (confirmation and refutation) are parts of the argumentation in a legal discourse, whereas the second (the interpretation of laws) belongs to the *stasis* theory, and the third (enthymemes) is a way of reasoning.

<sup>4</sup> See, e.g., S. F. Bonner, *Education in Ancient Rome* (London: Methuen, 1977), pp. 288-308; and O. E. Tellegen-Couperus, "The Role of the Judge in the Formulary Procedure", *The Journal of Legal History* 22 (2001), pp. 1-13.

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