# PRE-CONTACT AFRICAN JUDICIAL PROCEDURE AND THE *LEGIS ACTIO* PROCEDURE OF EARLY ROMAN ANTIQUITY: A COMPARATIVE ANALYSIS*

**Gardiol J. van NIEKERK****

**Summary:** *The purpose of the law and the legal processes in pre-contact Africa and ancient Rome differed fundamentally. The purpose of the law in Africa was to attain communitarian justice and in Rome, law focused on the attainment of individual justice. The legal process in Africa was consensual, informal and non-specialised, and the outcome aimed at reconciliation and integration of the parties. Legal knowledge was open and the litigants were groups, not individuals. The Roman legal process, again, was confrontational, specialised, formal and ritualistic and the outcome may be described in terms of winning and losing. Nevertheless, certain similarities in the law and legal procedure may also be observed: a pre-eminence of the spoken word; the emphasis on the sensory world; the absence of legal representation; the inquisitorial nature of proceedings; and inductive legal reasoning with a concomitant casuistic approach to law.*

**Keywords:** Pre-contact African legal procedure; *legis actio* procedure; purpose of the law; communitarian justice; informal consensual process; pre-eminence of individual; reconciliation and integration of parties; confrontation, specialised, formal, ritualistic legal procedure; winning and losing; sensory observation; struggle for law; inductive legal reasoning

## Introduction

Superficially, there appears to be remarkable resemblances in the social, political and legal organisation of many ancient cultures. It is therefore not surprising that scholars often compare the jural phenomena of pre-contact[1] Africa and early Roman antiquity.[2]

Societal structures in these two ancient civilizations displayed many similarities.[3] Nevertheless, in spite of the similarities in their social ordering, a closer inspection of their legal systems reveals fundamental differences as regards the purpose of the law, legal procedure, and the outcomes of the legal process.

## The Purpose of Law

The purpose of law informs the process or method followed to attain that purpose. Buckland[4] rightly points out that "substantive law can hardly be said to exist as law unless some method of enforcement is provided".

Within a western or European paradigm, to preserve order and to do justice have through the ages widely been accepted as the main objectives of law.[5] Significantly, the primacy of the individual has played an important role in the various theories of justice that have been developed through history.[6]

Modern discussions of justice in Roman law generally start with Ulpian's definition as evinced in the *Digest*: "Justice is the constant and unceasing will to give everyone his due."[7] It is notable that the individual takes a primary position already in this early description of justice: neither is the individual posited in a community, nor are the interests of the community as a whole referred to or even juxtaposed to the interest of the individual.

In contrast, pre-contact African law was founded on the principle of harmony and solidarity of the community;[8] collective good took a preferential position over individual claims. Therefore, justice focused on the welfare of the community as a whole and comprised communitarian ideals.[9]

The question is whether individualism dominated Roman jurisprudence during the time that the *legis actio* procedure was the only system of litigation and whether Roman procedure was consequently postulated on individualism.[10] Schultz[11] wrote that "the Romans probably passed through a medieval period of fettered rights", but that individualism in private law was undeniable from the beginning of the second century B.C.

Nevertheless, economic expediency prompted individualism to develop very early in Roman society. One may assume that by the time of the Twelve Tables the concept of individual "ownership" had already appeared, if not yet in the modern technical sense of the word. Individualism in Roman jurisprudence is confirmed by, among others, the ritual of the *rei vindicatio* as described in *G*. 4.16;[12] the unrestricted character of ownership in general: there were few limitations on the alienation of real and personal property;[13] freedom of testation (restriction on legacies were introduced only around the second century B.C.);[14] the *actio familiae erciscundae* for the division of the family property[15]; and the extremely individualistic nature of marriage (excluding the *manus* marriage).[16]

In essence, then, the difference in the purpose of pre-contact African and ancient Roman law may be described in terms of communitarianism versus individualism. The next question would then be whether the respective legal procedures to attain the divergent ideals of law, were equally divergent and likewise respectively based on communitarian and individualistic precepts.

### Legal Procedure

In Africa, legal procedure was an informal process of restoring equilibrium through consensus. In Rome, it was a ritualistic, formal process aimed at giving the individual his or her due, through confrontation. Most of the other disparities in the civil procedure of these communities could in some way be reduced to the fundamental

distinctions between communitarianism and individualism; between consensus and confrontation; and between informality and formalism. The discussion that follows will consequently focus on these three aspects.

### (a) Communitarianism v. Individualism

It is not surprising that legal procedure in Africa focused on restoring harmony and unity within groups and within larger communities, given the communitarian foundation of pre-contact African law.[17]

In civil procedure, the litigants were groups represented by the family head or the head of the ward.[18] It has to be borne in mind that in pre-contact African law, groups were legal subjects and that individual persons could not be the bearers of rights or incur personal liability. Proceedings commenced when an agnatic group reported their complaint to the head of the wrongdoer's group. The groups approached the headmen of the ward or the chief only if they could not settle their differences by agreement. [19]

As to be expected, the individual was at the centre of Roman civil procedure. In *I*.4.6*pr* the purpose of the law, as captured in *D*.1.1.10*pr*, and the manner of attaining that purpose are brought together when it is stated that "an action is nothing else but the right to seek by litigation what is due to one".[20] Romanists view this passage as wide enough to encompass both substantive law and legal procedure[21] – not that the Romans had necessarily reached a stage of abstraction in early antiquity that allowed for any distinction between the law of things and the law of procedure.[22] The pre-eminence of the individual speaks for itself in *D*.1.1.10*pr*. [23] Also *G*.4.3 focuses on individual rights: "an action *in rem* is one in which we claim either that some corporeal thing is ours, or that we are entitled to some right".[24] Accordingly, the litigants were individuals, [25] free Roman citizens above puberty.

### (b) Consensus v. Confrontation

There was an important link between law and compassion in ancient African culture manifested by a disinclination to litigate and a preference for mediation. Since confrontation was avoided as far as possible, the prospective litigants had to resort to certain extra-judicial processes before a dispute could be settled in court.

The meeting of the parties to attempt to work out the problem amicably was in fact an important phase in the legal process and a court would not continue with a hearing unless the parties had taken that step first. Where all the preliminary steps had been taken, the court would still refrain from adjudicating a case immediately. It would first make an effort to restore peace and reconcile the parties by mediation. Only if that also failed, could adjudication commence. In African law, procedure was inquisitorial. Consensus, equilibrium and conciliation were the primary objectives of the legal process and the responsibility of the court.[26]

In contrast, the hallmark of ancient Roman civil procedure was confrontation. Nevertheless, Roman procedure is generally characterised as inquisitorial in nature and the presiding official (magistrate and judge) played an active part in the process.[27] The formal, ritualistic *legis actio sacramento in rem* as described in *G*. 4.16,[28] epitomised most of the features of Roman civil litigation and will accordingly form the basis of this discussion.

Although confrontation permeated Roman civil procedure as a whole, it was especially evident in the *in iure* stage of the proceedings.

Both parties, as well as the movable thing in dispute,[29] had to be present before the magistrate[30] and the onus was on the claimant to ensure this[31] – not necessarily always in an affable manner. If the defendant did not want to yield to the summons to appear before the magistrate, the claimant could physically seize him.[32] The claimant was also at liberty to confiscate the object from the possessor and if the possessor denied possession, he could even pursue his search for the thing in his opponents' house as if it had been stolen.[33]

The symbolic theme of a physical contest[34] was refrained in the ritualistic words and actions of the *in iure* process.[35] The claimant or *vindicator* had to grasp the thing he claimed physically and touch it with a staff. His opponent asserted his right in the same way, by wielding a staff.[36] The staff symbolised a spear.[37] The image of power, conflict or war was therefore distinctive.[38] The adversarial nature of the proceedings was further confirmed by the fact that Gaius used the term "adversarius" when referring to the opponent, the grammatical meaning of which includes notions such as "antagonist, adversary, enemy and rival".[39] Interestingly, the term "adversarius" was often used to denote any one of the litigants, confirming the conflictual nature of the proceedings.[40]

These are but a few examples to illustrate the spirit of hostility which permeated the traditionally two-phased *legis actio* procedure of Roman law and which, as will be explained below, was also evident in the outcome of the legal process.

### Informality v. Ritualistic Formalism

With the emphasis on cohesion within the community, and concomitantly on harmonious relationships, it naturally follows that in pre-contact Africa, legal procedure was characteristically informal and free from technicality.[41]

Grevenbroek, Dutch-East India Company Secretary of the Local Council of Policy at the Cape of Good Hope noticed the simplicity of the African legal process when he observed the Xhosa in the seventeenth century. He wrote that the chief "deals out simple justice to his subjects, without tortuous pleas and judgments, but after hearing both sides, and on a fair and equitable basis".[42]

The African court assembled out of doors, in the cattle pen, and all adult males[43] could attend, ask questions and offer evidence. There was no oath. A trial was an interactive process and the law was in the public domain. In accordance with Africa's oral tradition, the law was communicated to children from a very early age and was consequently known to everybody.

Importantly, the focus was on facts, rather than rules. As a result of the lack of abstraction in indigenous African law and procedure, a consequence of the non-specialised nature of that culture, legal reasoning was founded in sensory observation. This was, of course, a natural corollary of the general pre-literate condition of ancient Africa. In an inquisitorial procedure, the presiding officer played an active role in eliciting evidence. Legal reasoning was further inductive and the approach to law casuistic: the court did not apply abstract, formulated rules of law to specific cases.

As expected, proceedings were conducted orally and there was obviously no record of the trial in the pre-literate African society. Consequently, judicial precedent could not be strictly followed – and certainly not in the modern-day sense of the practice. However, the court relied to an extent on previous decisions as guidelines in difficult cases, but only as part of the collective memory or accumulated knowledge of the past.

The Roman tradition could be distinguished by its ritualistic formalism of acts and spoken words.[44] Notably, even though ancient Roman society was not pre-literate,[45] as was the case with ancient African societies, there was an idiosyncratic emphasis on oral communication in the law in general and during the period under discussion written documentation was not regarded as a legal formality.[46]

A distinctive stylistic feature of Roman law was the "struggle for law"[47] which, in this context, entailed that even though law was aimed at giving everyone his due, the individual nevertheless had to struggle to attain what was due to him or her and a duty rested on the individual to fight for his rights. Although only selected aspects of civil procedure will be referred to in this regard, the Roman legal order, its law and procedure, abound with examples of how the individual had to struggle for justice.

The formalism and fixed ritual of the Roman legal process may be regarded as one of the main obstacles that the individual had to overcome in this struggle for justice. As indicated, the utterance of formal words were rigorously adhered to and in the *legis actio* procedure an action was easily lost where the prescribed formularies had not been followed strictly.[48] Gaius[49] provides the example of where a man lost his action because he had used the word "vines" instead of "trees" as prescribed by the Twelve Tables.

Further, this procedure pertained only to the strict *ius civile* and was applied only between Roman citizens.[50] This is in stark contrast to the "open" legal procedure and legal knowledge which prevailed in pre-contact Africa. Since social solidarity and harmony of the collectivity were fundamental postulates of African legal ordering, no one – not an individual,[51] a family group, a ward, or chiefdom; not even a foreigner – was excluded from the legal order, neither as regards legal procedure, nor as regards knowledge of the law.

But, knowledge of the law, or rather lack of such knowledge, was another barrier in the Roman citizen's struggle for justice. Before the Twelve Tables, the

legal order was closed and secretive and the reserved domain of the state priests. Although the laws and regulations were made known to everybody in the Twelve Tables, the *legis actiones* still remained a closed book in the pontifical archives.[52]

From the third century B.C., a secular jurisprudence started developing alongside the pontifical body of legal knowledge. It was during this time that the formularies of the civil actions and the pontifical calendar were published in the *Ius Civile Flavianum*. However, there was practically not much difference in this period between sacred and secular jurists:[53] they were all from the same small and select social class and they continued to monopolise legal knowledge.

There was no provision for legal representation in the *legis actio* procedure.[54] A separate class of legal representatives came to the fore only in the last two centuries of the republic[55] when specialisation in Roman law began developing.[56] A general aversion to general rules, abstract definitions, and so on, combined with the pre-eminence of procedure, naturally led to inductive rather than deductive legal reasoning – the latter comprising reasoning from the general rule to the specific case. [57] Concomitantly, the Roman jurisprudential method was characteristically casuistic and substantive law was created from considering (real and fictional) cases.

Interestingly, there was a predominant sensory element in Roman procedure which focused on tangible and sensory observation in the legal process. This was evidenced by the prevailing orality, the ritualistic physical contact which formed such an important part of the litigation process and the requirement that in the *actio in rem* the thing in dispute had to be present at the *in iure* stage of the proceedings.

### Outcome of the Process

Pre-contact African procedural law was aimed at the reconciliation of the parties and restoration of harmony in the community.[58] Harmony could be restored only if both parties were satisfied that justice had been done. The court had to ensure that the party at fault was aware that his behaviour had fallen short of communal expectations, that he had accepted the decision of the court and that he would be reintegrated into the community.[59]

The importance of reconciliation is illustrated by the way in which the Tiv of Northern Nigeria handled truth in litigation. They never judged truth in isolation, but viewed it within the context of equilibrium in the community. It was more important to determine whether a statement might be detrimental to the balance in the community, than whether strictly the statement was true or false. In fact, it was sometimes preferred that an untruth be told if that would enhance the possibility of a reconciliation between the parties to a dispute. Bohannan[60] explains:

> 'Truth' in Tivland is an elusive matter because smooth social relationships are deemed of higher cultural value than mere precision of fact. We must not judge Tiv litigants or witnesses by our standards. They are not liars, as they are sometimes called: their truth has other referents than has European truth

From this perspective, the absence in African litigation of an oath to tell the truth is not unexpected.

In ancient Roman procedural law, the enforcement of a judgement was true to the ethos of confrontation that permeated its procedure in general. There was no question of restoring relationships or reconciling the litigants, "there was no room for compromise", the judge decided "wholly for one party or the other". [61] The outcome of the Roman civil litigation was in effect the "winner takes all". Added to that, there was a measure of punishment for the unsuccessful litigant: While the successful party could recover the *sacramentum* he had pledged, the unsuccessful litigant forfeited his to the state by way of a penalty.[62]

**Conclusion**

Given how significant the deviation is in the legal procedure of pre-contact African and ancient Roman law, one would hardly expect that there could also be similarities, the more so if one considers how essentially different these two ancient societies viewed the purpose of the law in general. Nevertheless there were areas in the legal process that showed some resemblance, such as the pre-eminence of the spoken word along with the fact that proceedings were not recorded; the absence of legal representation and the inquisitorial nature of proceedings; and, importantly, inductive reasoning and a casuistic approach to law.

Still one would do well to heed Metzger's words of caution: "Anyone who studies procedure should be wary of ideas that have passed unchanged from textbook to textbook and be alert to the possibility that these ideas are modern".[63] The paucity of information on early, pre-classical civil procedure[64] has induced Romanists and historians through the ages to attribute characteristic features to Roman procedural law which may or may not reflect a true understanding of antiquity. Likewise scholarly interpretation of pre-contact African oral traditions[65] may have distorted current knowledge of those ancient legal procedures, especially since legal research has emanated predominantly from Western or European academics and also because the ancient, pre-literate Africans left no original paper-based or any other written information of their past.

That we must be circumspect when it comes to modern *communis opinio* is true. Yet we cannot let caution deter us from investigating all available knowledge on antiquity, for the past is accessible only through the present.

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** **GARDIOL J. VAN NIEKERK,** Department of Jurisprudence, School of Law, University of South Africa. Vniekgj@unisa.ac.za.

[1] The term “pre-contact” refers to the period before African communities came into contact with either the Arabic (trans-Saharan) or the European (Atlantic) slave traders: Hammond-Tooke *The Roots of Black South Africa* (1993) pp. 8-9. This term is preferred to “ancient” since it denotes a period in history before African cultures and specifically African law were influenced by other cultures.

[2] It is important to bear in mind that pre-contact African societies were traditionally preliterate and there are no ancient written sources compiled by indigenous Africans themselves. The most valuable sources of knowledge of pre-contact African law are the anthropological writings on African culture and the restatements of the law. Although some appeared in the early twentieth century and even during the nineteen century, most of these works were published from the 1930s onwards. Some information on the law and institutions of early African societies may also be gleaned from sixteenth and seventeenth-century texts of early travellers. Importantly, these works prove that already during the sixteenth century, African societies were socially and politically organised and had legal orders with well-structured laws and institutions. Examples of such works are Ioannis Leonis Africani *De Totius Africae Descriptione, Libri IX* (1556) and the texts of Olfert Dapper, *Kaffrarie, of Lant der Hottentots* (1668), Willem ten Rhyne *Schediasma de Promontorio Bonae Spei* (1686) and Johannes Gulielmus de Grevenbroek *Gentis Africanae circa Promontorium Capitis Bona Spei Vulgo Hottentotten Nuncupatae* Descriptio (1695). The latter three works together with translations and annotations were published by the van Riebeeck Society in CapeTown as Schapera Ed. *The Early Cape Hottentots*. During the nineteenth and early twentieth centuries various reports of commissions and parliamentary committees were published. Also these reports are valuable sources of information. Examples of these are the reports of the Natal Native Commission dated 1846-1847, 1852-1853, 1881-1882 and 1903-1905; and the reports of the Commons Select Committee on Aborigines (British Settlements) 1836-1837 and of the Commons Select Committee on Affairs of the Cape of Good Hope, 1851.

[3] See Westrup *Introduction to Early Roman Law. Comparative Sociological Studies. The Patriarchal Joint Family. Patria Potestas* Vol. 3 (1939) pp. 147, 150, 151, 186-187; Maine *Ancient Law* (1920) pp. 136-137.

[4] Buckland *A Manual of Roman Private Law* (1939) p. 361.

[5] Hahlo & Kahn *The South African Legal System and its Background* (1968) pp. 25, 26; Du Plessis *Die Juridiese Relevansie van Christelike Geregtigheid* (unpublished LLD Thesis, University of Potchefstroom, 1978) p. 827.

[6] Importantly, neo-Marxist and critical-legal-studies theorists have criticised the mainstream liberal theories of justice which emphasise the pre-eminent position of the individual and absolute individual freedom: Freeman *Lloyd's Introduction to Jurisprudence* (1984) pp. 857-861, 935-941.

[7] *D*. 1. 1. 10*pr*. (*I*. 1 .1*pr*.): *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.* The historical antecedent of this definition may be traced to Cicero’s conception of justice as the disposition that each should be granted his own. See *de Finibus* 5.23.65: *quae animi affectio suum cuique tribunes*: cf. Van Zyl *Justice and Equity in Cicero. A Critical Evaluation in Contextual Perspective* (1991) p. 107.

[8] See, e.g., Kidd *Kafir Socialism* (1908) Ch 1 *passim* on the concept of social solidarity in Africa. According to Gluckman "Natural justice in Africa" in Varga Ed. *Comparative Legal Cultures* (1992) p. 176, the adherence to a doctrine of natural justice in Africa is

illustrated by the fact that courts maintained the principles of law while restoring the disturbed relationships within the community. Harmony and equilibrium had to be maintained horizontally between members of the community, as well as vertically, between the community and the deceased ancestors (the superhuman), because relationships in the community did not cease with death: Omi & Anyanwu *African Philosophy. An Introduction to the Main Philosophical Trends in Contemporary Africa* (1981) p.143; see also Mbiti *African Religions and Philosophy* (1975) p. 107.

[9] Kidd (*supra* n.8) pp. 8-9 describes pre-contact African justice as "socialistic" and (at p. 80) "corporate"; see generally his discussion at pp. 61-93. Strictly speaking, it is not correct to speak of the absolute primacy of the collectivity over the individual good, since the welfare of the community was inextricably linked to the welfare of the individual. Accordingly, in pre-contact African societies there were mechanisms in place to protect the dignity of the individual.

[10] This legal procedure started even before the Twelve Tables and persisted until Augustus abolished it 17 B.C.: Mousourakis *The Historical and Institutional Context of Roman Law* (2003) p. 132; Buckland *Manual* (*supra* n. 4) p. 362.

[11] Schulz *Principles of Roman Law* (1936) pp. 146.

[12] Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) at pp. 58-59, states that "het ritueel der *reivindicatio* [described in *G.* 4.16] duidelik het beeld geeft van de manifestatie van individueelen eigendom op roerend goed"; see also *idem* pp. 96; 113, 116. It has to be borne in mind, though, that a relative right of possession preceded the absolute individual ownership of the earliest republican times: Jolowicz *Historical Introduction to the Study of Roman Law* (1967) pp.142, 144. See further Westrup *Introduction to Early Roman Law. Comparative Sociological Studies. The Patriarchal Joint Family. Joint Family and Family Property* Vol. 2 (1934) pp. 157, 172.

[13] Schulz *Principles* (*supra* n. 11) p. 153.

[14] *Idem* p. 156.

[15] Westrup Vol. 2 (*supra* n. 3) pp. 39, 43, 45, 61, 65; Van Oven (*supra* n. 12) pp. 570 571; Kaser *Das römische Privatrecht* Vol. 1 (1971) pp. 123, 124, 367, 368; Diósdi *Ownership in Ancient and Preclassical Roman Law* (1970) pp. 44, 46.

[16] See Schulz *Principles* (*supra* n. 11) pp. 146-148.

[17] The following general sources have been consulted with regard to pre-contact African law of procedure: Myburgh *Papers in Indigenous Law* (1990); Van Niekerk *A Comparative Study of the Application of Indigenous Law in the Administration of Criminal Justice in Southern Africa* (unpublished LLM dissertasion, University of South Africa, 1986); Myburgh & Prinsloo *Indigenous Public Law in KwaNdebele* (1985); Prinsloo *Inheemse Publiekreg in Lebowa* (1983); Van Niekerk "Principles of the indigenous law of procedure and evidence as exhibited in Tswana law" in Sanders Ed. *Southern Africa in Need of Law Reform* (1981); Van der Merwe "Accusatorial and inquisitorial procedures and restricted and free systems of evidence" in Sanders (*supra*); Mönnig *The Pedi* (1978); Schapera *A Handbook of Tswana Law* (1977); Schapera "The Tswana" in Forde Ed. *Ethnographic Survey of Africa. Southern Africa* Part 3 (1971); Cotran & Rubin Eds. *Readings in African Law* Vol. 1 (1970); Junod *The Life of a South African Tribe* (1966); Elias *The Nature of African Customary Law* (1956); Bohannan *Justice and Judgment among the Tiv* (1957); Bryant *The Zulu People* (1948); Marwick *The Swazi* (1940).

[18] Junod, (*supra* n. 17) pp. 332 437; Myburgh *Papers* (*supra* n. 17) pp. 70-75.

[19] In civil procedure there was always the possibility of informal settlement by a family council which played an important role in the procedure preceding the actual court hearing. The decision of a family council was not binding but was taken into consideration by the court. Family councils tried to reach a peaceful settlement out of court through conciliation.

[20] See also *D* 44.7.51; cf. Thomas *The Institutes of Justinian* (1975) p. 282; see also Sandars *The Institutes of Justinian* (1903) p. 426; Lee *The Elements of Roman Law* (1952) p. 412.

[21] See, e.g., Lee (*supra* n. 20) p. 412; Buckland *Manual* (*supra* n. 4) p. 363; Buckland *A Textbook of Roman Law from Augustus to Justinian* (1966) pp. 604-606.

[22] See Buckland *Textbook* (*supra* n. 21) p. 606; Maine *Dissertations on Early Law and Custom* (1901) pp. 366-368; *contra* Watson "The law of actions and the development of substantive law in the early Roman republic" 1973 (89) *Law Quarterly Review* pp. 389ff. See also Metzger "Roman judges, case law, and principles of procedure" 2004 (22-2) *Law and History Review* pp. 246-247; Buckland *Roman Law and Common Law. A Comparison in Outline* (1965) pp. 6-10.

[23] The element of individualism further comes to the fore in general academic enquiries into the nature of Roman procedure. Thus, Greenidge *The Legal Procedure of Cicero's Time* (1971) p. 1 defines procedure as the "symbolic actions" used by individual members of society to assert their rights or liberties.

[24] *In rem actio est cum aut corporalem rem intendimus nostram esse aut ius aliquod nobis competere.*

[25] Although one individual started the proceedings, it is in fact incorrect to speak of "plaintiff" and "defendant" in real actions since both parties made claims and neither could win unless he could prove his personal entitlement. This is confirmed by the fact that Gaius does not use these terms Buckland *Manual* (*supra* n. 4) p. 374; see also Van Oven (*supra* n. 12) p. 96. The terms he uses, as will be explained below, denotes the confrontational nature of the proceedings: *G.* 4.16 and 17. De Zulueta *The Institutes of Gaius* Part I (1946) uses "claimant" and "opponent" in his translation of *G.* 4.16.

[26] Breutz *Die Politischen und Gesellschaftlichen verhältnisse der Sotho-Tswana in Transvaal und Betschuanaland* (1941) p. 50; Myburgh & Prinsloo (*supra* n. 17) pp. 111-112, 121-122.

[27] Buckland *Textbook* (*supra* n. 21) p. 637; Meyer *Legitimacy and Law in the Roman World* (2004) p. 122.

[28] Procedure to assert ownership of a thing or control over a person in terms of *patria potestas*: Mousourakis *Context of Roman Law* (*supra* n. 10) p. 133. The following sources were consulted with regard to the *legis actio* procedure: Amos *The History and Principles of the Civil Law of Rome* (1883) 343-347; Kaser *Das römische Zivilprozessrecht* 2nd ed. by Hackl (1996) 89-107; Van Oven (*supra* n. 12) pp. 7-12; Lee (*supra* n. 20) pp. 412-428; Ledlie *Sohm's Institutes of Roman Law* (1935) pp. 229-240; Buckland *Textbook* (*supra* n. 21) pp. 610-616; Buckland *Manual* (*supra* n. 4) pp. 372-376; Greenidge (*supra* n. 23) pp. 49-75; Mousourakis *Context of Roman Law* (*supra* n. 10) pp.137-138; Mousourakis *A Legal History of Rome* (2007) 31-38.

[29] *G.* 4.17: *in rem praesentem vindication*; *G.* 4.16: *mobilia quidem et moventia, quae modo in ius adferri adducive possent, in iure vindicabantur*. See also Greenidge (*supra* n. 23) pp. 54-59; Van Oven (*supra* n. 12) pp. 8, 96; Mousourakis *Context of Roman Law* (*supra* n. 10) p. 134. One may argue that, as with the requirement of the physical presence of the

parties before the magistrate, the simple, practical reason why the thing had to be present was that it was a guarantee against misunderstanding and that it enhanced clarity – especially since the proceedings were conducted orally.

[30] The magistrate refers to a consul (or according to some, a pontiff) and later, from 367 B.C. in terms of the *leges Liciniae Sextiae*, a praetor: cf. Mousourakis *Context of Roman Law* (*supra* n. 10) pp.128, 132.

[31] Buckland *Textbook* (*supra* n. 21) p. 610 indicates that there is only scant evidence on the exact form prescribed for the summons (or *in ius vocatio*). See, too Mousourakis *Context of Roman Law* (*supra* n. 10) p. 132; Metzger "Roman judges" (*supra* n. 22) pp. 247-250; Metzger *Litigation in Roman Law* (2005) pp. 7-44 on the view that the *in ius vocatio* was replaced by consensual appearance.

[32] Unless he had a valid reason for not attending and he could procure a *vindex* or guarantor who could guarantee that he would appear before the magistrate at a specific date. Expert opinion appears to be divided on whether the *vindex* could be appointed under any circumstances or whether only in specific instances where there were grounds for non-appearance, such as *morbus sonticus*. Nevertheless, there are no details available on this specific practice: Buckland *Textbook* (*supra* n. 21) pp. 612-613, 708-709; Kaser *Zivilprozessrecht* (*supra* n. 28) pp. 224-226; see also Mousourakis *Context of Roman Law* (*supra* n. 10) pp. 132, 137; Metzger *Litigation* (*supra* n. 33) pp. 4-5, 13-15; and see n. 54 below.

[33] In such a case witnesses had to be present: see *G.* 3.186, 192 and 193 on the search for a stolen thing.

[34] Cf. Cicero *de Re Publica* 4.8: "I marvel at the elegant choice, not only of the facts, but of the language. If they dispute (*jurgant*). It is a contest between well-wishers, not a quarrel between enemies, that is called a dispute (*jurgium*)". In 4.10 it is further stated: "Thus the word *pleading,* signifies rather an amicable suit *between* friends, than a quarrel between enemies." For the latter fragment see Yonge *The Treatises of M.T. Cicero: On the Nature of the Gods; On Divination; On Fate; On the Republic; On the Laws; and On Standing for Consulship* (1878) at p. 372. This work is a revised edition of Barham *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws* (2 Vols.) (1841/1842). The Latin text which was translated was a manuscript discovered in 1822 by the librarian of the Vatican among the palimpsests in that Library. (Yonge p. 283).

[35] As evinced in *G.* 4.16

[36] *Ibid*: *Qui vindicabat festucam tenebat; deinde ipsam rem adprehendebat, veluti hominem, et ita dicebat: hunc ego hominem ex iure quiritium meum esse aio secundum suam causam. Sicut dixi, ecce tibi, vindictam imposui; et simul homini festucam imponebat. Adversarius eadem similiter dicebat et faciebat.* (The claimant, holding a rod and laying hold of the actual thing – let us say a slave – said: "I affirm that this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him"' and at that moment he laid his rod on the man. His opponent spoke and did the selfsame things.)

[37] According to *G.* 4.16 the rod represented a spear, which symbolised lawful ownership. The reasoning was that a person was considered to be the lawful owner of things which had been captured in war (*festuca autem utebantur quasi hastae loco, signo quodam iusti dominii, quando iusto dominio ea maxime sua esse credebant, quae ex hostibus cepissent*).

[38] This part of the process where each asserted their claims was known as "*manus consertio*": Buckland *Manual* (*supra* n. 4) p. 372.

[39] See *Lewis & Short A Latin Dictionary; Cassell's Latin Dictionary*: *sv* "adversarius".

[40] See Mousourakis *Context of Roman Law* (*supra* n. 10) p. 130.

[41] Significantly, Van der Westhuizen "Legal Philosophers (1) Socrates (469-399 B.C.) and the Ancient Greeks" 1982 *De Rebus* 31, notes that Socrates once introduced his own defence by saying that truth and a just decision were more important than the use of formal procedure and technical skills. That occurred at the age of seventy, when he appeared before a people's court facing charges of being a speculative philosopher and evil-doer who meddled with things under the earth and in heaven, of corrupting the youth and of being an atheist.

[42] [*Q*]*ui jura subditis de plano, sine judiciorum litiumque anfractu, parte utraque auditâ, ex aequo et bono reddit*: De Grevenbroek (*supra* n. 2) 257.

[43] Due to their perceived monthly ritual impurity, females were not casually allowed since that would affect the fertility of the cattle. They were however allowed if they were actively involved in a case.

[44] Schulz typified this as "actional formalism". Schulz *History of Roman Legal Science* (1946) 24-26 29-30; Watson "Law of actions" (*supra* n. 22) at p. 388 indicates that the process *in iure* was more formal than that *apud iudicem.*

[45]Records of legal acts were made from the sixth century B.C.: Schulz *Science* (*supra* n. 44) at p. 25. Isolated written records of judgments from the last century B.C. have survived: see generally Schulz *idem.* 25-26; Mousourakis *Context of Roman Law* (*supra* n. 10) pp. 211ff.

[46] Kaser *Zivilprozessrecht* (*supra n*. 28) at pp. 10-11; Metzger "Roman judges" (*supra* n. 22) at pp. 264ff; Meyer (*supra n*. 29) at pp. 2 36-39. Various reasons have been afforded for the prevalent orality of that time: from a practical point of view the physical presence of the parties was probably a guarantee against misunderstanding and enhanced clarity. It could also be attributed to general illiteracy, the available methods of writing and time limitations. Another view is that the "principle of orality ... lessened the complexity and secrecy of a procedure dominated by writing": Metzger "Roman judges" (*supra* n. 22) at p. 262.

[47] See the discussion of Zweigert & Kötz *Introduction to Comparative Law* trl. Weir (1998) pp. 71-72, of this characteristic feature of Western law in general.

[48] Kaser *Zivilprozessrecht* (*supra* n. 28) p. 35; Buckland *Textbook* (*supra* n. 21) p. 610; Buckland *Manual* (*supra* n. 4) p. 372; Mousourakis *Context of Roman Law* (*supra* n. 10) pp. 132, 198ff; Van Oven (*supra* n. 12) pp. 8-9. For a contrary view see Watson "Law of actions" (*supra* n. 22) pp. 389-391: he avers that the action was lost because of the extinctive effect of *litis contestatio*.

[49] *G.* 4.11.

[50] The *praetor perigrinus* introduced the *per formulam* procedure for the benefit of foreigners and in 200 B.C. the *Lex Aebutia* extended its application to cases where both parties were Roman citizens. Schulz *Principles* (*supra* n. 11) p. 93 points out that the introduction of the formulary litigation system did not bring an end to the formalism of Roman legal procedure. See generally on the *per formula* procedure Kunkel *An Introduction to Roman and Constitutional History* trl. Kelly (1966) ch 6; Kaser *Zivilprozessrecht* (*supra* n. 28) pp. 151-171.

[51] Through his or her agnatic group: See Junod (*supra* n. 17) p. 436.

[52] Schulz *Science* (*supra* n. 44) p. 34; Van Oven (*supra* n. 12) p. 9. The rigid ritual, formalistic acts and declarations of the procedure were prescribed by statute and by priestly lawyers interpreting the statute. At this early stage of Roman legal development private law and civil procedure centred mostly on the family and inheritance: *G.* 4.11; Buckland *Textbook* (*supra* n. 21) p. 608.

[53] Schulz *Science* (*supra* n. 44) pp. 7-12; he points out that the college of priests did not consist of a body of spiritual or religious leaders but rather of "*honoratiores*" who were wealthy men of high social standing, from respected Roman families, who worked without remuneration. See also Metzger "Roman judges" (*supra* n. 22) p. 525; Kerr Wylie "Roman law as an element in European culture" 1948 *South African Law Journal* pp. 349-350.

[54] *G.* 4.82: *... cum olim, quo tempore legis actiones in usu fuissent, alieno nomine agree non liceret, praeterquam ex certis causi* (whereas in former times when the *legis actiones* were in use, one was not allowed to take proceedings on another's behalf, except in certain cases). See also *I* 4 10*pr*: *... cum olim in usu fuisset, alterius nomine agere non posse nisi pro populo, pro libertate, pro tutela* (but anciently, custom forbade one person conducting an action in the name of another, unless for the people, for freedom, or for a pupil): Sandars (*supra* n. 20) p. 469). Oltmans *De Instituten van Justinianus* (1961) 254 explains that these exceptions were where a magistrate acted in a case of public interest; where an *adsertor libertatis* acted on behalf of a slave; and where a guardian acted on behalf of his pupil. This was representation in the *in iure* stage of the proceedings. See further Buckland *Textbook* (*supra* n. 21) pp. 613, 708; Buckland *Manual* (*supra* n. 4) pp. 406-407; Greenidge (*supra* n. 23) pp. 59, 235.

[55] Schulz *Science* (*supra* n. 44) p. 40; Mousourakis *Context of Roman Law* (*supra* n. 10) p. 212. Economic development, as well the needs of the old and infirm led to the development of representation in litigation. *Cognitores* could be appointed to represent the old and the infirm *apud iudicem*: Greenidge (*supra* n. 23) pp. 146, 235ff; Buckland *Manual* (*supra* n. 4) pp. 406ff. Buckland notes that there is speculation that the *cognitores* could be appointed in any case. Importantly in the *legis actio* procedure a *cognitor* appeared as a party and not as the principal of the party. *G.* 4.83 states: *Cognitor autem certis verbis in litem coram adversario substituitur* (A *cognitor* is substituted as a party to an action by special words being uttered in the presence of the opposing party). Further, women, children and mentally challenged persons could not appear in court alone and needed assistance; *Sui iuris* women had to be assisted by their guardians and children and the insane were represented. Mousourakis *Context of Roman Law* (*supra* n. 10) p. 131. See also n. 32 and n. 54 *supra*.

[56] Schulz *Science* (*supra* n. 44) pp. 40ff. However, it has to be borne in mind that traces of specialisation could be detected as early as the Twelve Tables. The division of civil procedure in two stages evidenced the separation of powers and thus specialization. Judges were always private individuals. During the period under discussion, a judge was not an institution of the State and did not represent the absolute powers of the State. He acted under oath to adjudicate in accordance with the existing law. In contrast, the magistrate acted as a representative of the State. The state power was thus eliminated from the sphere of private law. See generally Ledlie (*supra* n. 28) pp. 227-228; Rabello "Non liquet: From modern law to Roman law" 2004 (10) *Annual Survey of International and Comparative Law* pp. 14, 20.

[57] See Buckland *Roman Law and Common Law* (*supra* n. 22) pp. 9-10; Van der Merwe "Judicial institutions in the civil law: Towards a theory for common-law adjudication" 1993 *Tydskrif vir die Suid-Afrikaanse Reg* pp. 581-582.

[58]Gluckman (*supra* n. 8) pp. 190 -191.

[59] Allott "African law" in Derrett Ed. *An Introduction to Legal Systems* (1968) p. 145. See also Darboe *The Interaction of Western and African Traditional Systems of Justice: The Problem of Integration. (A Case Study of the Gambia)* (1982) pp. 108, 109. At p. 109 he observes that, African law aspired "not only [to] assure the continuity of social groupings, but also [to] enable the entire society to sustain conflicts which may arise to threaten social coherence and equilibrium". Reintegration into the community and rehabilitation of an accused in a criminal case is described by De Grevenbroek (*supra* n. 2) p. 249. However, Schapera (*supra* n. 2) p. 249 n. 69, doubts whether this was a general practice among the Hottentots.

[60] Bohannan (*supra* n. 17) p. 51; see also pp. 49-50; Gluckman (*supra* n. 8) pp. 190-191.

[61] Watson *Ancient Law and Modern Understanding* (1998) pp. 94-95.

[62] *G.* 4.13: *Nam qui victus erat, summam sacramenti praestabat poenae nomine, aeque in publicum cedebat* (For the defeated party forfeited the amount of the *sacramentum* by way of penalty, and this went to the public treasury). See also the references to a "penal sum" in *G.* 4.14.

[63] Metzger "Roman judges" (*supra* n. 22) p. 246.

[64] *Idem* 245.

[65] A technical term which refers to the oral communications of the past in the form of story-telling, legends, emblems, and so on.