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Het Tijdschrift voor Rechtsgeschiedenis is in 1918 op initiatief van E.M. Meijers opgericht door enkele Nederlandse juristen, die zich tot taak stelden in hun eigen land de wetenschappelijke belangstelling voor de rechtshistorie te stimuleren en tevens een middelpunt te scheppen voor een internationale samenwerking op dit gebied. Deze doelstelling is in de loop der jaren gerealiseerd. Reeds vóór 1940 was het Tijdschrift een van de leidende internationaal georiënteerde rechtshistorische periodieken geworden. Sinds het in 1950 onder een Belgisch-Nederlandse redactie is voortgezet, heeft het deze positie nog versterkt. Behalve aan de gemeenschappelijke grondslagen van de Westerse rechtstraditie wordt ook veel aandacht besteed aan de eigen, veelal afwijkende ontwikkeling van het nationale recht in de verschillende landen die tot deze traditie behoren of ermee verbonden zijn. Niet alleen de Oudheid en de Middeleeuwen maar ook de Nieuwe en Nieuwste Tijden komen aan de orde. Het Romeinse recht en zijn geschiedenis in later tijden alsmede het kanonieke recht hebben steeds een bijzondere plaats ingenomen; daarnaast echter ook de rechtsgeschiedenis van de Common Law landen.

La Revue d'Histoire du Droit a été fondée en 1918, à l'initiative de E.M. Meijers, par quelques juristes néerlandais qui s'étaient proposé de stimuler, dans leur propre pays, l'intérêt scientifique pour l'histoire du droit et d'assurer une collaboration internationale en ce domaine. Cet objectif s'est réalisé progressivement. Avant 1940 déjà, la Revue était devenue l'un des périodiques les plus importants, sur le plan international, en matière d'histoire du droit; son rôle s'est encore accru depuis la reprise de sa publication en 1950 par un comité de rédaction belgo-néerlandais. En dehors des fondements communs de la tradition juridique d'Europe occidentale, la Revue s'attache à l'évolution, souvent diversifiée, du droit des pays qui se trouvent dans cette tradition; et cela pour toutes les périodes de l'histoire, de l'Antiquité à nos jours. Le droit romain et son évolution ultérieure, tout comme le droit canonique, ont toujours occupé une place de choix, sans que soit négligée pour autant l'histoire du droit des pays de Common Law.

The Legal History Review, inspired by E.M. Meijers, was founded in 1918 by a number of Dutch jurists, who set out to stimulate a scholarly interest in legal history in their own country and also to provide a centre for international cooperation in the subject. This has gradually through the years been achieved. The Review had already become one of the leading internationally known periodicals in the field before 1940. Since 1950 when it emerged under Belgo-Dutch editorship its position has strengthened. Much attention is paid not only to the common foundations of the western legal tradition but also to the special, frequently divergent development of national law in the various countries belonging to, or influenced by it. Modern and contemporary, as well

PONTIFF, PRAETOR, AND *IURISDICTIO* IN THE ROMAN REPUBLIC

by

OLGA TELLEGEN-COUPERUS (Tilburg)*, **

1. – Introduction

Once upon a time, there was a woman who was jealous of her sister. Although this woman was herself married to a distinguished person, the plebeian C. Licinius Stolo, a tribune of the people, she felt jealous of her sister who was married to an even more distinguished citizen, the patrician Sulpicius, who was serving as a consular tribune. So she told her husband to make sure that he too became a consular tribune. The poor man obeyed, as husbands often do, and consulted his colleague L. Sextius Lateranus. They decided that Licinius' wife was right and they started a campaign to have the top magistracy opened up to plebeians. The patricians, of course, were not happy about this, and obstructed the campaign in every possible way. The campaign turned into a struggle, and the struggle into anarchy. When this anarchy had lasted for five years, the then dictator Camillus suddenly hammered out a compromise; the consulate was opened up to the plebeians but part of the consular duties, namely *iurisdictio*, was put into the hands of a new patrician magistrate, the *praetor*.

This story is the fullest account that we have of the creation of the praetorship. It is told by Livy in book 6 of his *Ab urbe condita*. It is mainly on the basis of this story that Mommsen, and many historians after him, assumed that the praetorship was introduced in 367 BC as a result of the struggle between patricians and plebeians, and that the praetor was made responsible for *iurisdictio*.

Iurisdictio has nothing to do with the modern concept of jurisdiction, but refers to supervision of civil litigation. One peculiarity of civil litigation in Republican Rome (i.e., from 510 to 27 BC onwards) was that proceedings were divided into two phases. The first phase served to prepare the actual trial; it took place in the presence of an 'official' who decided whether the contending parties could take legal action and in what manner, and who appointed another citizen as judge. In the second phase, the actual trial took place. *Iurisdictio* concerned only the first, introductory phase. It is assumed that, originally, *iurisdictio* formed part of *imperium*, the overall power of the kings, which at the beginning of the Republic had devolved upon a leading magistrate, possibly a *praefectus urbi*, or some other official, and since 367 BC upon the praetor[1].

* For a summary see below, p. 44.

** This is a revised version of a paper presented to the Edinburgh Roman Law Group on 11th February 2005.

1. See F. Wieacker, *Römische Rechtsgeschichte*, I, Munich 1988, p. 429ff.

However, in recent years, the historian Corey Brennan argued that it was only in about 200 BC that *iurisdictio* was assigned to the praetor[2]. Another historian, Richard Mitchell, even argued that before that time *iurisdictio* was in the hands of the pontiffs[3].

The pontiffs, or rather the College of Pontiffs, looked after religious matters[4]. Pontiffs were not professional priests, but public men, officials; Roman religion was not a belief or a theology, but concerned the relationship between the gods and men: it was a state religion. The pontiffs were responsible for safeguarding that relationship. There were several kinds of priests, but the pontiffs were the most important ones. They were appointed for life. One of the tasks of the pontiffs was to supervise the calendar which laid down the days on which the *comitia* could meet and the courts could sit, and they preserved the proper oral formulas to be used in court. As a result, they also acquired expert knowledge of the law. Theoretically speaking, this expertise should have made them pre-eminently qualified to supervise litigation. According to the romanists, however, they were only involved in litigation as advisers of the magistrates[5]. In this paper, I will argue that the pontiffs had *iurisdictio* until about 200 BC, and that it was only then that this task was given to the praetor.

I will first deal with the sources that give us some information about the introduction of the praetorship. Then, in section 3, I will discuss some critical comments, some more recent than others, on the most relevant source, the passage from Livy mentioned earlier. In section 4, I will deal with Mitchell's theory that jurisdiction was in the hands of the pontiffs. Finally, I will put forward a few more reasons why, in my view, it may have been the pontiffs who were first in charge of *iurisdictio* (section 5).

2. – What the sources tell us about the introduction of the praetorship

There are only three sources from Roman times dealing with the introduction of the praetorship. In chronological order, these are a passage from Livy (first century BC), one from Pomponius, who lived in the middle of the second century AD, and one from Lydus, a Byzantine administrator in the sixth century[6].

2. See T. Corey Brennan, *The praetorship in the Roman republic*, 2 vols., Oxford 2000, p. 130ff.

3. R.E. Mitchell, *Patricians and plebeians, The origin of the Roman state*, Ithaca (New York) – London 1990, p. 170ff. However, he was not the first to say so: in 1937, F. de Martino, *La giurisdizione nel diritto romano*, Padua 1937, p. 50f, suggested that the concept of *iurisdictio* was introduced only in 367 BC and that, before that time, the pontiffs as forerunners of the magistrates had supervised the first phase of the proceedings. See M. Kaser, *Das altrömische ius, Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer*, Göttingen 1949, p. 348ff, for a very useful overview.

4. See M. Beard, J. North, and R. Price, *Religions of Rome*, London 1998, p. 24ff.

5. Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 1), p. 310ff; A. Watson, *The state, law and religion: pagan Rome*, Athens (Georgia) 1992, p. 4ff.

6. See Brennan, *The praetorship* (*supra*, n. 2), p. 59ff.

The oldest text is to be found in *Ab urbe condita*, in which Livy describes the history of Rome from the foundation of the city to the death of Augustus' stepson Drusus in 9 BC. With this book Livy aimed to present his countrymen with a work of art that showed how the heroic deeds of the forefathers caused Rome to grow from a small town into an empire. The early period was a problem for Livy because no sources were available. The existing documents had been lost in 387 BC when Rome was conquered and sacked by the Celts. Furthermore, no Romans wrote history before the end of the third century. In order to fill the gaps in the source material, these Roman historians made use of legends or, sometimes, of their imagination. Therefore, their accounts of the early history were far from reliable, as Livy himself noted.

As I mentioned above, Livy described the year 367 BC in book 6 of his *Ab urbe condita*. He writes that, in that year, the city was still in turmoil because of the struggle between the patricians and the plebeians. The plebeians had elected a tribune, L. Sextius, as consul but the Senate refused to ratify this election. A compromise was found in the following way:

> Livius, *Ab urbe condita*, 6.42.11:
> … concessumque ab nobilitate plebi de consule plebeio, a plebe nobilitati de praetore uno, qui ius in urbe diceret, ex patribus creando.
>
> The nobility yielded to the plebs in the matter of the plebeian consul, the plebs conceded to the nobility a single praetor, elected from the patricians, who would administer law in the city[7].

According to Livy, therefore, the praetorship was created as a compromise in the struggle between the patricians and the plebeians, and the praetor was to administer law in the city.

The second text comes from Pomponius' *Enchiridium*, a monograph on the origin and development of law which – possibly in a shortened version – was included in the Digest. Pomponius offers a variation on Livy's statement but omits the idea of compromise:

> D. 1,2,2,27 (Pomponius *libro singulari enchiridii*):
> Cumque consules avocarentur bellis finitimis neque esset qui in civitate ius reddere posset factum est, ut praetor quoque crearetur, qui urbanus appellatus est, quod in urbe ius redderet.
>
> And when the consuls were called away to the wars with neighbouring peoples and there was no one in the *civitas* empowered to attend to legal business, what was done was that a praetor also was created, called the urban praetor on the ground that he exercised jurisdiction within the city[8].

7. Text and translation by B.O. Foster in Loeb Classical Library, London–Cambridge (Mass.) 1967.

8. Text and translation by D.N. MacCormick in *The Digest of Justinian*, Th. Mommsen / P. Krüger / A. Watson (eds.), Vol. I, Philadelphia 1985.

In the preceding section, Pomponius refers to the struggle between the patricians and plebeians but he does not say that the praetor was to be chosen from the patricians. He simply mentions the fact that the two consuls were away at the war and that therefore a third magistrate was appointed to attend to legal business in Rome.

The third source dealing with the introduction of the praetorship is a passage from John Lydus who, in the sixth century AD, wrote a monograph on the magistrates of the Roman people. His work is the least relevant in this connection, not only because he lived almost a millennium after the *leges Liciniae Sextiae* were composed, but also because his 'attempts at chronological precision' were sometimes disastrous (Brennan, p. 60). With regard to the innovations of 367 BC he writes the following.

> Iohannes Lydus, *De magistratibus populi romani* [Περὶ ἀρχῶν τῆς Ῥωμαίων Πολιτείας], 1.38.25–29:
> αὖθις δὲ προαχθέντων ὑπάτων, προεβλήθησαν ἐκ τῶν πατρικίων ἀγορανόμοι τέσσαρες καὶ ταμίαι δύο καὶ πραίτωρ, ὅιον εἰ στρατηγος, <καὶ> ληγᾶτοι, ὅιον εἰ ὑποστράτηγοι, καὶ δυοκαίδεκα χιλίαρχοι διὰ τὸ προσδοκᾶσθαι Ἀλέξανδρον τὸν Μακεδόνα κατὰ Ῥωμαίων στρατεύειν.
>
> When consuls had again been elevated, there were appointed from the ranks of the *patricii* four aediles, two quaestors, a praetor, that is, 'a general', *legati*, namely 'lieutenant-generals', and twelve military tribunes, on account of the fact that Alexander the Macedonian was expected to wage war against the Romans[9].

Lydus mentions the turmoil, but he is mistaken about the innovations and his chronology is confused[10]. What is interesting is that, according to Lydus, the praetor was introduced not for legal, but for military reasons.

It is clear that these three sources do not tell one and the same story. Since Livy's story is the oldest one, it can be considered to be more reliable than the other two. Mommsen has accepted Livy's view on Roman history, and many historians have followed suit. However, in recent years, a few historians have challenged this view. Two points in particular have been criticised: Livy's statement that the praetorship was introduced for legal reasons, and that the praetorship was introduced as a result of the struggle between the patricians and the plebeians. I will now discuss these two points.

3. – The military background to the praetorship

Some 50 years ago, Ugo Coli published a paper on the *tribus* and the *centuriae* of the ancient Roman Republic[11]. In this paper, he drew attention to a change in

9. Text and translation by A.C. Bandy, *Iohannes Lydus on powers or the magistracies of the Roman state, Introduction, critical text, translation, commentary, and indices*, Philadelphia 1983, p. 58–59.

10. Cf. the commentary on this text by Brennan, *The praetorship* (*supra*, n. 2), p. 61.

11. U. Coli, *Tribù e centurie dell'antica repubblica romana*, in Studia et Documenta

the organisation of the army which – according to Livy – took place in 386 BC, shortly after the Celts had conquered and burnt Rome. This dramatic event had been possible because the two consuls and their legions were away. After the Celts had been bought off and had left, the Romans decided to form a third legion that would remain in Rome to defend the city in case of emergency. This third legion was called *legio urbana*. At first, a consular tribune was in charge of this legion, but when this function was abolished in 367 BC, the newly created praetor took over. He was a colleague of the consuls but with an *imperium minus*. Because the praetor was to stay in Rome at all times, it made sense that he should administer the law. According to Coli, the reason for creating the praetorship was not jurisdiction, but the defence of the city. The legion of the praetor urbanus did not last very long; in the course of the fourth century, the Romans conquered central Italy, and Rome was no longer under threat. The main task of the praetor urbanus then became jurisdiction. Livy mentions this city legion again only once, namely, in dealing with 217 BC, when Hannibal had annihilated the whole Roman army at Lake Trasimene and the road to Rome lay open. After Rome had won the war against Hannibal, i.e. after the Second Punic War, jurisdiction again became the main duty of the praetor *urbanus* and, according to Coli, this was the situation that prevailed for several centuries.

Following Coli, several other historians have stressed the military background to the introduction of the praetorship[12]. However, on the whole, very little attention has been paid to this aspect of Roman history. It was only in 2000, when Brennan published his book *The praetorship in the Roman republic*, that this military background became an important issue[13]. On the basis of Livy's description, Brennan concludes that, in the period after 367 BC, the praetor was only active in the army, outside Rome. The legal duties of the praetor are not mentioned in books 7–10 dealing with the years 368 to 293 BC or in books 21–45 dealing with the years 216 to 167 BC. This is strange, because Livy himself had explained that the position of the praetor had been created because an official was needed to supervise civil litigation. According to Brennan, neither Livy nor the authors from the late second century BC whose work he used had any idea why the praetorship had been introduced in the middle of the fourth century BC, so they let themselves be inspired by the function of praetor as they knew it in their day: the magistrate charged with administering the law in Rome. Brennan therefore calls Livy's description anachronistic.

In Brennan's view, the turning point was at the beginning of the second century BC, at the end of or shortly after the Second Punic War. In addition to the praetor *urbanus*, a few more praetorships had been created: around 245 BC, the praetor *peregrinus* and, around 220, two more praetors as governors of Sicily and Sardinia. From that time onwards, the city praetor could remain in Rome

Historiae et Iuris, 21 (1955), p. 181ff., particularly p. 208f. He refers to Livy, *Ab urbe condita*, 6.6.14 and 6.9.5.

12. C.G. Starr, *The beginnings of imperial Rome: Rome in the Mid-Republic*, Ann Arbor 1980, p. 16ff.; W. Kunkel and R. Wittman, *Staatsordnung und Staatspraxis der römischen Republik*, Vol. II, *Die Magistratur*, Munich 1995, p. 296 with note 5, and Mitchell, *Patricians and plebeians* (*supra*, n. 3), p. 185.

13. Brennan, *The praetorship* (*supra*, n. 2), p. 30–31.

and the other three praetors could do their respective jobs outside Rome. With regard to jurisdiction, however, their competence was equal: jurisdiction was not the prerogative of the urban praetor[14]. According to Brennan – and I think he is right –, it can be concluded that, until about 200 BC, the praetors were military commanders who were active outside Rome.

4. – Mitchell on the jurisdiction of the pontiffs

If the praetors were indeed military commanders, who then supervised civil litigation before 200 BC? Was it another magistrate, as most historians, including Brennan, think? If so, that would fit into the accepted view that *iurisdictio* as part of *imperium* had devolved upon the leading (patrician) magistrates and that the introduction of the praetorship was the result of the struggle between the orders. But then, if the jurisdiction part of Livy's story is not true, why should we give credence to the struggle-of-the-orders part[15]? Perhaps Livy made that up, too. This doubt prompted another historian, Richard Mitchell, to try and find out whether Rome's early history could be explained in another way. Fifteen years ago, he wrote a controversial book about the origin of the Roman state in which he abandoned the idea that the struggle of the orders was a focal point of early Roman history. Rereading the sources, he concluded that it was the ever-increasing military requirements rather than conflict between social groups that served as the primary force for historical change[16].

I do not pretend to be able to judge whether Mitchell is right or wrong, but in the light of the above I do think that it is worthwhile paying particular attention to one of his hypotheses, namely, that until the second century BC, it was the pontiffs who administered the law in Rome. Unfortunately, his chapter on the jurisdiction of officials, in which he deals with the pontiffs, is not very clear and therefore not very convincing[17]. On the other hand, Mitchell comes up with a number of arguments that do seem to support his hypothesis. Before dealing with these arguments, however, I need to explain the position that, according to Mitchell, the priests had in early Roman society.

In identifying the patricians and the plebeians, Mitchell suggests that the term

14. According to Brennan, *The praetorship* (*supra*, n. 2), p. 133ff., Livy's description of the *praetor peregrinus* is also anachronistic. The sources show that this praetor was often sent out on jobs outside Rome. There is no proof of his then already being charged particularly with the administration of law between foreigners and between foreigners and Roman citizens.

15. Other questions are whether *iurisdictio* has always formed part of *imperium* and, if so, whether it devolved upon magistrates. Cf. Th. Mommsen, *Römisches Staatsrecht*, Vol. II 1, 3rd edition, Berlin 1887 (repr. Graz 1952), p. 20, suggesting that, as from the beginning of the republic, the *pontifex maximus* had *auspicium* and *imperium*. For the latter, he refers to Livy, *Ab urbe condita*, 37.51.4.

16. Mitchell, *Patricians and plebeians* (*supra*, n. 3), p. 64ff.

17. See the reviews by P. Zamorani in Studia et Documenta Historiae et Iuris, 57 (1991), p. 302–334; W. Eder in Savigny Zeitschrift, Rom. Abt., 111 (1994), p. 503ff.; more positive, F. Lucrezi in Labeo, 40 (1994), p. 284f.

patres originally referred to priests[18]. They belonged to the group of prominent persons who advised the Etruscan kings. By virtue of their major, hereditary priesthoods, they automatically had seats in the Senate. The late fourth century saw a remarkable and steady increase in the number of magistrates who became potential *ex officio* members of the Senate and who, upon admission, were called *conscripti*. As the number of priests in the Senate declined, the distinction between *patres* and *conscripti* virtually disappeared, and even priests were frequently subject to election procedures. However, some priests remained entitled to seats in the Senate. Thus, senatorial *patres* were those priests in the Senate who gave their collective religious sanction (*auctoritas*) to public measures and who were selected to be *interreges*.

At the beginning of his chapter on the jurisdiction of officials, Mitchell rejects the idea that the citizens' rights to seek redress for both private or public grievances were based on the principle of self-help[19]. In his view, the state took an active role in assisting citizens to make legal complaints or in punishing them for infringing civil or private law. However, this was not done through one or more magistrates, for they had military duties to perform. In early Rome, it was done through the pontiffs and, in a restricted way, by the plebeian tribunes. Only in the second century BC did Rome map out spheres of legal influence for the praetors. Like Coli, Mitchell considers the praetorship as being originally of a military nature.

As evidence of pontifical jurisdiction, Mitchell refers to the sanction of declaring someone *improbus*, which was very similar to declaring him an outlaw. This was a legal sentence which was probably pronounced by the *pontifex maximus*, the College of Pontiffs, or some other priests who exercised jurisdiction at the time. No other officials possessed the expertise or the freedom to administer the law.

Mitchell then points to the increase in number of pontiffs and augurs at the end of the fourth century BC. This increase is surprising because, due to greater secularisation, one would have expected a decline in their numbers and importance and a corresponding growth in the number of secular magistrates. Mitchell assumes that priests were the officials who handled legal matters *in iure* and assigned disputes to *iudices*, and that the pressure of legal business resulted in an increase in their numbers in 300 BC[20]. Unfortunately, Mitchell does not explain why legal business caused pressure at that time. It is only in his conclusion, that we find a (or the?) reason: in 304 BC, Cn. Flavius had published the *legis actiones* and the *fasti*, which contributed to an increase in the judicial activity in the city and, in turn, resulted in a considerable increase in the number of augurs and pontiffs[21].

Next, Mitchell deals with the (probably) most debated subject of early Roman law, the notions of *provocare* and *provocatio*. He rejects the view of modern scholars that *provocatio* was used by citizens to protect themselves from

18. Mitchell, *Patricians and plebeians* (*supra*, n. 3), p. 62ff.
19. Mitchell, *Patricians and plebeians* (*supra*, n. 3), p. 168ff.
20. Mitchell, *Patricians and plebeians*, p. 170. In his view, the *lex Ogulnia* of 300 BC allowing plebeians into the College of Pontiffs was introduced for secular and legal reasons and not because the plebeians had won another round in their struggle with the patricians.
21. Mitchell, *Patricians and plebeians*, p. 233.

magisterial *coercitio* and / or to appeal a magisterial sentence[22]. According to Mitchell, the existing evidence of a *provocatio* appeal procedure is limited to cases involving disputes between pontiffs and others. Returning to the original meaning of *provocare*, i.e. 'to challenge', he explains *provocatio* as 'a challenge one party issued to another which brought the matter under the jurisdiction of a judge recognized as the authority competent to decide which claim was *iustum*'. This challenge, however, 'soon evolved into an oath, *sacramentum*, sworn to the merit of one's case, which in turn gave way to a monetary payment also known as *sacramentum* in the form of a wager on the justice of one's suit'[23]. According to Mitchell, it was the Roman pontiffs who, as judicial specialists, developed the various legal procedures as means of initiating litigation. This is borne out by the clearly religious character of the *legis actio sacramento*. Mitchell concludes this section with a critical discussion of a provision in the Twelve Tables which is traditionally explained in terms of *provocatio* in the sense of an appeal procedure but which, in his view, may have placed restrictions on the jurisdiction exercised by the priests and on their power to sentence citizens.

This chapter contains some good arguments to support the jurisdiction of the pontiffs but also has some weak points. The latter include the lack of structure in this section in general, and the lack of clarity on a number of interesting issues. For instance, one would like to know more about the increase in legal business around 300 BC which is supposed to have resulted in an increase in the number of augurs and pontiffs. It would also be interesting to learn more about the provocation appeal procedures involving pontiffs and others. However, Mitchell puts forward at least two good arguments in favour of pontifical jurisdiction:

1. – The pontiffs had the expertise and authority to administer the law.
2. – The use of the *legis actio sacramento* clearly has a religious significance.

In the first edition of my *Short history of Roman law* (i.e. the Dutch version of 1990), I already suggested that, in the first 150 years of the Republic, the pontiffs had jurisdiction[24]. My theory was based on one particular text of Pomponius which, to my surprise, Mitchell does not mention. Moreover, reading about the relationship between priests and magistrates, I later discovered that there are more arguments in favour of pontifical jurisdiction in the three centuries before 200 BC. Pomponius' text and these arguments are explained below.

5. – A few more arguments in favour of a jurisdiction of the pontiffs

My arguments in support of the jurisdiction of the pontiffs consist of a text, a striking historical development, and a comparison.

22. Mitchell, *Patricians and plebeians*, p. 171ff. In note 12, he refers to the famous debate on *provocatio* between those who follow Mommsen and those who support Kunkel. Mitchell claims an intermediate position.

23. Mitchell, *Patricians and plebeians*, p. 171f.

24. O.E. Tellegen-Couperus, *Korte geschiedenis van het Romeinse recht*, Deventer 1990, p. 14. Also in the English translation: *Short history of Roman law*, London 1993, p. 22.

a. – The first argument is not just *a* text. It forms part of Pomponius' *Enchiridium*. The text runs as follows.

> D. 1,2,2,6 (Pomponius *libro singulari enchiridii*):
> Deinde ex his legibus eodem tempore fere actiones compositae sunt, quibus inter se homines disceptarent: quas actiones ne populus prout vellet institueret, certas sollemnesque voluerunt: et appellatur haec pars iuris legis actiones, id est legitimae actiones. Et ita eodem paene tempore tria haec iura nata sunt: lege duodecim tabularum ex his fluere coepit ius civile, ex isdem legis actiones compositae sunt. Omnium tamen harum et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur quis quoquo anno praeesset privatis. Et fere populus annis prope centum hac consuetudine usus est.
>
> Then, about the same time, actions-at-law whereby people could litigate among themselves were composed out of these statutes. To prevent the citizenry from instituting the actions in a arbitrary way, they wanted them to be in fixed and solemn terms. And this branch of law is called *legis actiones*, that is, statutory actions. And so these three branches of law came into being at almost the same time. Once the statute law of the Twelve Tables was passed, the *ius civile* started to emerge from them, and *legis actiones* were composed from the same source. In relation to all these statutes, however, knowledge of interpretation and the conduct of the actions belonged to the College of Priests, one of whom was appointed each year to preside over the private citizens. The people followed this practice for nearly a hundred years[25].

This text forms part of the story Pomponius tells about the origin and development of the law. In the previous sections, he describes how the Law of the Twelve Tables had come into being (§ 4) and how experts had begun to interpret the law (§ 5). Section 6 is about the actions that were formulated on the basis of the law. It is clear that the last part of this section is particularly relevant for my thesis. Here, Pomponius states that the knowledge about the interpretation and the conduct of actions was in the hands of the pontiffs. How historically reliable is this statement?

Pomponius is the only author to say that the pontiffs were in charge of interpretation and litigation in the *legis actio* procedure. From the last sentence ('The people followed this practice for nearly a hundred years'), it can be inferred that Pomponius limited this practice to the time between the Law of the Twelve Tables (i.e. 450 BC) and the *leges Liciniae Sextiae* of 367 BC. This fits in with his later statement (in § 27) that these laws served to introduce the praetor and his jurisdiction.

However, our main source of information on the *legis actio* procedure, Gaius' Institutes, mentions only the praetor as the person in charge of the first part of the trial[26]. At first sight, he seems to contradict Pomponius, but this is not necessarily the case. Gaius describes the *legis actio* procedure at the beginning of book IV on actions as a procedure applied by the *veteres*, a rather vague concept referring

25. This translation is based on the one by MacCormick in *The Digest of Justinian* (*supra*, n. 8).
26. Gaius, *Inst.* 4.11ff., particularly 16 and 17a.

to jurists ranging from the middle Republic to the early empire. Before moving on to the formulary procedure, he states that the old procedure had been applied until the time of Augustus[27]. That emperor had abolished the *legis actio* procedure except in two cases, the *damni infecti* cases and the cases that took place before the court of the *centumviri*, like the *querela inofficiosi testamenti*. The first one had soon gone out of use, but the second one had remained popular. So, in the second century AD, the *legis actio* procedure occasionally still took place, and that may have been the reason why Gaius described it. But he describes the procedure in the way it took place in his own day, before the praetor.

Pomponius was a contemporary of Gaius (he may even have been Gaius himself, if we can believe David Pugsley[28]) and, of course, he knew that, in his day, the praetor was in charge of the first part of the *legis actio* procedure. He himself mentioned it in his *Enchiridium* but there he let the praetor's jurisdiction begin in 367 BC. He may have been inspired by Livy on this point[29]. When he wrote that in early Rome it was the pontiffs who were in charge, he must have done so because he really believed they *had* been in charge. There is no reason why he would make up such an extraordinary detail. His purpose was not to describe the law as it was practised in his own day, but to describe the origin and development of the law. Therefore, I think that Pomponius' text is historically reliable on this point.

A counter-argument might be that Pomponius does not use the word *iurisdictio*. Instead, he describes the activity of the pontiffs as follows in the penultimate sentence, namely:

> In relation to all these statutes, however, knowledge of interpretation and the conduct of the actions belonged to the College of Priests, one of whom was appointed each year to preside over the private citizens.

Pomponius first mentions knowledge about the interpretation and the conduct of the actions. This would mean that the pontiff had to interpret the terms of the *legis actiones*, i.e. to decide whether a particular case could be brought under a particular *legis actio*, and that he had to conduct the action, i.e. the formal proceedings. From Gaius' Institutes, we know that that is exactly what the praetor did in the *legis actio* procedure and, later, also in the formulary procedure[30].

Furthermore, Pomponius describes the activity of the pontiffs as '*praeesset privatis*'. The verb *praeesse* means 'to preside over', 'to rule over', 'to

27. Gaius, *Inst.* 4.30 mentions the *lex Aebutia* and the two *leges Iuliae*; only the latter date from the time of Augustus, the *lex Aebutia* is supposed to have been introduced in the second century BC.

28. D. Pugsley, *Gaius or Sextus Pomponius*, in Revue Internationale des Droits de l'Antiquité, 3rd series, 41 (1994), p. 353ff.

29. See D. Nörr, *Pomponius*, in Aufstieg und Niedergang der römischen Welt, II, 15 (1976), p. 518–533, on the sources of Pomponius' historical information. He does not mention Livy.

30. Gaius, *Inst.* 4.16, describes the proceedings of the *legis actio sacramento in rem*. They consisted of two dialogues in prescribed words between the plaintiff and the defendant, with interventions by the praetor.

superintend'[31]. In at least three texts in the Digest, *praeesse* is used in combination with *iurisdictio* and with the tribunal, the place where, in the later Republic, the praetor heard the cases that citizens brought before him[32]. In these texts, *praeesse* means 'to be in charge of' the first phase of the *legis actio* procedure or the formulary procedure. Here, in our Pomponius text, '*praeesset*' is used in combination with '*privatis*'. The translators of the *Digest* generally render '*praeesset privatis*' with 'zur Leitung der Privatstreitigkeiten', '[to] have jurisdiction over private actions', 'to preside over private citizens', 'voor het toezicht op de geschillen tussen particulieren'[33]. Only the Spanish translation is different: 'de los que se designaba uno che cada año atendiera a los pleitos privados'[34]. 'Atender' or 'to attend' is much less explicit than 'to preside'. However, we can conclude that most romanists translate the words '*praeesset privatis*' literally as 'to preside over the private citizens'[35].

However, these authors all take '*praeesse privatis*' to mean 'to advise private citizens on their problems'[36]. This interpretation fits in with the general view among romanists and historians on the role of experts in, for instance, religion and law. According to this view, the role of the pontiffs and later the jurists simply was to advise and assist the magistrates or, for that matter, private citizens[37]. On another occasion, I have argued that there is no source to prove that the praetor had a permanent *consilium* of jurists[38]. I would argue here that Pomponius' text shows that in the early Republic the legal experts themselves, the pontiffs, were in charge of the first phase of the civil procedure; in other words, they had what later came to be called *iurisdictio*[39].

31. C.T. Lewis and C. Short, *A Latin dictionary*, New York 1879 (repr. Oxford 1960), col. 1432.

32. Ulp. D. 2,1,10 (*iurisdictioni*), Scaev. D. 39,.3,26 (*iure dicundo*), and Ulp. D. 5,1,1 (*tribunali*). In D. 48,8,1*pr.*, *praeesse* is used in connection with the *lex Cornelia de sicariis et veneficiis*: '...; quive, cum magistratus esset publicove iudicio praeesset, ...'.

33. In the following publications, respectively: *Das Corpus Iuris Civilis* (*Romani*) ins deutsche übersetzt von K.E. Otto, B. Schilling und K.F.F. Sintenis, Vol. I, 2nd edition, Leipzig 1839 (repr. Aalen 1984), p. 226; *The civil law*, translated by S.P. Scott, Vol. I, Cincinnati 1932, p. 213–214; D.N. MacCormick in *The Digest of Justinian* (*supra*, n. 8); J.E. Spruit en P.J. Verdam in *Corpus Iuris Civilis, Tekst en vertaling*, eds. J.E. Spruit et al., II, Zutphen–The Hague 1994, p. 73.

34. *El Digesto de Justiniano*, I, version castellana por A. D'Ors, F. Hernandez-Tejero, P. Fuenteseca, M. Garcia-Garrido y J. Burillo, Pamplona 1968, p. 48.

35. An exception to this rule is A. Watson, *The state, law and religion* (*supra*, n. 5), p. 26, who translates the last phrase of D. 1,2,2,6 as follows: 'from among whom one was appointed each year for interpreting private-law matters'.

36. For instance, H.F. Jolowicz, *Historical introduction to the study of Roman law*, Cambridge 1972, p. 88f.; R. Baumann, *Lawyers in Roman republican politics*, Munich 1983, p. 72; Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 5), p. 313f.

37. See, for instance, D.J. Gargola, *Lands, laws, & gods*, Chapel Hill–London 1995, p. 15.

38. See my article, *The so-called consilium of the praetor and the development of Roman law*, in Tijdschrift voor rechtsgeschiedenis, 69 (2001), p. 11–20.

39. Note the parallel between the pontiffs and the praetor in that both were appointed for one year to preside over civil cases.

b. – This brings me to the second argument in favour of jurisdiction by the pontiffs in the early Republic: the remarkable historical development. It is a well-known fact that there has always been a close connection between the priests and the magistrates. According to Schulz, the priests were men of high social standing, whose economic position enabled them to undertake public duties without pecuniary reward. 'They would, as a rule, have been magistrates before becoming priests'[40].

Some thirty years ago, Szemler published a study on the interaction between priests and magistrates[41]. He noticed that until about 200 BC it was customary for members of the nobility to first become magistrates and later in life to acquire one of the major priesthoods. At that time, there was no fixed order in which certain magisterial functions were fulfilled. For instance, it was possible for an ex-consul to become praetor. In about 210 BC, i.e. during the Second Punic War, this custom changed. Szemler noticed that from that time onwards young men from the leading families would acquire a priesthood at rather an early age, and that they would become magistrates only later in life[42]. He does not offer an explanation but, in my view, this change may well be connected with the disasters of the Second Punic War.

Many senators were killed in the battles that the Romans fought against Hannibal. After the defeats at Lake Trasimene and Cannae, there were 177 vacancies in the Senate which normally consisted of 300 members[43]. M. Fabius Buteo was made dictator and given authority to fill the vacancies. He selected new senators according to rank and distinction. These men, particularly curule magistrates, plebeian officials, and decorated soldiers, may have been much younger than men were traditionally when entering the Senate. The number of pontiffs and augurs was probably affected by the war as well, and the College of Pontiffs would have had to choose new members; this meant that youngish men became pontiffs. However, supervising litigation is not a task likely to be left in the hands of young or inexperienced people. Therefore, it would make sense that, when priesthoods were filled by young men, the pontiffs came to consider jurisdiction as being no longer necessarily and exclusively theirs[44]. Given the close connection between pontiffs and magistrates, it would be only a small step for the pontiffs to hand over jurisdiction to one of the magistrates. Among the magistrates, the urban praetor was the most obvious person to choose.

From the first years of the Second Punic War, the urban praetor had lost most of his military duties[45]. He still was expected to see to the defence of the city and to protect the coast near Rome, but now he acquired mainly civic duties like,

40. F. Schulz, *History of Roman legal science*, Oxford 1946, p. 7.

41. G.J. Szemler, *The priests of the Roman republic, A study of interaction between priesthoods and magistrates*, Brussels 1972.

42. Szemler, *The priests*, p. 182ff., presents a survey for the years 235 to 53 BC.

43. Cf. Livy, *Ab urbe condita*, 23.23.4. See also Mitchell, *Patricians and plebeians* (*supra*, n. 3), p. 117f.

44. Of course, secularisation may also have contributed to the change, but then there always remains the question of what is cause and what is effect.

45. Brennan, *The praetorship* (*supra*, n. 2), p. 102 remarks that the urban praetor was not at Cannae, the greatest emergency in the history of the Republic.

in the absence of the consuls, presiding over the Senate. Acquiring jurisdiction would be a natural extension of these duties.

Livy confirms that the urban as well as the peregrine praetor did in fact have jurisdiction by the turn of the second century. When describing the elections held and measures taken for the year 197 BC, he writes that, for the first time, six praetors were chosen; two of them were to have jurisdiction: the *iurisdictio urbana* was allotted to Marcus Sergius Silus, the *peregrina* to Marcus Minucius Rufus[46]. However, we do not know how and when they acquired jurisdiction for the first time.

c. – The transfer of jurisdiction to the praetors brings me to the third argument, the comparison. The comparison I want to make is between the loss of jurisdiction on the part of the pontiffs and the loss of a function traditionally performed by another very old priestly college at Rome, that of the *fetiales*: the declaration of war. The fetials were the priests responsible for the proper, religious conduct of international relations, including the observation of the sacred forms[47]. They developed special legal-religious *formulae*, rituals, and ceremonies for the declaration of war and for making peace. One of these rituals was throwing a spear into enemy territory as a declaration of war. According to Watson, the fetials were introduced in the regal period in order to keep peace with other Latin communities which also had fetials and had a shared religion[48]. Consequently, the archaic procedure which the fetials used to declare war could only be properly used in a limited territory, say central Italy.

However, with the expansion of Rome's military operations beyond central Italy, it was no longer possible to keep to these rituals. The fetials devised tricks to circumvent such problems but, by the end of the third century BC, fetial procedure became too burdensome and declaring war was a task taken over by senatorial legates. We know something about the way in which this happened from the writings of Polybius and Livy[49].

When writing about the beginnings of the second Macedonian War in 200 BC, Polybius and Livy mention that consul P. Sulpicius Galba was in doubt as to the way in which war should be declared on Philip V of Macedon. He consulted the fetials and, with their permission, selected legates from persons outside the Senate. This created a double break with the past. Normally, this function would have fallen to one of the fetials who, traditionally, were all members of the Senate[50]. Now they allowed the consul to appoint a legate not only from outside their college, but also from outside the Senate.

46. Livy, *Ab urbe condita*, 32.27 *in fine* and 32.28.1. In *Ab urbe condita* 23.32, he mentions praetors of the year 215 BC who were charged with *iurisdictio* but who, to his amazement, were not granted exemption from the war. See also Brennan, *The praetorship* (*supra*, n. 2), p. 106ff.

47. Cicero, *De officiis*, 1.11.36; Livy, *Ab urbe condita*, 9.9.3. On the *fetiales*, see Beard, North, and Price, *Religions* (*supra*, n. 4), p. 26f., and, particularly, A. Watson, *International law in archaic Rome, War and religion*, Baltimore–London 1993.

48. Watson, *International law*, p. 7.

49. Livy, *Ab urbe condita*, 31.8.3. See also Polybius 16.34.2.

50. Cf. Mitchell, *Patricians and plebeians* (*supra*, n. 3), p. 112.

In the same way, the pontiffs as members of the Senate may have agreed to charging someone outside their college with the supervision of civil litigation. And that person was the praetor. The fact that there is no record of this important change does not mean that the change did not take place. Other major changes in law have been introduced without leaving a trace in the sources. A famous example is the replacement of the *legis actio* procedure by the formulary procedure[51]. Therefore, it is possible that, around 200 BC, the College of Pontiffs agreed to the transfer of jurisdiction to the praetors.

Summary

Pontiff, praetor, and *iurisdictio* in the Roman republic

It is generally assumed that from 367 BC the praetor was charged with *iurisdictio*, i.e. the supervision of civil litigation, and that, before that time, this task was performed by some other magistrate. Pontiffs were legal experts who served as advisers. However, new research has shown that the praetor originally had military duties and that it was only around 200 BC that he became involved in administering the law. In this paper the author suggests that, up to 200 BC, it was the College of Pontiffs which was responsible for supervising civil litigation. Mitchell put forward a similar hypothesis a few years ago, but so far he failed to convince his readers. In the author's view, close reading of Pomp. D. 1,2,2,6 and appreciating the fact that around 200 BC the relationship between pontiffs and magistrates changed fundamentally indicate that, before that year, the pontiffs were directly involved in civil litigation and were more than simply advisers.

51. Gaius, *Inst.* 4.30, and Gellius, *Noctes Atticae*, 16.10.8, do mention the *lex Aebutia* in this connection, but we do not know the content of this law; cf. M. Elster, *Die Gesetze der mittleren römischen Republik*, Darmstadt 2003, p. 454ff.

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