# Ago and aio or "how to make law with words"

## Observations on ritualized law-making in republican Roman law by means of a spoken word

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## I. Introduction: Methodological remarks

### A. The polysemy of the terms *agere* and *actio* in Roman law as a challenge for the legal historian

Action, azione, agency, legal act, claim, subjective right - what connects all these terms used in different legal cultures of the civil law legal tradition? – They all go back to the concepts *actio* and *agere* of Roman law.


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*Agere* and *actio* are polysemic legal terms.[1] Consequently, they have a wide range of meanings in sources of Roman law[2]: legal action, claim (*Anspruch*), subjective right, judicial proceeding, the processual formula to pursue a subjective right (*actio=formula*, *iudicium*) in the formulary system, legal negotiation, legal act, legal ritual, performative speech act.[3] Depending on the context and period of Roman law, they express various legal concepts. In archaic (before 510 BC) and republican Roman law (from 510 to 27 BC onwards), the term *agere* primarily denotes a ritualized procedure as well as an individual speech act particularly in the so-called procedure of *legis actiones*. In the classical period of Roman law and in formulary procedure, the terms *agere* and the later emerging *actio* relate to a legal action, a claim, a writ[4], an institutionalized civil procedure. The classical period of Roman law encompasses the time between first century and the beginning of the third century AD. The formulary procedure that dominates in the classical period was institutionalized, the actors and judicial magistrate played their particular roles, and the *actio* was reduced to the claim and to the specific written *formula* published by aparticular judicial magistrate, i.e. the *praetor*.

The wide range of meanings makes research on the roman legal concepts of *agere* and *actio* particularly complex and challenging. Especially in the republican period of Roman law, it is not possible to demarcate legal order (*ius*) and religious order (*fas*), private and public spheres, subjective and objective law, the *agere*/*actio* in the colloquial sense and in the legally relevant context.

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[1] See Heikki E.S. Mattila, 'Legal Vocabulary', in Peter Meijes Tiersma (ed.), *The Oxford Handbook of Language and Law* (Oxford: ed. Oxford University Press, 2012) 27-38, p. 30.

[2] Vgl. s.v. *actio*, in (ed. auctoritate et consilio academiarum quinque Germanicarum: Berolinensis, Gottingensis, Lipsiensis, Monacensis, Vindobonensis) *Thesavrvs lingvae Latinae* (Lipsiae: Aedibus B. G. Tevbneri, 1900) 438-444, pp. 441-444.

[3] See Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 5th edn., vol. I (Stuttgart: Verlag von Ebner & Seubert, 1879) p. 106: „Actio, in the gradation of its increasingly narrowing meanings, is: Act, negotiation (with another); judicial negotiation; contentious judicial negotiation; contentious judicial negotiation with special reference to the person making the attack, i.e. judicial prosecution, what we call claim; judicial prosecution, action, not conceived as a fact, but as legal competence." Further overview of the meanings see in Moriz Wlassak, 's.v. *actio*', in Georg Wissowa (ed.), *Paulys Realencyclopädie der classischen Altertumswissenschaft*, vol. I.1 (Stuttgart: J.B. Metzler'sche Buchhandlung, 1894) Sp. 303-323. See also Leopold Wenger, 's.v. *formula*', in Georg Wissowa (ed.), *Paulys Realencyclopädie der classischen Altertumswissenschaft*, vol. VI.2 (Stuttgart: Stuttgart: J.B. Metzler'sche Buchhandlung, 1909) 2859-2876.

[4] Peter Hans, *Actio und Writ. Eine vergleichende Darstellung römischer und englischer Rechtsbehelfe* (Tübingen: Mohr, 1957) p. 6.


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## B. Research questions and the structure of the paper

This paper analyses the meanings of the verb *agere* and the noun *actio* in the republican period of Roman law. It will be shown how *agere* in the sense of a unilateral performative legal speech act unifies concepts of an objective and subjective law. The performance of legal speech acts, denominated as *agere*, can formalize the individual legal status, (re)create and (re)acknowledge an individual right as well as the objective legal reality also without an intervention of a judicial magistrate. This research may challenge the traditional interpretation of *agere* and *actio* in the study of Roman law that reduce these legal figures to the concepts of subjective rights and of legal claims.

This paper is divided into three parts. In the first part (I. Introduction: Methodological remarks), it will be shown how dogmatic and critical-historical approaches to the study of *actio* and *agere* in Roman law dating back to 19th and 20th century, have influenced our perception of these legal figures (I.A. Actio and agere in a strict and wide sense). The theory of the performative legal speech act is proposed as a useful tool for a description of Roman legal rituals (I.B. Unilateral speech act, ritual, a spoken word).

The second part (II. Terminological and etymological observations on *agere*) will stress the necessity of differentiating between the terms *agere* and *actio* and the legal concepts they denote (II.A. Termini and legal concepts). Different etymological reconstructions of *agere* and *actio* will be evaluated (II.B. Etymology of *agere* and its relevance for legal context) to show, that in literary and legal sources related to the republican period of Roman law, the verb *agere* predominantly denotes a speech act (*ago* in the sense of *aio*) before a court (II.C. Wide and strict juridical meanings of the verb *agere* in literal sources). This interpretation of *agere* as a unilateral speech act will be verified on the basis of the norm *Rem ubi pacunt, orato* from the Twelve Tables (II.D. *Rem ubi pacunt, orato*), as well as on the basis of an analysis of the legal figures *lege agere* and *legis actio* (II.E. *Lege agere* and *legis actio*).

The third and main part of the paper (III. Genesis of *agere* – from a transformative speech act of law-finding to a claim) focusses on the transformation of *agere* in the republican period. The verb *agere* will be shown as denoting not only the rituals of private actors but also a ritual activity of judicial magistrates. This will be followed by a consideration of the oldest judicial rituals from the Twelve Tables – *legis actio sacramento in rem* (the action-at-law *by oath*), *legis actio per manus iniectionem* (the action-at-law *by the laying on of a hand*) and *legis actio per pignoris capionem* (the action-at-law *by the taking of a pledge*). This analysis will show that originally the verb *agere* denotes highly individual unilateral performative speech acts, like *meum esse*


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*aio/ago* or *manum inicio*. Especially the individual speech act *meum esse aio/ago* is not only part of a ritual struggle on the basis of the *legis actio per sacramentum* but is also necessary to the accomplishment of certain civil-law (*ius civile*) rituals of a contractual nature, such as the *mancipatio* (a solemn ritual under *ius civile* by which ownership of special classes of things was transferred) and *in iure cessio* (the solemn ritual by means of a fictious trialby which individual rights were transferred).

An especial focus on the *legis actio per sacramentum* will allow us to see how the formation and the expansion of the Roman state, as well as the gradual transition from an oral to a written legal culture, led to the reduction of *agere* from an individual orally performed speech act (*agere per concepta verba*) to a legal claim in written form (*agere per certa verba*, *formula*) that was witnessed and controlled by *praetores* and by *iudices*.

The conclusion will allow these results to engage with certain questions about our modern understanding of Law, particularly the role of speech acts and performance in a largely written legal culture.

## C. *Actio* and *agere* in a strict and wide sense in the Roman legal tradition

According to literary and legal sources of republican and classical Roman law, it is possible to distinguish between strict procedural-technical and wide meanings of *agere* and *actio*. In the strict sense, *agere* and *actio* refer to the claim, institutionalized civil procedure and to legal action. In a wide sense, *agere* and *actio* refer to a legal ritual,[5] a highly formalized individual legal speech act.[6] The word *actio* is also a part

[5] Paul Jörs, *Römische Rechtswissenschaft zur Zeit der Republik I. Bis auf die Catonen* (Berlin: Verlag von Franz Vahlen, 1888); Raimondo Santoro, 'Potere ed azione nell'antico diritto romano' (1967) 30 Annali del seminario giuridico 103-664; Raimondo Santoro, 'Appio Claudio e la concezione strumentalistica di *ius*' (2002) 47 Annali del seminario giuridico 295-365, p. 295; Raimondo Santoro, 'Actio in diritto romano', in *Poteri negotia actiones. Atti del convegno di diritto romano. Copanello 12-15 maggio 1982* (Napoli: Edizioni scientifiche italiane, 1984) 201-217; Giuseppe Provera, 'Diritto ed azione nell'esperienza giuridica romana', in Franco Pastori (ed.), *Studi in onore di Arnaldo Biscardi*, vol. IV (1983) 325-348, p. 327s.; Detlef Liebs, 'Einleitung zu den archaischen Rechtsbüchern', in Reinhart Herzog and Peter Lebrecht Schmidt (eds.), *Handbuch der lateinischen Literatur der Antike*, vol. I (München: Beck, 2002) p. 76; Riccardo Cardilli, 'Brevi riflessioni critiche sull'azione come difesa del diritto attraverso il diritto romano' (2010) 22 Revista Chilena de historia del derecho 95-102, p. 99. Regarding the phenomenon of a legal ritual see Barbara Stollberg-Rilinger, *Rituale* (Frankfurt, New York: Campus Verlag, 2019).

[6] Ulrich Manthe, '*Agere* und *aio*: Sprechakttheorie und Legisaktionen', in Martin Schermaier, Johannes Michael Rainer and Laurens Winkel (eds.) *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly* (Köln, Wien: Böhlau, 2002) 431-444, p. 439; Ruelle interprets the verb *agere* as an act of linguistic manifestation („manifestation linguistique"). See Annette Ruelle, 'Sacrifice, énonciation et actes de langage en droit romain archaïque («agone?», lege agere, cum populo agere)' (2002) 49 Revue Internationale des droits de l'antiquité 203-239, p. 238.

of the expression *libri actionum* that denotes a specific genre of republican legal literature.[7] These *libri actionum* contain ritualized speech *formulae,* i.e. *actiones,* that could be used as samples for designing legal transactions or procedural claims.

The wider technical sense which *agere* and *actio* held in the republican period cannot be reduced to the concept of a procedural remedy which is used for the judicial prosecution of a preexisting material subjective right.[8] The terms *agere* and *actio* moreover do not denote an abstract procedural remedy, which does not pressupose the existence of a subjective right, since only the decision (*iudicium*) of a judge identifies that such an individual right had existed.[9]

Moreover, studies of Roman civil procedure focus predominantly on the meanings of the noun *actio* in a strict technical sense as relevant to an understanding of Roman civil procedure and ignore similar words such as *actus*, *actum*, and *agere*.[10] In particular, the significance of the legal term *agere*, which chronologically and grammatically precedes the noun *actio*, remains underrated and is not evaluated in studies of Roman law.[11]

The strict technical interpretation of the noun *actio*, which focuses on the sources of classical Roman law, has its roots in the reception of Roman law in the civil-law legal

[7] These are the *libri actionum* of Ofilius (Ulp. 22 Sab. D. 33.9.3.8). In the sources are mentioned also the *libri actionum* of Cn. Flavius, which have also a name of *ius civile Flavianum*. The word *ius* means in this context a ritual. See also *ius Aelianum* (Pomp. l. sing. ench. D. 1.2.2.7): *Sextus Aelius alias actiones composuit et librum populo dedit, qui appellatur ius Aelianum* (Sextus Aelius not much later composed further forms of actions and gave to the people the book which is called The Law according to Aelius [Ius Aelianum]). The translation according to Alan Watson (transl. and ed.), *The Digest of Justinian. English-language Translation*, vol. I (Philadelphia: University of Pennsylvania Press, 1985) p. 4. Cf. also *Tripertita*, *Manilii actiones*, *actiones Cosconii*, *actiones Hostilianae*. On the genre *libri actionum* s. Liebs, 'Einleitung zu den archaischen Rechtsbüchern', pp. 78-79.

[8] The main representative of the technical meaning of *actio* in the sense of a *procedural* claim of the formulary system was Pugliese. See Giovanni Pugliese, *Actio e diritto subiettivo* (Milano: Giuffré, 1939) pas. On Pugliese's influentional monography and on the context of its creation see Massimo Brutti, 'Postfazione', in Giovanni Pugliese (ed.), *Actio e diritto subiettivo, 1939* (Napoli: Jovene, 1939, rist. 2006) 447-489, p. 447; Mario Talamanca, 'Processo civile (diritto romano)', in *Enciclopedia del diritto* 36 (Varese: Giuffré, 1987) 1-79, p. 5, note 29; Mario Talamanca, *Istituzioni di diritto romano* (Milano: Giuffré, 1990) pp. 273s.

[9] See the overview of the different concepts in Carlo Pelloso, 'Il concetto di "actio" alla luce della struttura primitiva del vincolo obbligatorio', in Luigi Garofalo (ed.), *Actio in rem e actio in personam. In ricordo di Mario Talamanca*, vol. I (Padova: Cedam, 2011) 127-332, p. 146, note 29.

[10] Max Kaser and Karl Hackl, *Das Römische Zivilprozessrecht,* 2nd edn. (München: C. H. Beck'sche Verlagsbuchhandlung, 1996) p. 233 note 12a.

[11] Talamanca outlines for example the derivation of the noun *actio* from the verb agere, which is older, without a detailed analysis of it. See, Talamanca, '*Istituzioni di diritto romano*', p. 277.


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tradition.[12] A (re)interpretation of Roman sources was the basis (especially in German-speaking legal culture of the 19th century) for the creation of new modern legal concepts such as a subjective right,[13] a claim, a procedural relationship, agency[14] and others. Even though these legal concepts – especially that of a subjective right – are the result of an interpretation of the Roman *actio* that was based on ideas of legal individualism, legal historians came to perceive these constructs as authentic to Roman legal experience.[15]

In the legal literature of the 20th century we can at the same time perceive a methodological turn from dogmatic-oriented to critical-historical studies of the Roman *actio*. This is connected in German-speaking legal culture *inter alia* to the fact that Roman law lost its practical significance when the German BGB came into effect.[16] These critical-historical studies consider not only the strictly technical meanings of the noun *actio* but also take into account wider meanings not only of *actio* but also of the verb *agere* and of its deverbatives in relation to the archaic and republican periods of Roman law.

However, if we include the "atechnical", wider meanings of *agere* and *actio* in republican and archaic Roman law, our research focus expands.[17] We must consider the role of legal solemn rituals as well as the significance of the ritualized spoken word[18] for the formation of legal reality in the legal order of the archaic and republican

[12] Riccardo Orestano, s.v. 'Azione in generale', in *Enciclopedia del diritto*, vol. 4 (Milano, Giuffrè, 1959) 785–822; Cardilli, 'Brevi riflessioni critiche sull'azione come difesa del diritto attraverso il diritto romano', p. 96.

[13] Regarding the applicability of the concept of subjective right for analysis of Roman legal sources see Tiziana Chiusi, 'Diritti soggettivi e diritti nella persona umana: sulla funzione del diritto privato per la definizione die soggetti del diritto', in Andrea Landi and Aldo Petrucci (eds.), *Pluralismo delle fonti e metamorfosi del diritto soggettivo nella storia della cultura giuridica* (Torino: Giappicelli, 2016) 79–103.

[14] Cf. s.v. agency, in Robert K. Barnhart (ed.), *The Barnhard Dictionary of Etymology* (New York: The H.W. Wilson Company, 1988) p. 19.

[15] The application of the concept 'subjective right' for analysis of Roman law was particularly criticised by Pierangelo Catalano, 'Diritto, soggetti, oggetti: Un contributo alla pulizia concettuale sulla base di D. 1.1.12', in Capogrossi Colognesi *et al.* (ed.), *IVRIS VINCULA. Scritti in onore di Mario Talamanca II* (Napoli: Jovene, 2001) 95-117.

[16] Tommaso Beggio and Aleksander Grebieniow, 'Einleitung', in Thommaso Beggio and Aleksander Grebieniow (ed.), *Methodenfragen der Romanistik im Wandel. Paul Koschakers Vermächtnis. 80 Jahre nach seiner Krisenschrift* (Tübingen: Mohr Siebeck, 2020) p. 2.

[17] On the demarcation of the 'technical' meaning of *actio* from other meanings of *actio* cf. also Kaser and Hackl, *Das Römische Zivilprozessrecht,* p. 233, note 12a.

[18] See Ricardo Orestano, 'La "parola creatrice" ', in Umberto Scarpelli, Paolo Di Lucia (eds.), Il linguaggio del diritto (Milano: LED, 1994) p. 199, 202.

periods of Roman law. A renewed understanding of *agere* and *actio* in Roman law could be reached through a critical (re)evaluation of the premises of its reception in the dogmatic tradition, and by taking a more critical-historical approach which also engages with the literary sources from the republican and archaic periods.

## D. Unilateral speech act, ritual, spoken word

The analysis of Roman sources of the archaic and republican period of Roman law shows that individual solemn acts play a significant role in law-making or rather in the creation of legal reality. Already Huschke[19], Kaser[20], Fögen,[21] Meder[22], Orestano[23], but also Hattenhauer[24] outlined this law-changing capacity of roman rituals, which are composed of a speech act and physical contact with the object of the ritual.

In his research Manthe analyses solemn rituals of Roman law by means of J.L. Austin's Speech Act Theory.[25] He applies Austin's theory to the interpretation of republican Roman civil procedure based on *legis actiones*. Expressions such as *aio* (I declare), *postulo* (I claim), *nego* (I deny) can change the legal reality of the actor who is making these utterances. Roman legal rituals become lawful or, if we use the terminology of Manthe „geglückt" (successful), if they are performed by means of the aforementioned explicit performative speech acts.[26]

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[19] Philip Eduard Huschke, 'Kritische Bemerkungen zu Gaius' (1868) 7 Zeitschrift für Rechtsgeschichte 161–191, p. 176 uses the term 'aneignende dicere'.

[20] Max Kaser, *Das altrömische ius. Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer* (Göttingen: Vandenhoeck & Ruprecht, 1949) 324 supposes that they require beside the spoken word also a physical act.

[21] Marie Theres Fögen, 'Ritual und Rechtsfindung', in Corina Caduff and Joanna Pfaff-Czarnecka (eds.), *Rituale heute. Theorien-Kontroversen-Entwürfe* (Berlin: Reimer, 1999) 149-163.

[22] Stephan Meder, *Ius non scriptum. Tradition privater Rechtssetzung*, 2nd edn. (Tübingen: Mohr Siebeck, 2009) p. 33.

[23] Riccardo Orestano, 'La "parola creatrice" (1967)' p. 199, 202.

[24] Christian Hattenhauer, Einseitige private Rechtsgestaltung. Geschichte und Dogmatik (Tübingen: Mohr Siebeck, 2011) passim.

[25] Manthe, '*Agere* und *aio*: Sprechakttheorie und Legisaktionen', 431-444; John Langshaw Austin, *How To Do Things With Words: The William James Lectures delivered at Harvard University in 1955*, 2nd edn., edited by James Opi Urmson, Marina Sbisà (Oxford: Clarendon Press, 1975).

[26] The idea of a performative speech act goes back to Austin's work "How to do things with words". He differentiates performative and constative utterances. The constative utterances describe the state of affairs, which could be false or true. They report some things or events. "For performative utterances we do something rather than say that something is or is not the case" according to Deborah Cao. See Deborah Cao, 'Legal Speech Acts as Intersubjective Communicative Action', in Anne Wagner, Wouter Werner and Deborah Cao (ed.), *Interpretation, Law and the Construction of*

Manthe pays no attention to the difference between constative and performative speech acts but tries to apply Austin's classic theory of illocutory and perlocutory speech acts, as well as the classification of perlocutory speech acts (in assertive, directive, commissive, expressive, declarative) to Roman law.

In studies related to legal language, the concepts of performativity and performative speech acts occur usually in atechnical sense.[27] The core idea of the performative speech act in the legal context is reduced to the postulate that the law, or legal reality in general, can be formed through the utterance of certain performative verbs.[28]

This atechnical application of performative speech act theory in the legal context is probably a result of critical reflection of some postulates of Austin's theory like, for example, the distinction between performative and constative speech acts. Sabine Müller-Mall emphasises that even Austin could not clearly distinguish between the performative and the constitutive acts.[29] Manthe uses the theory of Austin, but in fact he does not clearly make sense of the perlocutory, comissive and directive utterances, which he fails to properly demarcate.[30]

By speech act, we understand in this paper a unilateral solemn oral act consisting of the utterance of a prescribed ritualized speech *formula* that could have a norm-setting effect. The core characteristic of the speech act is for us the creation or changing of a legal reality by means of explicit performative verbs. As Olivecrona outlined, performative legal speech acts are similar to acts of magic.[31] The legal speech acts of

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*Meaning* (Dordrecht: Springer, 2007) 65-82. According to Austin the performative acts create a new reality: "To utter the sentence is not to describe my doing...or to state that I am doing it: it is do it... What are we to call a sentence or an utterance of this type? I propose to call it a performative sentence or a performative utterance, or, for short, 'a performative'." John L. Austin, *How to Do Things with Word: The William James Lectures Delivered at Harvard University in 1955*, p. 6.

[27] In legal literature the differentiation between performance and performative is not always obvious in relation to legal acts. See Sabine Müller-Mall, *Performative Rechtserzeugung: eine theoretische Annäherung* (Weilerswist: Velbrück Wissenschaft, 2012) p. 126.

[28] Lars Bülow, 'Performativität in Sprache und Recht. Synopse der einzelnen Beiträge', in Lars Bülow Jochen Bung, Rüdiger Harnisch and Rainer Wernsmann (eds.), *Performativität in Sprache und Recht* (Berlin/Boston: De Gruyter, 2016) 3-17, pp. 3-5.

[29] Sabine Müller-Mall, 'Rekursion. Rezeption. Relation. Rechtstheoretische Aspekte des Performativen', in Lars Bülow Jochen Bung, Rüdiger Harnisch and Rainer Wernsmann (ed.) Performativität in Sprache und Recht (Berlin/Boston: De Gruyter, 2016) 22.

[30] Manthe, '*Agere* und *aio*: Sprechakttheorie und Legisaktionen', 434. Cf. Amir Mischiach, 'The Performative Speech Act in Jewish Law: Interpersonal vs. Human-Divine Speech', in Hebrew Union College Annual (2013-2014) pp. 173-206, p. 176.

[31] Olivecrona probably created his concept of similarity between acts of verbal magic and legal speech acts based on his study of Roman Law. See Karl Olivecrona, *Law as Fact*, 2nd edn. (London: Stevens & Sons, 1971) 228-229. See also Oscar Vergara, 'The Magical Element in the Law' (2018) 104(1) Archiv für Rechts- und Sozialphilosophie 103-120.

archaic and republican Roman law that we will focus on purport to create a reality through using 'powerful' words, as magicians or practitioners of verbal magic do, in a way which at least projects how they invite the audience to share their view of things.[32] Through the proclamation of the prescribed ritualized *formulae* the actors who pronounce these acts can create or change legal reality. We also take into consideration that a particular feature of legal speech acts is their institutionalized character, that is the control over their correctness and lawfulness exercised by the *civitas*, by witnesses, and later by judicial magistrates.

In the literary and legal sources of Roman law, these speech acts are denominated *inter alia* with the verb *ago*/*agere* and the verb *aio*.[33] If we describe an act as performative, we emphasize that the pronunciation of some solemn *formulae*, phrased in the first person singular, has (or can have) a law-changing effect.

In this paper, we use the concept of performative speech acts especially but not exclusively for the analysis of the rituals *agere per sacramentum* and *agere per manus iniectionem*.

## II. Terminological and etymological observations on *agere* and *actio*

### A. Termini and legal concepts

The noun *actio* in the sense of a claim occurs relatively late in literary sources of Roman law, beginning with Varro (2nd century BC).[34] The first transmitted legal source that uses the term *actio* is an epigraphic text of the *lex Acilia repetundarum* (l. 57.74), also dated to the mid to late 2nd century BC.[35]

Since the word *actio* is a so-called deverbative noun[36] of the verb *agere*; the sources that use the verb *agere* are older. In some comedies of Plautus from the 3rd century

[32] Jacqueline Visconti, 'Speech Acts in Legal Language: Introduction' (2009) 41 Journal of Pragmatics 393-400; Karl Olivecrona, 'Legal Language and Reality', in Ralph Abraham Newman (ed.), *Essays in Jurisprudence in Honour of Roscoe Pound* (New York: Bobbs-Merrill, 1962) 151-191, p. 175.

[33] Müller-Mall, 'Rekursion. Rezeption. Relation. Rechtstheoretische Aspekte des Performativen', 21-34.

[34] According to the sources, the morphological form *actio* is used beginning with Varro (Varro, Ling. Lat. 5.11; 6,41); s.v. *agō* in: Michiel de Vaan (ed.), *Etymological Dictionary of Latin and Other Italic Languages* (Brill, 2008).

[35] Here the word *actio* occurs in the context of the rule "*De eadem re ne bis agatur*". S. Salvator Riccobono (ed.), *Fontes Ivris Romani Antejvstiniani. Pars Prima. ü*S. Giovanni Pugliese, s. v. azione (diritto romano), in Novissimo Digesto Italiano, vol. II (Torino: Tipografia Sociale Torinese, 1958) 24-29, p. 24. Cf. also Rhet. ad Her. 2.12.18.

[36] Deverbatives or deverbative nouns are nouns that are derived from verb stems.

BC we find termini such as *lege agere* or *lege agito* that refer to legal rituals of republican Roman law.

It is noteworthy that in the republican period of Roman law the formation of legal terms and concepts is connected with the development of the colloquial Latin language. Even though the word *agere* goes back to the 3rd century BC, i.e. to the period of the creation of Plautus' comedies, the history of the oral and performative legal concepts goes even back further: the grammarian Festus (Fest. s.v. *orare*, Lindsay, 218.6)[37] says: *Orare antiquos dixisse pro agere* (to speak solemnly (*orare*) the ancestors said instead of *agere*). This remark by Festus on the interchangeability of *agere* and *orare* is of crucial significance for the methodology of our research. For the reconstruction of the legal concept of *agere* we can also use sources in that the most ancient and interchangeable term *orare* is used before the verb *agere* arises in the legal context.

At the same time classical jurists Gaius and Pomponius ascribe the concept of *actio* to early Roman law. Thus, Gaius (Gai 4.11) talks about *actiones* that *habuerunt in usu veteres* (the actions used by old [lawyers])[38], referring to *legis actiones* of the Twelve Tables from the 5th century BC. Pomponius (Pomp. l. sing. ench. D. 1.2.2.6) likewise connects the *legis actiones* with the Twelve Tables: *ex his legibus eodem tempore fere actiones compositae sunt* (about the same time actions-at-law whereby people could litigate among themselves were composed of these statutes)[39].

The reconstruction of *actio* and *agere* in the republican period of Roman law therefore implies a continuous differentiation between these terms and the legal concepts they denote. It also demands a comparative analysis of the sources related to the classical period of Roman law that ascribe the concepts *agere* and *actio* to its archaic and republican periods.

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[37] Cf. the similar Festus definition of the verb *adorare* (Fest. s.v. *adorare*, Lindsay 17.26): [...] *Adorare apud antiquos significabat agere; unde et legati oratores dicuntur, quia mandata populi agunt.* See Fest. s.v. *orata* (Lindsay, 196.25); The verb *perorare* is described by Gaius, in Gai 4.15: [...] *deinde cum ad iudicem venerant, antequam apud eum causam perorarent, solebant breviter ei et quasi per indicem rem exponere; quae dicebatur causae coniectio quasi causae suae in breve coacti.* The verb *perorare* expresses the idea of a completed action and also appears in the Twelve Table. See (Tab. 1.7): *Cum perorant ambo praesentes. Post meridiem praesenti litem addicit.* See Roberto Fiori, Il processo privato, in Maria Floriana Cursi (ed.), *XII Tabulae. Testo e commento*, vol. I (Napoli: Edizione scientifiche italiane, 2018) 45-149, p. 68.

[38] The translation of William M. Gordon, Olivia F. Robinson, *The Institutes of Gaius* (London: Duckworth, 1988, rest. 2001), p. 407.

[39] The translation follows Alan Watson (transl. and ed.), *The Digest of Justinian. English-language Translation*, vol. I (Philadelphia: University of Pennsylvania Press, 1985) p. 4.

## B. Etymology of *agere* and its relevance for a legal reconstruction

For the comprehension of polysemic words from the republican and probably archaic periods of Roman law, etymological reconstructions are of particular significance. They can help us to better understand the meaning of *agere* also in a legal context.

According to one theory, the original meaning of *agere* is "to draw", "to turn", "to make".[40] A second theory, put forward already by Donellus[41], identifies in the verb *agere* the idea of a speech act. A third etymological theory connects the verb *agere* with *augurium*, i.e. a religious practice that derived omens from the observation of the behaviour of birds.[42] In my opinion, the legal term *agere* embodies characteristics that unite all of these etymological reconstructions. *Agere* in a legal context signifies an oral speech ritual (*agere* = to speak). This speech act has a performative effect (*agere* = to do, to draw). The syncretism of Roman law, which does not distinguish between legal (*ius*) and sacral (*fas*) orders,[43] as well as the central role of Roman priests (*pontifices*, *augures*) in the creation, interpretation and application of legal rituals,[44] entails that *agere* has significance not only in the sphere of the *ius humanum* but also in that of the *ius divinum* (*agere* = *augurium*).[45]

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[40] S.v. *agō* in Michiel de Vaan (ed.) *Etymological Dictionary of Latin and Other Italic Languages*; s.v. *actio*, in P.G.W. Glare (ed.), *Oxford Latin Dictionary* (Oxford: Clarendon Press, 1968), pp. 87s.

[41] Hugo Donellus, *Commentariorum de iure civili, Cum notis Osualdi Hilligeri, Accedunt Summaria, & Castigationes Theologicae*, vol. VI (Luca: Typis Joannis Riccomini censorum permissu, 1764) Sp. 521: *Non alia igitur ... significatio est, quam ut cum dicimus agere cum aliquo* [...] (There is no other meaning, if when we say something (*dicimus*) we act with someone (*agere cum*) [...]).

[42] On the connection between *agere* and *agonium* see s.v. *ago*, in Alfred Ernout and Alfred Meillet, *Dictionnaire étymologique de la langue latine*, 4th edn. (Paris: Klincksieck, 1985), pp. 23s.; Alois Walde and Johann Baptist Hoffmann, *Lateinisches Etymologisches Wörterbuch*, 3rd edn. (1938) pp. 23s.; Pietro De Francisci, *Primordia civitatis* (Romae: Apollinaris, 1959) 297. See also Santoro, 'Potere ed azione nell'antico diritto romano', p. 291; Ruelle, 'Sacrifice, énonciation et actes de langage en droit romain archaïque', p. 214.

[43] Riccardo Orestano, 'Dal *ius* al *fas.* Rapporto fra diritto divino e umano in Roma dall'età primitiva all'età classica' (1939) 46 Bullettino dell'Istituto di Diritto Romano 194–273; Okko Behrends, 'Ius und Ius Civile. Untersuchungen zur Herkunft des *ius*-Begriffs im römischen Zivilrecht', in Detlef Liebs (ed.), *Sympotica Franz Wieacker* (Göttingen: Vandenhoeck & Ruprecht, 1970) 11-58, pp. 13s.

[44] According to Manthe, that *legis actiones* were created by augurs. They were a young cast of roman priests. See Ulrich Manthe, 'Stilistische Gemeinsamkeiten in den Fachsprachen der Juristen und Auguren der römischen Republik', in Konrad Zimmermann (ed.), *Der Stilbegriff in den Altertumswissenschaften* (Rostock: Univ., Presse- und Informationsstelle, Wiss.-Publizistik, 1993) 69-74.

[45] On the relation of the terms *ius divinum*, *ius pontificium* and *ius sacrum* cf. Anna Margarete Seelentag, *Ius pontificium cum iure civili coniunctum. Das Recht der Arrogation in klassischer Zeit* (Tübingen: Mohr Siebeck, 2014) pp. 42s.


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In literary and legal sources related to the republican period of Roman law the verb *agere* is used predominantly in connection with the idea of a speech act. This is evidenced by the expression *agere cum* (to act, to speak with someone) or the oral performative act *meum esse aio,* (see below II. F.), further by the interchangeability of the words *orare* and *agere* in literary sources (see below II. D.) as well as by the expression *lege agere* (see below II. E).

The further discourse will be focused on the meaning of *agere* in connection with the speech act.

## C. Wide and strict juridical meanings of the verb *agere* in literary sources

As mentioned above the formation of the legal terminology of Roman Law is strictly connected with the formation of Latin itself. It is the reason why we find descriptions of some legal terms and concepts in the compilations of Roman grammarians.

There exist for example two fragments that give an overview of the different legally relevant meanings of *agere* in the Latin language – one from Marcus Terentius Varro's[46] tractate "*De lingua latina*" (On the Latin language) and one from Festus' (Flaccus) compilation "*De verborum significatione*" (On the meaning of the words).[47]

Varro describes the verb *agere* in a way that embraces both its colloquial and its narrow legal meaning (Varro, De ling. lat. 6.42):

> [...] *et cum cogitamus quid et eam rem agitamus in mente agimus et cum pronuntiamus agimus. Itaque ab eo orator agere dicitur causam, et augures agere augurium dicuntur, cum in eo plura dicant faciant.*
>
> [...] But also when we consider (*cogitamus*) something and turn it over in our mind (*agitamus in mente*), we are acting (*agimus*), and when we make an utterance (*pronuntiamus*), we are acting (*agimus*). Therefore from this the orator

[46] Marcus Terentius Varro (116-27 BC) was a Roman intellectual and a writer of the late Republic. He wrote a linguistic treatise "On the Latin language", which contains *inter alia* explanations of some legal concepts and terms.

[47] Sextus Pompeius Festus was a Latin grammarian of the second century AD. He made an epitome of the work of Roman Grammarian Verrius Flaccus *De verborum significatione*, of the period of Augustus. This work of Flaccus represents thesaurus with word meanings. *De verborum significatione* has been 'reedited' twice – by Pompeius Festus and by Paulus Diaconus. S. Michael von Albrecht, *Geschichte der römischen Literatur. Von Andronicus bis Boethius und ihr Fortwirken*, vol. I, 3rd rev. edn. (Berlin/Boston: De Gruyter, 2012).


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> is said to plead the case (*causam agere*), and the *augures* are said to practice augury (*augurium agere*), although in this there is more saying than doing.[48]

According to Varro, the verb *agere* refers not only to a speech act (*pronuntiare*) but is used in connection with the Latin word *mens* (mind) and in this connection signifies a cognitive process (*in mente agere*). The technical processual meaning of *agere* is evident in the expression *causam agere*; this expression occurs also in other literary and legal sources, where it means a court dispute on a particular matter (*causa*).[49] Furthermore, Varro emphasizes the relation between *augurium* and *agere*: when the *augures* perform *agere*, they say and do something (*dicant faciant*).

Festus offers an overview of the meanings of the verb *agere* based on M. Verrius Flaccus' grammatical work *De verborum significatione* (Fest. s.v. *agere*, Lindsay, 21.1):

> *Agere modo significat ante se pellere, id est minare. Virgilius (Ecl. 9, 24): „Et potum pastas age." Modo significat iurgari, ut dicimus: agit cum eo furti; modo rependere, ut is cum dicimus: gratias ago; modo verbis indicare, ut cum dicimus: causam ago; quin etiam si accessit gestus et vultus quidam decor, ut cum scaenici agere dicuntur.*
>
> *Agere* sometimes means to push, i.e. to drive. Thus Virgil (Ecl. 9,24): "And lead them after the pasture to drink"; sometimes it means "to dispute"(*iurgari*), as when we say: he complains with him from the *furtum*; sometimes it means "to repay" (*rependere*), as when we say I thank you; sometimes it means to show with words (*verbis indicare*), as when we say: I act in a cause (*causam ago*); even when a *gesture* and a facial expression are added as an adornment, as when actors are said to act.

The most relevant for us is the significance of *agere* as *iurgari*, i.e. "to dispute". This meaning of the word *iurgari* (to dispute) can be clarified with the aid of another fragment from Varro's *De Lingua Latina* (Varro, De ling. lat. 7.93). Varro compares the word *iurgare* with *iure litigare*: [...] *Ex quo licet videre iurgare esse ab iure dictum, cum quis iure litigaret* ([...] From this you may see that *iurgare* 'to contend in words' is said from *ius* 'right', when a person *litigaret* 'went to law' *iure* 'with right'[50]). Cicero in contrast uses the verb *iurgari* to refer to a 'peaceful' conflict among neighbours in

[48] The translation is based on Thomas Ethelbert Page, Edward Capps and Wiliam Henry Denham Rouse, *Varro. On the Latin Language*, vol. I, books V-VII (Cambridge, Massachusetts: Harvard University Press, 1938) p. 213.

[49] Cic. Pro Balbo 3; Cic. De or. 1.237; Cic. Pro Cluent. 47.131; Cic. Pro Flac. 52; Cic. Der or. 46.37.

[50] Translation according to Page, Capps, Rouse, *Varro, On the Latin Language*, vol. I, p. 347.


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his work *De re publica* (Cic. Rep. 4.8).[51] It cannot be ruled out that *iurgare* means both – a peaceful resolution of a conflict and s a legal dispute.[52]

Flaccus quotes a further example of *agere* in the sense of *iurgare*: *agit cum eo furti* (he sues him for theft [*furtum*]). The expression "*agit cum*" (literally "act with") could be a possible indication of *agere* as a speech act as an act of communication with the defendant in the course of the litigation.[53] The phrase *verbis indicare* points towards a solemn performative activity that combines the pronouncement of a solemn speech formula as well as a physical gesture. It means that through the enunciation of words (*verbis*) particular matters are shown and demonstrated (*indicare*). The expression *causam ago* is already used by Varro in the text quoted above (Varro, De ling. lat. 6.42) and in other sources to refer to a judicial procedure.[54]

### *D. Rem ubi pacunt, orato*

The meaning of *agere* as a speech act can be traced to another definition that Festus gives of the word *orare*, as we mentioned above.[55] The use of the verb *orare* as a more ancient equivalent of *agere* can be exemplified by the Twelve Tables, in a famous legal norm (Tab. 1.6):[56] *Rem ubi pacunt, orato* (When parties have a contract on the matter, he shall proclaim).[57] According to the traditional interpretation this legal norm

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[51] Cic. rep. 4.8.: [...] *iurgare igitur lex putat inter se vicinos, non litigare* (The law assumes that neighbours dispute among themselves (*iurgare*) and do not litigate [*litigare*]).

[52] S.v. *iurgare*, in Hermann Gottlieb Heumann and Emil Seckel, *Handlexikon zu den Quellen des römischen Rechts*, 11th edn. (Graz: Akademischer Druck und Verlagsanst., 1971) p. 299

[53] See above the remark of Donellus, note 37.

[54] Ulp. 4 ed. D. 2.14.7.5; Gai 30 ed. prov. D. 12.2.31; Ulp. 2 de of. cons. D. 22.3.14; Paul. sing. reg. D. 19.2.38.1; Scaev. 25 dig. D. 41.4.14; Mod. l. sing. de praescr. D. 49.1.20.1; Aurel. Arc. Char. mag. libel. l. sing. de mun. civil. D. 50.4.18.13.

[55] Carlo Gioffredi, 'Rem ubi pacunt orato' (1973) 76 Bullettino dell'Istituto di Diritto Romano 271-294, p. 272.

[56] Salvator Riccobono (ed.), *Fontes Ivris Romani Antejvstiniani. Pars Prima. Leges*, 3rd edn (Firenze: Florentiae apud S. A. G. Barbèra, 1968) p. 28. According to Crawford the passage sounds as follows: *ubi pacunt, orato*. S. Michael Hewson Crawford, *Roman Statutes*, vol. II (London: Institute of Classical Studies, 1996) p. 578.

[57] The text is an excerpt from the treatise "Rhetorica ad Herennium" by an unknown author (Rhet. Her. 2.20), which reads as follows: [...] *ex pacto ius est, si quid inter se pepigerunt, si quid inter quos convenit. Pacta sunt, quae legibus observanda sunt, hoc modo: Rem ubi pacunt, orato; ni pacunt in comitio aut in foro ante meridiem causam coicito* (It is Law founded on agreement if the parties have made some contract between themselves—if there is some covenant between parties. There are agreements which must be observed according to statutes, as for example: "When parties have contract on the matter, party shall plead; if they do not have contract, party shall state outline of cause in the Comitium or the Forum before midday"), as translated by Harry Caplan (transl.), *[Cicero] ad C.*


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expresses the idea that private actors could enter into a settlement agreement (*pacunt*); the settlement agreement receives its legal acknowledgment through a speech act, i.e. *orare*, or later *agere*. For our topic two questions are of central relevance: What does the verb *orare* mean? Who performs *orare*?

The word *orare* is interpreted in the literature as "to speak in a prescribed form"[58], "to proclaim"[59], "to attest"[60]. As Wagenvoort points out, "the principal force of the verb *orare* is 'to make words', to speak, and that almost always with some authority."[61]

It is noteworthy that the verb *orare* implies the oral proclamation of a solemn speech *formula*. This aspect, i.e. orality, is not really evaluated in the research of Roman procedural law in the republic period but has in my opinion a crucial significance for an understanding of legal procedure in this time. The orality of legal rituals is connected to their performative character. Oral legal rituals were staged publicly and in some cases without the intervention of a judicial magistrate.[62] For their legal validity they had to be understood correctly. This implies that the private actors used predominantly unilateral simply formulated but effective speech acts. These solemn speech acts are designated according to the quoted text with the term *orare* (and later with the term *agere*).

The imperative form *orato* (he shall proclaim) as understood by the *communis opinio* means that a judicial magistrate (*rex*, *praetor*) issues a proclamation in a prescribed

*Herennium. De ratione dicendi (Rhetorica ad Herennium)* (London: William Heinemann / Cambridge: Harvard University Press, 1964) p. 95.

[58] Fiori, 'Il processo privato', 68 proposes, that *orare* means "to speak in a certain form" by comparing *oratio* and *sermo* on the basis of a following note of Cicero (Cic. Or. 64): *Itaque sermo potius quam oratio dicitur*. See also Rhet ad Her. 3,23.: *sermo est oratio remissa et finitima cotidianae locutioni*.

[59] Max Kaser, 'Prätor und Judex im römischen Zivilprozess' (1964) 21 Tijdschrift voor Rechtsgeschiedenis 329-362, p. 349.

[60] In the sense see Festus, s.v. *oratores* (Lindsay, 197.1), who connects the verb *orare* with a verb *testari*, i.e. "to testify", "to explain".

[61] An overview of sources can be found in Hendrik Wagenvoort, 'Orare, Precari', in Hendrik Wagenvoort (ed.), *Pietas. Selected Studies in Roman Religion*, vol. I (Leiden: Brill, 1980) 197-209, p. 197. Cf. Plaut. Capt. 244: *nunc te oro per precem* (now I do beg and pray you). The translation see in Wagenvoort, 'Orare, Precari', p. 198.

[62] This conception goes back to Jhering. He notes, that the enforcement of the right is not the business of the state, but of the individual who is entitled to it. Cf. Rudolf von Jhering, *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. I.1 (Leipzig: Breitkopf und Härtel, 1852) p. 146. See also Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. II.2 (Leipzig: Breitkopf und Härtel, 1858) 431.


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form, thereby confirming a settlement agreement between private parties (*pactum*).[63] This understanding is inspired by the modern concept of civil procedure in which a judge has to approve a settlement agreement between the parties. This interpretation presumes, moreover, that already in the period of the Twelve Tables (5th century BC) there existed an institutionalized process by means of which private actors could bring actions or claims, and in which the Roman state – embodied by a *rex* or later a *praetor* – pronounced judgment. This interpretation does not correspond to the usage of the word *orare* in the sources. As Wagenvoort showed, the word *orare* never appears in republican literary sources in connection with the activity of a court magistrate or other authority; instead, it always refers to the actions of private persons.[64]

The boundaries between the exercise of public functions and the ritualized activity of private persons cannot be clearly drawn in the archaic and republican periods of Roman Law. It can be assumed that the norm *Rem ubi pacunt, orato* stresses therefore the wide autonomy of private actors in early republican and probably archaic Roman law and shows that a probably socially more dominant actor could confirm an informal agreement between parties by performing a speech act described as *orare*.[65] The term used for this act of legal autonomy was originally *orare* and later also *agere*. The requirments under which an act of personal autonomy, designated with the term *orare*, acquires legal significance were compliance with the rules of the ritual, as well as its public performance.

### E. *Lege agere* and *legis actio*

As we mentioned above, before the establishment of the formulary procedure, the main form of Roman civil procedure was the procedure of *legis actiones*. This procedure goes back to *primordia civitatis*, and was redesigned through the Twelve Tables. It is marked on the one side by high formalism and on the other side by a high level of private autonomy.

Its specific characteristic consists in the oral performance of highly personal oral rituals, comprising prescribed oral *formulae* (*certa verba*), in front of a court

[63] The interpretation, that the verb *orato* refers to the activity of the magistrate is generally accepted in literature. See Kaser, 'Praetor und Judex im römischen Zivilprozess', pp. 349s.; Kaser and Hackl, *Das Römische Zivilprozessrecht*, p. 115. Cf. also Dieter Flach and Andreas Flach, *Das Zwölftafelgesetz. Leges XII tabularum* (Darmstadt: Wiss. Buchges, 2004) p. 177.

[64] An overview of sources can be found in Wagenvoort, 'Orare, Precari', p. 199.

[65] The following translation by Crawford seems for that reason more correct in the part where he explains who is the subject of the *orare*: "He (the plaintiff) is to plead, where they agree". See Crawford, '*Roman Statutes*', p. 579.


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magistrate.[66] In the formulary procedure, the *praetor* hears both participants of a trial on the procedural stage *in iure*, who explain their claims in a non-formal way, and then composes a specific judicial schema in written form, i.e. the *formula* (*concepta verba*) in the objectivized form. However, in the procedure *lege agere*/*legis actio*, the parties and the *praetor* employ predetermined and highly formal oral rituals in the very first stage (that is *in iure*).[67]

A morphological analysis of the terms *lege agere* and *legis actio* already reveals the significance of *agere* as a speech act.[68] The oldest term is *lege agere*. As mentioned earlier it occurs in the comedies of Plautus of the 3rd century BC.[69]

Both *termini* consist of two parts – *actio* or *agere* and an additional part derived from the word *lex,* that is *lege* (*agere*) and *legis* (*actio*). The word *lex* has two main meanings in the relevant sources: it designates a solemn word, a solemnly exercised imperative command[70] and a (public) law. In its older, primordial meaning *lex* denoted a

[66] Kaser and Hackl, 'Das Römische Zivilprozessrecht', pp. 151-153.

[67] Andrew M. Riggsby, *Roman Law and the Legal World of the Romans* (New York: Cambridge University Press, 2010) p. 117.

[68] Bruno Schmidlin, 'Zur Bedeutung der legis actio: Gesetzesklage oder Spruchklage?' (1970) 38 Tijdschrift voor Rechtsgeschiedenis 367–387

[69] Plaut. Aulularia, 3.3.10: *Lege agito mecum.*; Miles gloriosus, 2.5.43: *Lege agito: te nusquam mittam, nisi das firmatam fidem* [...] (Go to law about it. I shan't let you loose at all, unless I have your word of honour [...]). The translation according to Paul Nixon, *Plautus III. The Merchant, the Braggart Warrior. The Haunted House. The Perisan*, vol. III. (London: William Heinemann, New York: G.P. Putnam's Sons, 1924) pp. 171, 173; Plaut. Mercator, 5.4.59: *cum eo nos hac lege agemus* [...] (With this man we shall deal in accordance with this law [...]). See Nixon, *Plautus*, p. 117.

[70] Cf. Franz Wieacker, 'Ius civile und lex publica in der römischen Frühzeit', in Gottfried Baumgärtel et al. (eds.), *Festschrift für Heinz Hübner zum 70. Geburtstag am 7. November 1984* (Berlin/New York: De Gruyter, 1984) 357-393.


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solemnly prescribed word and can be found in the following expressions: *lex dicta*,[71] *legem dicere*,[72] *verba legitima*,[73] *actus legitimi*.[74]

The term *lege agere* further contains the noun *lege* in the ablative case and describes an *agere* performed by means of *lex*, i.e. by means of a certain *solemn formula*. The word *lex* as a part of the term *legis actio* is a *genitivus subiectivus* and accentuates the legal basis of the *actio*. The expressions *lege agere* and *legis actio* thus highlight different moments. While *lege agere* represents a judicial ritual carried out through the utterance of a ritualized oral formula, *legis actio* indicates an action that has its basis in a statute, i.e. the Twelve Tables.[75]

Gaius, our central source concerning *legis actio* and *lege agere*, is probably aware of these two meanings of *lex*, even if he uses the word *lex* in his other texts predominantly in the sense of "law" or "statute".[76] In the famous fragment 4.11, he surmises that the *legis actiones* have their name either because they have their legal

[71] The *lex dicta* as a part of *mancipio* is a unilaterally imposed additional condition of a *mancipatio*. See Cic. De or. 1.39.178. In Afr. 9 quaest. D. 40.7.15.1 and in Serv. ad Aen. 3.89 the term *legum dictio* is used to refer to additional conditions. For further sources, see Bernardo Albanese, *Il processo privato romano delle legis actiones* (Palermo: Palumbo, 1987) p. 13, note 19. The expression *lex dicta* refers to a unilateral, initially always formal declaration made by one of the parties to a legal transaction, often a contract, when it is concluded, which either specifies the content of the transaction in more detail or expands or restricts it. For an overview of sources, see Max Kaser, 'Der Privatrechtsakt in der römischen Rechtsquellenlehre', in Hermann Lange, Christian Wollschläger, Detlef Liebs, Joseph Georg Wolf, Okko Behrends and Malte Diesselhorst (eds.), *Festschrift für Franz Wieacker zum 70. Geburtstag* (Göttingen: Vandenhoeck & Ruprecht, 1978) 90-114, p. 94.

[72] The sources refer to the expression *legem dicere*, which means a binding, solemn condition made while establishing the testament. See Paul. 2 reg. D. 28.1.14; Marcian emphasises a connection between *legare* (to dispose of by legacy bequeath; to make testamentary dispositions) and *legem dicere* (to declare, what the law is) by the establishment of the testament (Marc. 8 inst. D. 30.114.14).

[73] See Varro, De ling. lat. 6.53; Ovid. Fasti 2.527; Liv. Ab urb. cond. 9.9.5; Gell. Noct. Att. 11.1.4.

[74] Papinian uses the term *actus legitimi*, which is probably a paraphrase of *actio legitima* or *legis actio*. He defines *actus legitimi* as follows (Pap. 28 quaest. D. 50.17.77): *Actus legitimi, qui non recipiunt diem vel condicionem, veluti emancipatio, acceptilatio, hereditatis aditio, servi optio, datio tutoris, in totum vitiantur per temporis vel condicionis adiectionem* [...] (Legal acts which do not involve a day or condition, such as emancipation, acceptilation, entry into an inheritance, option on a slave, grant of tutor are entirely violated by the addition of a time or a condition [...]). The translation according to Alan Watson (transl. and ed.), *The Digest of Justinian. English-language Translation*, vol. IV (Philadelphia: University of Pennsylvania Press, 1985) p. 475.

[75] Cosimo Cascione, 'Lege agere e poena capitis', in Capogrossi Colognesi et al. (eds.), *IVRIS VINCULA. Scritti in onore di Mario Talamanca*, vol. I (Napoli: Jovene, 2001) 511-536, p. 515, note 8.

[76] See s.v. *lex*, in Luigi Labruna, Enrico de Simone and Settimio di Salvo, *Lessico di Gaio* (Napoli: Jovene, 1971) p. 64.


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origin in the Twelve Tables or because their speech *formulae* are as unchangeable as the words of a statute. He cannot decide in favour of one or the other meaning.[77]

Gaius' uncertainty about the origins of the *legis actio* as an action introduced by a Twelve Table Law (that is an "action-at-law"), or an action that has to be pronounced in the form of a solemn speech formula (*certa verba*) emphasizes a similarity between a *lex publica* and a *lex* in the sense of a solemn oral formula. A ritualized solemn spoken word (*lex*) has the legal effect of setting a norm, just like a *lex publica.*

The narrow interpretation of the word *lex* in literature exclusively as public law or statute, and the subsequent interpretation of the terms *legis actio* and *lege agere* as rituals introduced by the Twelve Tables contrasts with another text by Gaius which states that the *legis actio per pignoris capionem* (Gai 4.26) goes back to custom and existed before the Twelve Tables.[78] Moreover, other rituals such as the *legis actio per sacramentum*,[79] as well as the *legis actio per manus iniectionem,*[80] existed long before the Twelve Table Law. They receive a new legal basis by the Twelve Tables, as emphasised by the term *legis actio*.

The primary and oldest meaning of *lex* in the context of the *legis actiones* is therefore a solemn word, which affects first of all the understanding of the term *lege agere*.

### F. *Ago* and *aio*. The expression *MEUM ESSE AIO* and its application to a wide range of legal situations

According to Manthe's etymological reconstruction, Latin has two stems of *ag- with different meanings. The first is *ag- in the sense of "to do", and the second form is *ag- in the sense of "to speak". The second stem *ag- in the sense of "to speak" or

[77] "[...] *Actiones, quas in usu veteres habuerunt, legis actiones appellabantur vel ideo, quod legibus proditae erant, quippe tunc edicta praetoris, quibus conplures actiones introductae sunt, nondum in usu habebantur, vel ideo, quia ipsarum legum verbis accommodatae erant et ideo immutabiles proinde atque leges observabantur* [...]" ("The actions used by the old lawyers were described as actions in the law, either because they were set out statutes, since at that time the praetor's edicts, which introduced numerous actions, were not yet in use – or because they were precisely adjusted to the words of statutes, and were accordingly observed as immutably as if they had been statutes"). Translation based on Gordon and Robinson, *The Institutes of Gaius,* p. 407.

[78] See below III. E.

[79] See below III. B.

[80] See below III. C.


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"to declare" originates from the verbal proto-form "*aio*".[81] At some moment, the proto-form "*aio"* (I declare) transforms into *ago* (I declare/I act).

The sources use this proto-form of the verb *ago*, that is *aio* (I declare) in the sense of a highly personal assertive and performative utterance in legal rituals. When performing the *legis actio sacramento in personam*, the plaintiff uses the expression: *AIO TE MIHI DARE OPORTERE* (I declare that you have a duty).[82] In the case of the *legis actio per iudicis arbitrive postulationem*, the claimant uses the following speech *formula* (Gai. 4.17a): *EX SPONSIONE TE MIHI X MILIA SESTERTA DARE OPORTERE AIO; ID POSTULO, AIAS AN NEGAS.* (I declare that you have a duty to give me ten thousand under your solemn promise. I demand that you affirm or deny this).[83] The speech formula of the *legis actio per condictionem* contains the following words: *AIO TE MIHI SESTERTIA X MILIA DARE OPORTERE; ID POSTULO, AIAS AN NEGAS* (I declare that you have a duty to give me ten thousand. I demand that you affirm or deny this)[84].

The speech act *MEUM ESSE AIO* (*ago*) (I declare that this is mine) occurs particularly often in a wide range of legal rituals that also aimed at the formalization of the transfer of property (*mancipatio*), of transfer of individual rights (*in iure cessio*) as well as at judicial procedure (*legis actio per sacramentum*).

[81] Mante speaks about a flexion from agō to aio. For other scholars, who represent this theory, see S.v. agō in: Michiel de Vaan (ed.), *Etymological Dictionary of Latin and Other Italic Languages* (Brill, 2008). Cf. s.v. aio, in Michel Bréal and Anatole Bailly, *Dictionnaire Étymologique Latin* (Paris: Librairie Hachette et Cie, 1885) p. 7.

[82] See below III. B.

[83] Translation based on Gordon and Robinson, *The Institutes of Gaius,* p. 417. *Legis actio per iudicis arbitrive postulationem,* that is the action-at-law by application for a judge, was a procedure for claims arising from a verbal contract (*sponsio* and *stipulatio*). Its application field covered also the division of an inheritance among co-heirs, as well as the settlement of controversies between co-owners. In the course of procedure a judge or arbiter was appointed after the formal proclamation of a speech formula by the plaintiff and denial by the defendant.

[84] Translation based on Gordon and Robinson, *The Institutes of Gaius,* p. 417. As it shows the quoted speech act, the plaintiff gave notice to the defendant to confirm or deny his statement. In the course of procedure the plaintiff asked, whether the defendant confirms the duty of the defendant or not. In the case of denial, the plaintiff gave notice to the defendant to appear after 30 days before the magistrate in order to have a judge appointed. Cf. "It was introduced by a *lex Silia* for the recovery of definite sums of money and by lex Calpurnia for all "definite things" (*certa res*)". Cf. H.F. Jolowitz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd. edn. (Cambridge: Cambridge University Press, 1972) p. 193.


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It is notable that the rituals that use the words MEUM ESSE AIO[85] do not strictly differentiate between judicial prosecution and contract formation by means of ritual,[86] which challenges the modern differentiation in legal theory between 'judicial prosecution', based on conflict, and legal regulation, based on contract.

### G. First intermediate conclusions

To sum up: (1) the verb *agere* is older than the noun *actio*; (2) we can trace the word *agere* back to the 3th century BC but we assume that the legal concept of *agere* is more ancient. (3) Authors from the early Republic (*antiqui*) used *inter alia* the word *orare* before the word *agere* came into use. The verb *orare*, which expresses the idea of *agere*, i.e. that of a solemn speech act, dates back to the 5th century BC, i.e. to the time of the Twelve Tables. There, *agere* or *orare* occurs in the norm *Rem ubi pacunt, orato*. This norm decrees that the more socially dominant private actor could confirm a (settlement) agreement with the other party by performing a speech act (*orare*).In the texts of Varro and Flaccus, we can follow a panorama of meanings of *agere*. In a legal context *agere* means "to litigate" (*causam agere*, *iurgari*), to pronounce *certa verba* (*pronuntiare*, *orare*) as well as "to demonstrate with a speech formula the object of a ritual" (*verbis indicare*), what highlights the significance of *agere* as a ritualized speech act. (4) The morphological analysis of the terms *lege agere* and *legis actio* reveals that the original meaning the expression *lege agere* is "to perform a ritual by means of a pronunciation of a prescribed solemn word". (5) The utterance *MEUM ESSE AIO* contains probably a proto-form of the verb *agere*/*ago*, that is *aio*, and is used according to our sources in a wide range of rituals, aimed at the formalization of contracts as well as at the judicial prosecution.

## III. Genesis of *agere* – from a transformative speech act of law-finding to a legal claim

### A. *Agere* of private actors and of the republican magistrates

According to the prevailing interpretation by means of the *actio*, the plaintiff formalises his claim against the defendant. The judicial magistrate (*praetor*) has the legal power, the so-called *iurisdictio*, to declare the plaintiff's legal action worthy of being protected before the *iudex*, who pronounces judgment (*iudicatio*).[87] This

[85] Plaut., Rudens, 1024-1025: *GRIP. Nescio, neque ego istas vestras leges urbanas scio, nisi quia hunc meum esse dico. TRACH. Et ego item esse aio meum.* Cf. Cic. De off. 3.91*: Diogenes ait, Antipater negat.*

[86] Schmidlin, 'Zur Bedeutung der legis actio: Gesetzesklage oder Spruchklage? 'p. 376.

[87] In the literature, therefore, a concept of the clear demarcation between *ius dicere* and *iudicare* prevails. This demarcation can be traced from the middle of the 4th century BC. See Mario


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interpretation takes as its basis the Roman formulary procedure of the classical period, which implies a clear division of roles between the state and private individuals.[88]

These characteristics of the civil procedure of classical Roman law cannot be explicitly projected onto its earlier period of the *legis actiones*, because the boundaries between the legal authority of a private plaintiff and the legal authority of the *praetor* were at this time somewhat blurred.

On the basis of our sources we can assume that the relation between *agere* and *ius dicere* of the republican period of Roman law should be also evaluated differently than the relation between *actio* and *iurisdictio* in the formulary process of the classical period.[89]

A re-evaluation of the limits of private rital activity and of state control should place particular emphasis on two points. Firstly, the verb *agere* describes not only a ritualized activity of private persons but also of the representatives of the Roman state. Some sources describe the law-making activity of the *praetor* with the term *agere* instead of *ius dicere*. An example is the ritual *agere cum populo*.[90] It designates a ritualized approval of

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Talamanca, *Lineamenti di storia del diritto romano*, 2nd edn. (Milano: Giuffré, 1989) p. 133. Orestano rightly opposes this distinction between *ius dicere* and *ius dicare*, seeing no difference between these legal acts. Cf. Riccardo Orestano, 'La parola creatrice', in Umberto Scarpelli and Paolo De Lucia (eds.), *Il linguaggio del diritto* (Milano: LED, 1994), p. 199-200. In contrast, d'Ors, who assigns a demonstrative function to the *ius dicare* and understands this expression as "showing justice". Cf. Alvaro D'Ors, 'Las declaraciones Juridicas en derecho romano' (1964) 34 Anuario de historia del derecho español 565–573, p. 568.

[88] Roman jurists of the classic period define *iurisdictio* as a "*iudicis dandi licentia*" (Ulp. 2 de off. quaest. D. 2.1.3).

[89] The wide meaning of *ius dicere* is evident, among other things, from the famous passage of Paulus (Paul. 14 Sab. D. 1.1.11): *... ubicumque praetor salva maiestate imperii sui salvoque more maiorum ius dicere constituit, is locus recte ius appellatur* (... wherever the *praetor* has determined to *ius dicere*, having due regard to the majesty of his own *imperium* and to the customs of our ancestors, that place is correctly called *ius*). The translation follows Alan Watson (transl. and ed.), *The Digest of Justinian. English-language Translation*, vol. I (Philadelphia: University of Pennsylvania Press, 1985) p. 3.

[90] Fest. s.v. *cum populo agere* (Lindsay, 44.7): *cum populo agere hoc est populum ad concilium aut comitia vocare* (to act with the people [exercising legislative and judicial power] means to call the people to the popular assembly (*concilium*) or to elective assemblies [*comitia*]). See also Cic. De leg. 2.31: *Quid religiosius quam cum populo, cum plebe agendi ius aut dare aut non dare*? (What right is more sacred than that of giving or refusing permission to hold an assembly of the people or of the plebeians, or that of abrogating laws illegally passed?). The translation is based on Clinton Walker Keyes (transl.), *De Re Publica / De Legibus* (Cambridge, MA: Harvard University Press, 1928) p. 469. See also Cic. De leg. 3.4.10: *Cum populo patribusque agendi ius esto consuli, praetori, magistro populi equitumque eique quem patres produnt consulum rogandorum ergo; tribunisque, quos sibi plebes creassit, ius esto cum patribus agendi* (Consuls, praetors, masters of the people, masters of the horse, and those officials whom the Senate shall appoint to conduct the election of consuls shall have the right


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*senatusconsulta*, *plebiscita*, *leges rogatae* and other resolutions by the request of the citizens (*rogatio*) and by the vote of the citizen community.[91]

Secondly, some assertive speech acts designated by the term *agere* contain a potential to create, to set a legal norm, and to declare what is law (*ius dicere*) without the intervention of a *praetor* and/or judge. It is therefore impossible to reduce the concept of *agere* to the legal claim.

The civil procedure of republican and also of archaic Roman law is based to some extent on the idea of self-help; private actors and families (*gentes*) played a socially important role in the law-making and norm-setting process in this time. The intervention of the judicial magistrate was therefore not always necessary.[92]

With the institutionalisation of civil procedure – even if studies of Roman law still have not offered a clear chronological reconstruction of this process –*agere* diminishes into a claim in front of a *praetor* and a *iudex*, who can decide whether this *agere* is lawful or not. Moreover, the activity of the *praetor* is now described as *ius dicere* rather than *agere*.

The stages of this transformation, even if we cannot date them with any certainty, could be shown by an analysis of the oldest forms of *lege agere*. These oldest forms are *per sacramentum, per manus iniectionem* as well as *per pignoris capionem*.

### *B. Vim dicere* and *agere*: some remarks on the *legis actio per sacramentum in rem*

As mentioned above, the verb *agere* forms part of the expression *lege agere*. One of the oldest types of *lege agere* is the so-called *lege agere per sacramentum*.[93] Gaius

to preside over meetings of the people and the Senate [*Cum populo patribusque agendi ius esto*]). The translation is based on Keyes (transl.), *De Re Publica,* p. 469.

[91] Related to the classical period of Roman law we can find texts, where the *agere* is used for a procedural activity of proconsul. See Ulp. 10 de off. procons. D. 1.16.10.pr.: *Meminisse oportebit usque ad adventum successoris omnia debere pro consulem agere...ergo in adventum successoris debebit ius dicere*; See also Iul. 5 dig. D. 1.21.3: *Et si praetor sit is, qui alienam iurisdictionem exsequitur, non tamen pro suo imperio agit, sed pro eo cuius mandatu ius dicit, quotiens partibus eius fungitur.*

[92] The further literature on the concept of *actiones* without an intervention of the Roman state see in Carlo Pelloso, '"Giudicare" e "decidere" in Roma arcaica. Contributo alla contestualizzazione storico-giuridica di Tab. 1.8', in Luigi Garofalo (ed.), *Il giudice privato nel processo civile romano*, vol. I (Padova: Cedam, 2012) 59-128, pp. 66s.

[93] This procedure was transmitted also in other literary sources. Particularly relevant are the following excerpts from Cicero: Pro Mur. 11. 25 (he describes the ritual *manum conserere*); Pro Caec. 33. 97; Pro Mil. 27.74; De domo 29.78; De or. 1.10.42; Gell. Noct. Att. 20.10; Liv. Ab urb. cond. 3.44; Val. Prob. 4.4, 4.6, 4.7; Varro, De ling. lat. 5. 36. 180. Gaius provides us with the more detailed description of this ritual.


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defines its range of application in his *Institutiones* as *generalis* [94] (Gai 4.13): *Sacramenti actio generalis est. De quibus enim rebus ut aliter ageretur, lege cautum non erat, de his sacramento agebatur* [...] (The action by oath was of a general nature. It was the mode of action employed in those matters for which a statute did not otherwise provide[...]). The *sacramentum*, i.e. oath, gave this form of action its peculiar character. Gaius differentiates between two kinds of this procedure *per sacramentum – in rem* and *in personam*. Since the part of his manuscript that contains information about the *legis actio per sacramentum in personam* [95] is missing, [96] the *agere per sacramentum in rem*, which provides us with an overview of the genesis of *agere*, will be examined in more detail.

We can distinguish the following stages of this complex ritual, i.e. *agere per sacramentum*: (1) the introduction, (2) the *vindicatio*, (3) the intervention of the *praetor*, (4) the foundation of the claim, performed by both parties; (4) the summons to take the oath (*provocatio sacramenti*) and the oaths, and finally (5) the proceedings before the judge.

The procedure *agere per sacramentum in rem* in its late period can be divided in two main phases – a preliminary hearing (phase: *in iure*) and a full trial before a judge (phase: *apud iudicem*). The stages 1-4 belong to the preliminary hearings and took

[94] The adjective *generalis* means that this *actio* is applied when no particular procedure by the specific *lex publica* was provided. In this context, *legis actio sacramento* can also cover the application field of the other *legis actiones* - such as *legis actio per iudicis arbitrive postulationem* and *per condictionem*. In the overlapping area of application, the choice between the *legis actiones* was open (Gai 4.20). Moreover, this designation as *generalis* can be a sign, that this procedure was used not only for the procedural enforcement of claims, but also for the formalization of the legal transactions. The designation of *legis actio* as *generalis* means that its speech formula was formulated in the most abstract way. Cf. Santoro, 'Potere ed azione nell'antico diritto romano', p. 117.

[95] According to Walter Selb, 'Vom geschichtlichen Wandel der Aufgabe des *iudex* in der *legis actio*', in Dieter Nörr and Dieter Simon (eds.), *Gedächtnisschrift für Wolfgang Kunkel* (Frankfurt am Main: Vittorio Klostermann, 1984) 391-448, p. 395, 400. Valerius Probus transmits the speech *formula* for the performance of this *legis actio* as follows: *AIO TE MIHI DARE OPORTERE* (Prob Notae 4.1: A.T. M. D.O.). The procedure *legis actio per sacramentum in personam* was used for *in iure cessio*, but also for the establishment of the *consortium*. See Gai. 3.154. The overview of dogmatic positions related to Gai. 3.154 see in Franz-Stefan Meissel, *Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrages* (Frankfurt am Main et al.: Peter Lang, 2004) pp. 94-97.

[96] See the literature in Philipp Scheibelreiter, *Der ungetreue Verwahrer. Eine Studie zur Haftungsbegründung im griechischen und frühen römischen Depositenrecht* (München: Verlag C. H. Beck, 2020) pp. 150–154.


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place before a magistrate; the stage 5, i.e. a full trial before a judge, was remarkably informal in comparisonto the formal preliminary hearings.[97]

For a better understanding of *agere* and *actio* we focus on the phase *in iure*. We (following Watson[98]) will structure the *legis actio per sacramentum* transmitted in Gai 4.16 as follows:[99]

| Introduction | |
|---|---|
| *Si in rem agebatur, mobilia quidem et moventia, quae modo in ius adferri adducive possent, in iure vindicabantur ad hunc modum:* | If it was an action *in rem*, they vindicated before the court moveable and living property, which could be carried or led into the court, in this way. |
| (1) *Vindicatio* | |
| *qui vindicabat, festucam tenebat; deinde ipsam rem adprehendebat, velut hominem, et ita dicebat*: | The claimant would hold a rod; then he would take hold of the actual property, for instance a slave, and say: |
| *Vindicans* | |
| *HUNC EGO HOMINEM EX IURE QUIRITIVM MEUM ESSE AIO SECUNDUM SUAM CAUSAM; SICUT DIXI, ECCE TIBI, VINDICTAM INPOSUI, et simul homini festucam inponebat.* | 'I declare that this slave is mine by quiritary right in accordance with my case. As I have spoken, see, I have imposed the claim', and at same time he laid the rod on the slave. |
| *Adversarius/Contravindicans* | |

[97] Cf. Paul du Plessis and Andrew Borkowski, *Textbook on Roman Law*, 5th edn. (Oxford: Oxford University Press, 2015) p. 67.

[98] See Alan Watson, 'Towards a New Hypothesis of the Legis Actio Sacramento in Rem', in Alan Watson (ed.), *Studies in Roman Private Law* (London: The Hambledon Press, 1967) 147-157, pp. 147s.

[99] The translation is based on William M. Gordon and Olivia F. Robinson, *The Institutes of Gaius* (London: Duckworth, 1988, rest. 2001) pp. 411-413.


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| | |
|---|---|
| *Adversarius eadem similiter dicebat et faciebat.* | His opponent likewise said and did the same. |
| (2) Intervention of *praetor*: | |
| Cum uterque vindicasset, praetor dicebat: MIT*TI*TE AMBO HOMINEM, illi mittebant. | When each of them had made his claim, the praetor would say: 'Both of you, let go of the slave.' They then let go of him. |
| (3) The claims foundation: | |
| *Vindicans* | |
| *Qui prior vindica*verat, ita alterum interroga*bat: POSTULO, ANNE DICAS, QUA EX CAUSA VINDICAVERIS?* | The first claimant would then put a question to the other in these words: 'I DEMAND THAT YOU TELL ME THE GROUNDS OF YOUR CLAIM.' |
| *Adversarius* | |
| *ille respondebat: IUS FECI, SICUT VINDICTAM INPOSUI.* | The other replied: 'I HAVE EXERCISED MY RIGHT IN IMPOSING THE *VINDICTA*.' |
| (4) *Provocatio sacramenti*: | |
| *Vindicans* | |
| *Deinde qui prior vindicauerat, dicebat: QUANDO TU INIURIA VINDICAVISTI, QUINGENTIS ASSIBUS SACRAMENTO TE PROVOCO* | The first claimant would then say: 'Inasmuch as you have claimed wrongfully, I challenge you on oath for five hundred "asses".' |
| *Adversarius* | |
| *adversarius quoque dicebat similiter: ET EGO TE* | His opponent then said likewise: 'And I you'. |
| (5) Proceedings before a judge | |


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| | |
|---|---|
| *Deinde eadem sequebantur, quae cum in personam ageretur.* | The following stages were the same as for an action *in personam*. |

Gaius explains procedure by means of *lege agere per sacramentum* that at the time of writing the *Institutiones* had not been practised for almost two centuries. His representation of the old *legis actiones* is therefore fragmentary and eclectic, based on different sources from different epochs. In Gaius' text we can, for instance, demarcate the old stages of this ritual that date back to the period before the establishment of the *praetor urbanus*, and the more recent stages.

In the literature there is no consensus regarding the question which stages of this ritual are the oldest and go back to the so called predecemviral period, that is to the period before the Twelve Tables, and which stages of the ritual were added in a more recent period. With certainty it can be said that the *vindicatio* (1), the ritualized claims foundation (3), as well as the *provocatio sacramenti* (4) are the oldest procedural parts, while the intervention of (2) the *praetor* as well as (5) the proceedings before the judge could reflect later procedural developments. The main argument for this is the fact that the magistrate by the name of *praetor urbanus* is established after 367 BC.[100] It is questionable whether an institutional intervention before the establishment of the *praetor urbanus* was prescribed.

1. Different meanings and contexts of *agere* and *actio*

The first question, which precedes the analysis of the ritual *per sacramentum*, concerns the significance of the terms *agere* and *actio* in the fragments quoted here. Before describing the procedure, Gaius gives an overview of the *actio per sacramentum* (text Gai. 4.13, see above). He refers to a substantivised form, the *actio sacramenti*, when he emphasizes that the ritual *per sacramentum* is an institutionalized legal figure with its own area of application. When Gaius refers to its application by analogy, he uses the more abstract verbal term *agere*: *De quibus enim rebus ut aliter ageretur, lege cautum non erat, de his sacramento agebatur* [...] (It was a mode of action employed in those matters for which a statute did not otherwise provide). In another text related to the procedure *agere per sacramentum* (Gai 4.16, also quoted above) Gaius uses the verb *agere* to refer, on the one hand, to the whole procedure, as in the expression "*si in rem agebatur*" (see introduction). This procedure *agere in rem* comprises the bringing of a *res* or *homo* to the place of *ius*

[100] Giovanni Nicosia, *Il processo privato romano.* vol. III.1: *Nascita ed evoluzione della iurisdictio* (Catania: Libreria Editrice Torre sas, 2012) pp. 51-52; Giovanni Nicosia, *Nuovi profili istituzionali di diritto privato romano*, 6th edn. (Catania: Libreria Editrice Torre sas, 2013) pp. 130ss.


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*dicere*, that is the place of judgment, physical contact as well as the proclamation of a speech act. On the other hand, Gaius uses *agere* to denominate a specific speech act of the plaintiff, when he says *qui agebat...sic dicebat*. This narrow sense of *agere* is the subject of our further analysis.[101]

## 2. *Vindicatio* and *contravindicatio*

The first stage of the ritual *lege agere per sacramentum* is the so-called *vindicatio*. The plaintiff performs the *vindicatio* first.[102] After this the defendant, or *adversarius*, performs a *contravindicatio*. While doing so, both parties – *vindicans* and *adversarius* – are placed on equal terms because they perform identical acts (*vindicationes*).

Gaius describes the first act of the *vindicatio* in detail. Before the plaintiff began a *vindicatio* he took a *festuca* (a rod) and laid his other hand (*aprehendere*) on the slave.[103] After that, he declared (*ita dicit*[104]): *HUNC EGO HOMINEM EX IURE QUIRITIVM MEUM ESSE AIO SECUNDUM SUAM CAUSAM; SICUT DIXI, ECCE TIBI, VINDICTAM INPOSUI* (I declare that this slave is mine by quiritary right in accordance with my case. As I have spoken, see, I have imposed the *vindicta* and at same time laid the rod on the slave).

The *vindicatio* consists of the simultaneous performance of a speech act (*aio=ago*) and a physical act, carried out by placing the rod (that Gaius calls first *festuca*, then

[101] Wolf, however, supposes that the act of *vindicare* means only a laying on of the *festuca* and of the hand on the slave, but this interpretation contradicts the text, from which it follows that the *vindicare* includes both the making of the gestures mentioned and the declaration of the speech formula. See Joseph Georg Wolf, *Recht im frühen Rom. Gesammelte Aufsätze* (Berlin: Duncker & Humboldt, 2015) pp. 73-74.

[102] The verb *vindicare* arises from an expression *vim dicere*, that is 'to declare a power.' Cf. Cic. Verr. 2.2.148. Concerning *vim dicere, dicare* (to declare force) see Johannes Platschek, 'Ex iure manum conserere. Zur Symbolischen Gewalt im frühen Römischen Eigentumsprozess' (2006) 74 Tijdschrift voor rechtsgeschiedenis 245-260, p. 257, note 53. Regarding the etymology of the *vindicatio* and the *vim dicere* see Michal Staszkòw, 'III. „Vim dicere" im altrömischen Prozeß' (1963) 80 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 83-108, p. 88.

[103] According to Santoro, 'Potere ed azione', pp. 265 s., the *vindicans* put simultaneously one hand and the *festuca* on the slave. In accordance with the reconstruction of Gerhard von Beseler, 'Miszellen' (1929) 49 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 404-460, p. 425, note 2, the *vindicans* has a *festuca* in the right hand, and touches the slave with the left one.

[104] The word *dicere* is used in the legal meaning. According to Amelia Castresana, *Actos de Palabra y Derecho* (Salamanca: Ratio Legis, 2007) pp. 32s, *dicere* represents a speech act, an act of literal objectification. As shown above, the peculiarity of *agere* is that the *agere* combines the elements of speaking, driving or acting and sacrificing, whereas *dicere* only refers to the speech act. Gioffredi also emphasises that *dicere* does not only mean to pronounce, but also to establish. S. Carlo Gioffredi, *Diritto e processo nelle forme giuridiche romane. Studia et documenta* (Roma: Apollinaris, 1955) p. 64.


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*vindicta*[105]) on the slave. The meaning of both acts is the subject of numerous discussions among scholars.

The first question concerns the legal effect of the *vindicatio* and *contravindicatio* for the property rights of the *vindicans* and *contravindicans.* Since Bethmann-Hollweg, there prevails in the literature the idea of a relative property right in archaic and republican Roman law.[106] According to this theory, the owner has no absolute property right but merely a better right to possession. This better right to possession could be determined by litigation in the form of *lege agere per sacramentum.*[107] The exponents of this theory try to interpret the utterance *EGO...MEUM ESSE AIO* (literally: I declare... this is mine) as a main part of *vindicatio* and *contravindicatio* accordingly, translating it as "I own the thing more than you do", or "I declare that the thing, with respect to you, is mine". These interpretations have in common that they ascribe meanings to Gaius' text that it literally does not have. Indeed, the expression "EGO... MEUM ESSE AIO" represents a direct assertive statement.

The theory of a relative property right furthermore does not consider that the abstractly formulated solemn statement MEUM ESSE AIO was used not only in litigation in the form of *lege agere per sacramentum* but also when transferring a property right by means of *mancipatio* or *in iure cessio*. These acts do not presuppose conflict and comparison whose declared right to possession in the form of the solemn act of speaking MEUM ESSE AIO is better or more legitimate.

The second question regards the meaning of *festuca*, or *vindicta*. According to one group of theories, the placing of the *vindicta* symbolizes a struggle, a conflict. The rod stands symbolically for a sword. According to another, more convincing, interpretation, the placing of the *festuca* symbolizes legal domination, which also depicts a demonstrative significance. With the placing of the *festuca*, the subject

[105] It is notable that in the introduction Gaius refers to the rod employed as *festuca*, while by a presentation of a speech formula he uses the word *vindicta*. Highly probable that Gaius uses words *festuca* and *vindicta* as synonyms. In this way Wolff, 'Recht im frühen Rom. Gesammelte Aufsätze', pp. 74-75 with the literature.

[106] Moritz August von Bethmann-Hollweg, *Der römische Zivilprozess*, vol. I (Bonn: A. Marcus, 1864) p. 132. Alongside the theory that ownership in archaic and republican Roman law was a "relative right" there exists the theory of *legis actio sacramento* as a distinct absolute right. Cf. the discussion in the book chapter 'The legis actio sacramento in rem' (pp. 125-133), in Alan Watson (ed.), *Rome of the XII Tables. Persons and Property* (New Jersey: Princeton University Press, 1976), pp. 125s.

[107] Also Jhering sees in the *legis actio per sacramentum* a legal mean of acknowledgment or protection of a better right on possession. The party who has a better right can win a process. The ownership would therefore not constitute an absolute right but a better right on possession. See the further arguments in Gyŏrgy Diodsi, *Ownership in Ancient and Preclassical Roman Law* (Budapest: Akadémiai Kiadó, 1970) p. 95.

matter of an action, that is a *homo* or slave according to the procedure described by Gaius, can be shown and concretized.[108] For our research it is relevant that according to each interpretation, the placing of the *vindicta* contributes a physical dimension to the speech act *MEUM ESSE AIO*. The *vindicans* declares that the slave is his, identifies and shows him by imposing the *vindicta*. This physical contact with a ritual object is preserved in the *mancipatio* and can be observed in other rituals like the *agere per manus iniectionem* as well as the *per pignoris capionem*.[109]

The third question regarding the *vindicatio* that is relevant for our research concerns the legal nature of this act. The *vindicatio* exhibits many important characteristics of ritualised law-making in republican Roman law, such as publicity, abstract content of a speech act, strongly personalised and formalised character of a ritual etc.

The *vindicans* must bring the object (*homo* or *res*) of the *vindicatio* to an institutionalised place, that is *in ius*[110], as can be gleaned from the expression: [...] *in ius adferri adducive possent* (which could be carried or led into the court). The public performance of this ritual as well as its observation by the *civitas* and probably by a *praetor* provides its normative, i.e. norm-setting, character. The struggle of two actors (*vindicans* and *contravindicans*) goes beyond an interpersonal conflict. The unilateral speech act of *vindicatio* is perceived by the observing *civitas* as a specific legal norm, exercised in the form of an orally accomplished solemn ritual.

As mentioned above, the *vindicatio* is a highly personal act. Herein a fundamental difference to the *formulae* of the formulary procedure can be found, where the claim of the plaintiff as well as the *exceptio* of the defendant are transmitted in a depersonalised, objective way.[111] The utterance *MEUM ESSE AIO* as a part of the

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[108] In case of a *contravindicatio*, i.e. when an *adversarius* places his *festuca* on the slave as a *vindicans* did before, the procedure transforms into a ritualised conflict, by which both *actors* (*vindicans* and *contravindicans*) challenge the property right of their opponent. Only in case of a ritualised struggle as a result of *contravindicatio festuca* or *vindicta* symbolises a weapon. Cf. Platschek, 'Ex iure manum conserere. Zur Symbolischen Gewalt im frühen Römischen Eigentumsprozess', p. 257, note 53.

[109] See also the role of a laying on of a hand in the ritual "*manum conserere*", which was mentioned by Gellius (Gell. Noct. Att. 20.10) as well as by Cicero (Cic. Pro Murena, 11, 25).

[110] Gaius uses here the word *ius* in the sense of a place for judicial procedure. See also Paul. 14 Sab. D. 1.1.11. Cf. Roland Färber, *Römische Gerichtsorte. Räumliche Dynamiken von Jurisdiktion im Imperium Romanum* (München: C.H. Beck, 2014) p. 3.

[111] Compare an objectively formulated *rei vindicatio* of the formulary process, which was reconstructed by Mantovani in the following way: *C. Aquilius iudex esto. Si paret fundum quo de agitur ex iure Quiritium A. Agerii* [...] (Let C. Aquilius be the judge. If it appears that this farm, which is the subject of the action, belongs to Aulus Augerius by quiritary right [...]). See Dario Mantovani, *Le formule del processo privato romano. Pe la didattica delle Istituzioni di diritto romano* (Como: Edizione New Press, 1992) p. 33.


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*vindicatio* is strongly formalised. Gaius explains elsewhere that even a minor deviation from the prescribed oral ritual caould lead to the loss of the lawsuit.[112] The strict formalism of the *vindicatio* is closely linked to its norm-setting effect. Only a correctly performed ritualised speech act has the potential to create a legal norm.

It is also notable that the utterance *HUNC EGO HOMINEM EX IURE QUIRITTVM MEUM ESSE AIO SECUNDUM SUAM CAUSAM* (I declare that this slave is mine by quiritary right in accordance with my case) as a main part of the *vindicatio* possesses an abstract character. The possible factual basis for the *vindicans*' ownership is not covered by the solemn act of speaking. It is referred to only in the expression *SECUNDAM SUAM CAUSAM* ("in accordance with my case"). This abstract character of the speech act allows the use of this ritual for different types of vindication not only of a slave but also of other assets.

The fifth and the central question for our research is whether the *vindicatio* is only an assertion of a property right (*MEUM ESSE AIO*) or can be a statement of the property right exercised by *vindicans*.

The publicly performed, strongly formalized unilateral personal speech act *HUNC EGO HOMINEM EX IURE QUIRITTIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM* accompanied by the placing of a rod (*festuca*) can in my opinion create or reaffirm the property right of the *vindicans*.[113] The *vindicans* is entitled on the basis of the quiritary right (*EX IURE QUIRITTIUM.*)[114] The essential requirement for this unilateral creation of a property right is the concurrence of the opponent (*contravindicans*). If the *contravindicans* does not object to the act of *vindicatio*, the entire procedure terminates. In this scenario, the unilateral *vindicatio* leads to the acknowledgment of the property right of the *vindicans*. Based on this procedure we can postulate an inseparable connection between the individual property right and its formalisation through the act of *agere* in the narrow sense, that is MEUM ESSE AIO.

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[112] Gai 4.30: *ed istae omnes legis actiones paulatim in odium uenerunt. namque ex nimia subtilitate ueterum, qui tunc iura condiderunt, eo res perducta est, ut uel qui minimum errasset, litem perderet.*

[113] The distinction between acknowledgement and creation of the property right by the virtue of a ritual could not be drawn so clearly. Also if the *vindicans* is *de facto* the owner, through the fulfilment of the *vindicatio* the individual property right will be quasi re-acknowledged and also re-created on the basis of the fulfilled ritual, i.e. *vindicatio*.

[114] Santoro, 'Potere ed azione nell'antico diritto romano', 221 interprets the reference to *ius Quiritum* as a reference to "forza rituale" (ritual force). Jónos Zlinszky, 'Gedanken zur *legis actio sacramento in rem'* (1989) 106 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 106-151, pp. 115, 117 identifies in the expression *ex iure Quiritum* a reference to the legal position assured by the community of *quirites*.


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However, the opponent (*contravindicans*) can object to the act of *vindicatio* by performing a *contravindicatio.* Gaius describes this as follows: *adversarius eadem similiter dicebat et faciebat* (His opponent likewise said and did the same). Thus, if the opponent (*contravindicans*) opposes the act of *vindicatio*, he performs *contravindicatio* by touching the object under dispute as the *vindicans* has done before him (*adprehensio rei*) and by uttering the same solemn speech act: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO (I declare that this slave is mine by quiritary right).

Just like the *contravindicans*, the *vindicans* too could terminate this ritualised conflict by acknowledging the act of *contravindicatio*. This act of acknowledgement of the *contravindicatio* could be the breaking off of physical contact with the slave. In this case, the solemn speech act of the *contravindicans*, that is MEUM ESSE AIO, serves as the ritualized basis for the formalisation and acknowledgement of his ownership. This symmetry and similarity of the *vindicatio* and *contravindicatio* reveals that each unilateral performative speech act contains *per se* the potential to create or to "reconfirm" a legal status and to challenge the property assertion of an opponent.[115]

3. The intervention of the *praetor*

If both – *vindicans* and *contravindicans* – continue to insist and are not willing to give up their claims, the *praetor* intervenes. He says: MITTITE AMBO HOMINEM/ "Both of you let go of him". The parties obey and let go the slave which was an object of the litigation.

The intervention of the *praetor* reflects the increasing role of the Roman state in conflict resolution, which was intended to prevent the escalation of the struggle between *vindicans* and *contravindicans* and to guarantee social peace.[116] Scholars discuss whether the intervention of the *praetor* or earlier of the *rex* was already established in the original constellation of the ritual. According to the theories based on Jhering's concept of self-help, the intervention of the *praetor* was not an original part of the ritual. The socially more dominant actor could assert and enforce his right

[115] Huschke, 'Kritische Bemerkungen zu Gaius', p. 176. Cf. Max Kaser, *Das altrömische ius. Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer* (Göttingen: Vandenhoeck & Ruprecht, 1949) pp. 326ss. Later expresses Kaser this idea more cautiously: Max Kaser, 'Über relatives Eigentum im Altrömischen Recht' (1985) 102 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 1-39. Objecting however Wolf, 'Recht im frühen Rom. Gesammelte Aufsätze', p. 74. He assumes that the pronunciation of the speech *formula* is assertion of property and nothing but that.

[116] The prohibition to use force is particularly evident in the interdicts *uti possidetis* and *utrubi*. These praetorian interdicts represent later remedies for fighting unauthorized self-help and also have a preparatory function – preparing the dispute over ownership. Cf. Max Kaser, Rolf Knütel and Sebastian Lohsse, *Römisches Privatrecht*, 21st edn. (2017) 131, notes10-11.

– of course respecting the ritual but without the intervention of a third party. Thus the legitimacy of the *vindicatio*, as well as that of the *contravindicatio*, could be ensured by the control of the *civitas* and performance of the ritual in a specified place (*in iure*) as well as by compliance with ritual rules.[117] The intervention of the *rex*, and later of the *praetor*, reveals the transition of the ritual from popular justice to state judicial procedure as well as a consequence of increased state control of private legal acts.[118]

According to the prevailing interpretation the intervention of the *praetor* (and before him *rex*) was an immanent part of the original ritual and not the later stage of the procedure; the *agere* represents *ab initio* an institutionally controlled legal action. The intervention of the *praetor* (and before it of *rex*) in the form of the exhortation *MITTITE AMBO HOMINEM* (Both of you, let go of the slave) therefore symbolises a necessary solemn speech act, intended to prevent the violence.

4. Foundation of the claim

During the following stage, the *vindicans* and *contravindicans* ask each other to provide legal grounds for their property right. The *vindicans* asks: *POSTULO ANNE DICAS, QUA EX CAUSA VINDICAVERIS* (I demand that you tell me the grounds of your claim). The *contravindicans* can still withdraw and terminate the procedure at this stage. If he does so, the initial legal assertion MEUM ESSE AIO of the *vindicans* unfolds its creative potential and effects the acknowledgment of his individual property right. However, if the *contravindicans* insists on his right, he responds to the question of the *vindicans* and justifies his right as follows: *ille respondebat*: *IUS FECI, SICUT VINDICTAM INPOSUI* (I have exercised my right by imposing the *vindicta*). The *vindicans* can also withdraw after these words of

[117] Giovanni Nicosia, *Il processo privato romano*, vol. I: *Le orgini* (Torino: G. Giappichelli, 1980, repr. 1986) pp. 146s. Nicosia's main argument is based on the fact that the praetorship was introduced only in the year 367 BC. Before it there existed according to Nicosia no State intervention at all in the private ritualised procedures. This idea was correctly criticised by Carlo Pelloso, '"Giudicare" e "decider" in Roma arcaica', pp. 66s.

[118] Disputable is the period, when this ritual was changed through the intervention of the praetor. According to Franchini, the intervention of the *praetor* could already take place at the end of the 3rd century BC. See Lorenzo Franchini, 'Alle origini di negozio e processo: l'autotutela rituale', in Luigi Garofalo (ed.), *Il giudice privato nel processo civile romano. Omaggio ad Alberto Burdese I* (Padova: CEDAM, 2012) 163–272, p. 84, note 32; Cf. Lorenzo Franchini, *La desuetudine delle XII tavole nell'età arcaica* (Milano: Vita e pensieri, 2005) p. 83, note 31. According to Pugliese and Santoro the ritual was modified only in the last century of the Republic. See Giovanni Pugliese, *Il processo civile romano. Le legis actiones 1961–1962* (Roma: Ricerche, 1963) p. 43; Raimondo Santoro, 'Manu(m) conserere' (1971/1972) 32 Annali del seminario giuridico 513-589, p. 535. See also Pelloso, '"Giudicare" e "decidere" in Roma arcaica', pp. 59s., 101s.


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the *contravindicans* and end the entire procedure. In this case, the original assertion MEUM ESSE AIO of the *contravindicans* leads to the acknowledgment of the property right of the *contravindicans*.

If one of the parties omits a speech formula that is a necessary part of the ritual, the previously declared MEUM ESSE AIO of the *vindicans* or *contravindicans* (if the *vindicans* omits the procedure) is considered the basis for the property right. Thus, the unilateral speech act MEUM ESSE AIO as a core part of the *vindicatio* of the *vindicans* or *contravindicans* in this case unilaterally generates the property right.

We can therefore see that the *MEUM ESSE AIO* of the *vindicatio* retains its significance in the course of the whole preliminary stage, also after the intervention of the *praetor* and also at the stage at which parties had to justify their property rights.

## 5. *Provocatio sacramento*, sacral dimension of the ritual and transformation of the object of the proceedings

The logic of the proceedings changes at the next stage, the so-called *provocatio sacramento* (appeal to the gods by means of the oath). At this stage the *vindicans* declares that he does not acknowledge the right of the *adversarius*: "*Deinde qui prior vindicauerat, dicebat: QUANDO TU INIURIA VINDICAVISTI, QUINGENTIS ASSIBUS SACRAMENTO TE PROVOCO* (The first claimant would then say: Inasmuch as you have claimed wrongfully, I challenge you on oath for five hundred asses). The *contravindicans* responds: *ET EGO TE* (and I you).

According to Institutiones of Gaius, in which a developed legislative action procedure was handed down, the *provocatio sacramento* and the praetor's decision on who is entitled to temporary possession of the disputed object (*homo*) are the stages of the trial that conclude the phase of the proceedings *in iure*. This phase is followed by the ordinary proceedings before the *iudex*, in which it is decided first of all whose *sacramentum* is *iustum*, and whose *sacramentum* is *iniustum* (a phase *apud iudicem*).[119] After the *provocatio* the object of the trial changes: not the statement

[119] There are two views in the current doctrine regarding the original meaning of *sacramentum* in the *lege agere per sacramentum*. According to the one interpretation, the *sacramentum* always had the meaning of *poena sacramenti*. According to the other interpretation, the concept of *sacramentum* as *poena sacramenti* is modelled in the original meaning to be an oath (*iusiurandum*) in judicial proceedings. The overview of the sources and arguments see in Fiori, 'Il processo privato' 93, note 372, who ascribes to the *sacramentum* originally the meaning of *poena sacramenti*, that is of the penal sum, which is deposited in the *aerarium* until the end of the procedure. The defeated party lost its amount of the *sacramentum* (Gai. 4.13). For the meaning of the *sacramenum* as the oath see for example Ferdinando Zuccotti, *Il giuramento nel mondo giuridico e religioso antico. Elementi per uno studio comparatistico* (Milano: Giuffrè, 2000) p. 3.


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"*MEUM ESSE AIO*" is now the subject of the trial but rather the question whose oath is legally correct.

However, it cannot be excluded that in the early republican period, in which there division of the procedure in the stages - *in iure* and *apud iudicem* – was still not practicesed, the *provocatio sacramenti* was the final and conclusive stage of the whole ritual *lege agere per sacramentum in rem*. In this early phase the *provocatio sacramento* shifted the dispute also into the realm of the *ius divinum* and diverts the "interpersonal" situation onto the religious track. The whole ritual is now subject to two orders - the legal order (*ius*) and the religious order (*fas*).[120] It can not be excluded, that before the roman magistrature of pretorship was established, the roman pontiffs could interpret, whose oath (*sacramentum*) is lawful (*iustum*), and whose was not lawful (*iniustum*).[121]

## C. The expression *MEUM ESSE AIO* in the rituals of the *mancipatio* and *in iure cessio*

A special feature of the early ritualised legal order is the fusion between the private and the public, between the general legal order and the legal orders of small groups, between law-making for private persons and norm-making for the whole *civitas*. The public performance of most rituals (denoted by *agere* and *actio*) makes them legally binding also for third parties, giving them a norm-setting function so that they are regarded as objective law.

A second special feature of *agere*, in the republican and probably archaic periods of Roman law, is the already revealed proximity between the judicial enforcement of rights and the formalisation of a contract regulation by means of the same ritual, of which a core element was the unilateral speech act.

As mentioned above, the unilateral speech act MEUM ESSE AIO, in which the verb *aio* is used interchangeably with *ago*, forms the core of the contractual rituals *mancipatio* and in *iure cessio*.[122]

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[120] Regarding the meanings of *ius* and *fas* see Alfredo Mordechai Rabello, 'Alcune note sul fas ed i precetti noachidi' (2014) 20(2) Fundamina (Pretoria) 756-764, pp. 757-760.

[121] See the so-called theory of the pontiff's *iurisdictio* in Francesco De Martino, *La giurisdizione nel diritto romano* (Padova: Cedam, 1937) pp. 5-8; Jan Hendrik Valgaeren, The Jurisdiction of the Pontiff in the Roman Republic: a Third Dimension (Nijmegen: Wolf Legal Publishers, 2012).

[122] Cf. Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung,* vol. I.1 (Leipzig: Breitkopf und Härtel, 1852) 153: "Since violence appears in the mancipatio [...] as the original source of property, so in the vindicatio [the violence appears] as the original means of protecting it." (my translation). On the comprehensive role of the *vindicatio* for the

The *mancipatio* was the oldest ritual by which property rights could be transferred. Gaius describes it as follows (Gai 1.119-120):

[...] *is, qui mancipio accipit, rem tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO ISQUE MIHI EMPTUS ESTO HOC AERE AENEAQUE LIBRA; deinde aere percutit libram idque aes dat ei, a quo mancipio accipit, quasi pretii loco.*

The person who is acquiring by mancipation, while holding the object says the following words: 'I declare that this man is mine by quiritary right and let him be bought to me with this bronze piece and bronze scales.' Then he strikes the scales with the piece of bronze, and gives it to him from whom he is taking by mancipation by way of a price.[123]

According to the prevailing opinion, the *mancipatio* was modelled on the *legis actio per sacramentum*.[124] This ritual was performed in the presence of five Roman citizens as witnesses and of a man who held the scales. The transferee uttered the formalised speech act *MEUM ESSE AIO* just as the vindicans does when performing the *vindicatio*. He strikes a piece of bronze against the scales and gives it to the transferor.[125]

The Roman *pontifices* adapted this act of verbal magic[126] to new purposes by additions such as *leges mancipio dictae* or *nuncupationes*. This extension and adaptation of the *mancipatio* led to the elaboration of new legal figures of a

elaboration of the legal constructions of contractual nature in the archaic law, see with further literature Lorenzo Franchini, 'Alle origini di negozio e processo: l'autotutela rituale', pp. 163–272.

[123] Translation based on Gordon and Robinson, *The Institutes of Gaius,* p. 81.

[124] Ernst Rabel, 'X. Nachgeformte Rechtsgeschäfte. Mit Beiträgen zu den Lehren von der Injurezession und vom Pfandrecht' (1906) 27 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 290–335; Ernst Rabel, 'XI. Nachgeformte Rechtsgeschäfte. Mit Beiträgen zu den Lehren von der Injurezession und vom Pfandrecht' (1907) 28 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 311–379, pp. 300ss.; Fritz Pringsheim, 'Symbol und Fiktion in antiken Rechten', in *Gesammelte Abhandlungen*, vol. II (Heidelberg: Universitätsverlag C. Winter: 1961) 382-400, pp. 396s.; Wolf, 'Recht im frühen Rom. Gesammelte Aufsätze', pp. 115-140.

[125] On the performative nature of *mancipatio* see Olivecrona, *Law as Fact*, 228-229.

[126] So describes Olivecrona the *mancipatio*. Cf. Olivecrona, *Law as Fact*, p. 229.


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contractual nature that are in the core the forms of the *mancipatio*. Such figures include the *mancipatio familiae*,[127] the *emancipatio*,[128] and the *adoptio*.[129]

Finally, the *in iure cessio* was a ritual by which a defendant formally admits or concedes before the *praetor* the plaintiff's claim, and the *praetor* adjudges the matter of a claim to the plaintiff. Sources depict the *in iure cessio* as a form of *agere*. This legal figure combines the elements of *legis actio per sacramentum* and of *mancipatio*. The plaintiff (transferee) declared that an asset was his by means of the unilateral pronunciation *MEUM ESSE AIO.* The praetor asked whether the defendant (transferor) intended to make a *contravindicatio*. The assignor remained silent or replied in the negative. After that the praetor assigned the object or asset to the plaintiff (transferee) by an act of validation (in theform of the so-called *addictio*). It is worth noting that the Roman *pontifices* also adapted the *in iure cessio*, which is basically an act of *vindicatio*, for a wide range of legal transactions.[130]

The utterance MEUM ESSE AIO, which represents the core part of a speech act, described in the sources as *agere*, retains its importance during the whole republican period of Roman law. This solemnly pronounced perforamatory imperative stays at the centre of the ritualised oral legal order. The individual (*persona sui iuris*) was able to formalise his individual legal position and create a legal norm through the correctly recited 'powerful' word and the observance of a ritual.

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[127] Gai. 2.102: accessit deinde tertium genus testamenti...quod per *aes et libram agitur: qui enim neque calatis cimitiis neque in procinctu testamentum fecerat, is, si subita morte urguebatur, amico familiam suam, id est patrimonium suum, mancipio dabat eumque rogabat, quid cuique post mortem suam dari vellet. Quod testamentum dicitur per aes et libram, scilicet quia per mancipationem peragitur.* (Later a third kind of will was developed, made by bronze and scales. Someone facing the prospect of imminent death who hat neither made a will before the convocation nor in battle-line would mancipate his family, that is his property, to a friend and ask him to distribute it according to his instructions after his death. This will is said to be made by bronze and scales because, of course, it is done by mancipation). The translation is based on Gordon and Robinson, *The Institutes of Gaius,* p. 171.

[128] The *emancipatio* also belongs to the procedure according to so-called *iurisdictio voluntaria* and is qualified in the sources as the *legis actio* as well as the *actus legitimus*. The *emancipatio* is modelled on the *mancipatio*.

[129] Alan Watson, *The Law of Persons in the Later Roman Republic* (Oxford: Clarendon Press, 1967) pp. 82s.

[130] Cf. *hereditatis petitio*, *vindicatio patriae potestatis*, *adoptio*, *in iure cessio* of the *tutela mulierum* (see Gai. 1.168), as well as the *vindicatio in libertatem* Cf. Paul Jörs, Wolfgang Kunkel and Leopold Wenger, *Römisches Recht*, 3rd edn. (Berlin: Springer Verlag, 1949) p. 96.


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### *D. Lege agere per manus iniectionem*

The other archetype of *agere* which probably originates from the *mores* (customs) and receives its legitimation through the Law of the Twelve Tables is *lege agere per manus iniectionem*.[131] Its essence consists in the unilateral act of an effective enforcement, in which the actor pronounces a speech formula and lays his hand on the debtor, who does not resist this physical contact and does not contest the speech act. The accomplishment of *agere per manus iniectionem* assigns individual legal power to an actor who performs *agere* over the property, but also over the person of his debtor. While the speech act *MEUM ESSE AIO* as a part of *agere per sacramentum* can transform into a ritualised struggle if the *contravindicans* opposes the act of *vindicatio*, the performance of *manus iniectio* does not presuppose a reaction of the debtor. A *manus iniectio* is therefore a unilateral ritualised act of personal execution. There are three kinds of *legis actiones per manus iniectionem* that Gaius outlines in further detail in his Institutiones – *iudicati*, *pro iudicato* and *pura.*

1. Legis actio per manus iniectionem iudicati

The main form of ritualized *manus iniectio* is the *legis actio per manus iniectionem iudicati*. Gaius explains it as follows (structured here for a better understanding) (Gai. 4.21)[132]:

<table>
<tr><th colspan="2">Introduction</th></tr>
<tr><td>Per manus iniectionem aeque de his rebus agebatur, de quibus ut ita ageretur, lege aliqua cautum est, velut iudicati lege XII tabularum.</td><td>Per manus iniectionem agere (An action by the laying on of a hand) was likewise brought in those matters where such procedure had been provided by a statute, for instance, by the Twelve Tables for a judgment debt</td></tr>
<tr><th colspan="2">Solemn ritual of manus iniectio</th></tr>
</table>

[131] The sources confirm the use of the *manus iniectio* in the sense of a lawful self-help in the republican period of Roman law. Probably also after the elimination of the procedure *per legis actiones* the *manus iniectio* remains as measure of a self-help. The *pater familias* could perform *manus iniectio* over the son on basis of the *patria potestas* (Quint. Inst. 7.7.9). Also the *dominus* could confirm the legal power over the slave by means of the *manus iniectio* (Liv. Ab urb. cond. 3.44.6). With the *manus iniectio* a woman can be subjected to marital power (*manus*). See Okko Behrends, *Der Zwölftafelprozess. Zur Geschichte des römischen Obligationenrechts* (Göttingen: Otto Schwartz & Co, 1974) p. 118.

[132] The translation is based on Gordon and Robinson, *The Institutes of Gaius,* pp. 419-421.


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| | |
|---|---|
| *Quae actio talis erat: qui agebat, sic dicebat: QUOD TU MIHI IUDICATUS sive DAMNATUS ES SESTERTIUM X MILIA, QUANDOC NON SOLVISTI, OB EAM REM EGO TIBI SESTERTIUM X MILIUM IUDICATI MANUM INICIO et simul aliquam partem corporis eius prendebat* [...]. | This *actio* was as follows: the actor (*qui agebat*) would say (*sic dicebat*): 'Because the court has awarded that to you' or 'because you are condemned to give me ten thousand, in that you have not paid, I accordingly lay my hand on you for the ten thousand of the judgment', at the same time taking hold of some part of his body [...]. |

*a.* The termini *agere* and *actio*

With the term *per manus iniectionem agere* Gaius describes the procedure in general. Gaius stresses the anchoring of the *legis actio per manus iniectionem iudicati*, the oldest form of *manus iniectio*, in the Twelve Tables. In the narrow sense of a speech act, Gaius uses the verb *agere* in the expression "*qui agebat, sic dicebat"*, which introduces an oral *formula*. It is noteworthy that Gaius applies the similar construction *qui vindicabat...ita dicebat* in his description of *agere per sacramentum*. This construction *qui agebat/qui vindicabat...ita dicebat* indicates to my opinion that *agere* in the narrow sense consists in the pronouncation of the speech formula (*dicere*) combined with the physical act of the *manus iniectio.* If we remember the definition of *agere* as *verbis indicare* of Varro, quoted above, as well as the meanings of *agere* as *orare* in Festus, we can speculate that an individual speech act is probably what Gaius also has in mind when he uses *agere* in respect of the concrete *actor*.The term *agere* in the text quoted here is therefore a designation for the whole proceedings as well as in the narrow sense for the individual ritual, which core is a speech act.

*b.* The range of applications of the *manus iniectio iudicati*

The *agere per manus iniectionem iudicati* is used for the legal formalisation of execution proceedings in a wide range of situations. The model *causa* for a ritualised execution by means of *lege agere per manus iniectionem* was a judicial decision (*iudicatum*). But also the defendant's acknowledgment of the plaintsff's claim before the magistrate at the stage of the proceeding *in iure* (*confessio in iure*) could be a ground for an application of the *manus iniectio*. The *manus iniectio* further functions as a form of personal extrajudicial enforcement against a *fur manifestus*, a thief caught in the act. The ritual of *manus iniectio* (probably with an extrajudicial field of application) serves to formalize the execution of formal contracts, so-called *negotia*


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*per aes et libram*, for example *nexum*[133] or *sponsio*.[134] The extrajudicial *manus iniectio* is also used for the *damnatio testamentaria*.[135] It is also not possible to exclude the application of the *manus iniectio* to enforce claims arising from the *lex Aquilia*.[136]

c. The solemn ritual of the *manus iniectio* for the effective enforcement of extrajudicial cases

In our examination of *agere per sacramentum*, we focused on the ritualised conflict and on the role of the speech act MEUM ESSE AIO. In the analysis of the *manus iniectio*, our attention is directed at its extrajudicial application. The purpose of this examination is to show that *agere* designates not only a claim or proceedings before a magistrate, but likewise the ritual, which formalised the wide personal autonomy of the plaintiff. This act of wide autonomy did not even require the active intervention of the roman judicial magistrates.

*d. IUDICATUS sive DAMNATUS*

The basis for a ritualised execution by means of *manus iniectio iudicati* was not only a judgement but also an extrajudicial private legal act. This extrajudicial ground is called *damnatus* according to the solemn speech formula (Gai. 4.21): *QUOD TU*

[133] The use of the *manus iniectio* for the liability arose from the *nexum* confirms Livius (Liv. Ab urb. cond. 8.28.8) and Aulus Gellius. *Nexum* was a solemn transaction *per aes et libram*, whereby the debtor could make himself liable to *manus iniectio* without judgment if he did not pay on the appointed date. The Twelve Tables (Tab 3.3) probably designed the application of the *manus iniectio* for a case of the *nexum*. For further literature see Salvator Riccobono (ed.), *Fontes Ivris Romani Antejvstiniani. Pars Prima. Leges* (Firenze: Florentiae apud S. A. G. Barbèra, 1968) p. 33, note B.

[134] The overview of the doctrinal positions see by Max Kaser, 'Unmittelbare Vollstreckbarkeit und Bürgenregress' (1983) 100 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 80-135, p. 110.

[135] Here, the *manus iniectio* legitimates an individual execution of the legatee against a *heres*, who did not fulfil an obligation from this legacy, i.e. *legatum per damnationem*. Cf. Giovanni Nicosia, 'La *manus iniectio*. Dal regime originario a quello della *manus iniectio pura*', in Francesco Milazzo (ed.), *Praesidia libertatis. Garantismo e sistemi processuali nell'esperienza di Roma repubblicana. Atti del convegno internazionae di diritto romano. Copanello 7 10 giugno 1992* (Napoli: Edizione Scientifiche Italiane; 1994) 163-225, p. 165.

[136] Pugliese, 'Il processo civile romano I', 309. This hypothesis is based on the interpretation of the Veronese palimpsest of Gai 4.21. According to Mario Varvaro this palimpsest uses an expression *lege Aq(ui)lia* and not *lege aliqua*. Cf. the scepsis of this interpretation by Riccardo Cardilli, 'Damnas esto e manus iniectio nella lex Aquilia: un indizio paleografico?' (2014) 20(1) Fundamina (Pretoria) 110-124, pp. 111s.; Riccardo Cardilli, *Damnatio e oportere nell'obbligazione* (Napoli: Jovene, 2016) pp. 193s. See however: Mario Varvaro, 'Gai. IV.21 e la presunta manus iniectio ex lege Aquilia' (2016) 59 Annali del seminario giuridico 335-347, pp. 337s.


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*MIHI IUDICATUS sive DAMNATUS ES...OB EAM REM EGO ... IUDICATI MANUM INICIO.*

As we can see, the actor lays a hand on the debtor because the latter is IUDICATUS (adjudged) or DAMNATUS (condemned). The word *damnatus* covers all these extrajudicial cases in which a private legal act forms the ground for imposing the creditor's hand. The quoted speech act contains characteristics that we already saw in the utterance *MEUM ESSE AIO*. The act was performed *in iure*, in a public place. The act is formulated in an abstract way without detailed information about the factual basis. It has a law-changing effect. As mentioned above, the debtor was not allowed to resist. Only a *vindex* (a guarantor in the procedural law) could intervene and save an executed debtor. The solemn act was strongly personal. The *manus iniciens* says *EGO ... IUDICATI MANUM INICIO*. If all conditions are fulfilled, the performance of the ritual – *agere per manus iniectionem* – can create an individual legal title that makes the individual enforcement legally correct and binding. In consequence, the *actor* receives a legitimate title for his physical domination over a person or over a thing. The public performance of this ritual *in iure* and its perception by the *civitas*, as well as its accomplishment in the presence of a magistrate, gives this ritual the role of a norm-setting act.

e. From unlimited autonomy to a regulated ritual

The sources do not provide clear evidence that the accomplishment of *lege agere per manus iniectionem* was possible in front of a judicial magistrate (*rex* and later *praetor*). The relevant literature has long questioned whether this *agere per manus iniectionem* was originally a form of self-help in which a third party (*rex* or *praetor*) did not intervene. Thus, Nicosia, the main proponent of the theory of non-jurisdictional *actiones*, emphasizes that the Twelve Tables contain no reference to the exercise of control by the magistrate and thus no indication that an act of jurisdiction (in form of a *addictio*) before the judicial magistrate would have been necessary.[137] Other scholars suggest that *agere per manus iniectionem* was originally exercised under state control.[138]

In my view it cannot be excluded that there originally existed a kind of silent control through the judicial magistrate and through the citizen witnesses (*civitas*) because of the public and ostentious character of this legal ritual. Through the institutionalisation of Roman civil procedure, *manus iniectio* became subject to a kind of "summary

[137] Nicosia, 'Processo privato romano I', 93.

[138] See Pelloso, '"Giudicare" e "decidere" in Roma arcaica', pp. 65s.


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procedure" before a judicial magistrate.[139] This ritual in its later stage may have taken place before the *praetor*, who observed the correctness and legality of the ritual without interfering in its course[140] A possible reason why the sources are silent on the role of the magistrate is a lack of conflict and struggle between the parties, as we can see in the example of the *legis actio per sacramentum*.

### *2. Legis actio per manus iniectionem pro iudicato*

Some time after the *legis actio per manus iniectionem iudicati*, a new kind of executive legal ritual – the *legis actio per manus iniectionem pro iudicato* – was introduced (Gai. 4.22).

This later form is modelled on enforcement through a court judgment. The name of the new form *legis actio per manus iniectionem pro iudicato* (instead of by court judgment) confirms that the judgment (*iudicatum*) had become the central legal means for an effective enforcement, i.e. execution, as early as the Twelve Tables. The more recent legal figure *pro iudicato* means that even extrajudicial legal execution has an effect, "as if according to judgment". This new ritual is used for cases based on the *lex Publila*,[141] the *lex Furia de sponsu*,[142] and other laws.[143]

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[139] See for example Paul Jörs, Wolfgang Kunkel and Leopold Wenger, *Römisches Recht*, 4th edn. rev. by Heinrich Honsell, Theo Mayer-Maly and Walter Selb (Berlin et al.: Springer, 1987) p. 523. It is not a matter of the public authority intervening in old self-help relationships but rather of an additional jurisprudential legitimation of the court magistrate. Cf. Giuseppe Luzzatto, 'Von der Selbsthilfe zum römischen Prozeß' (1956) 73 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 29-67, pp. 29s., 53; Okko Behrends, 'Der Zwölftafelprozess', p. 116.

[140] Walter Selb, 'Vom geschichtlichen Wandel der Aufgabe des *iudex* in der *legis actio*', p. 444.

[141] The *agere per manus iniectionem pro iudicato*, introduced according to the *lex Publila de sponsu*, formalized a legal power of the guarantor over the assets of principal debtor. The date of this lex is controversial. Probably the lex Publilia goes to the 4th century BC. See Mariette Elster, *Die Gesetze der Mittleren Römischen Republik. Text und Kommentar* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2003) pp. 464-466.

[142] According to the *lex Furia de sponsu* (ca 180 BC), the co-guarantor who paid the creditor more than what he was obliged to pay, could demand the excess based on the *agere per manus iniectionem pro iudicato* (See Gai 3.121). See Elster, *Die Gesetze der Mittleren Römischen Republik*, pp. 466-469.

[143] Also in the concluding part of the text, related to the *lege agere per manus iniectionem pro iudicato* (Gai. 4.22), Gaius confirms that this type of *lege agere* was introduced by the statutes for the other cases (*complures aliae leges in multis causas dederunt*). These statutes could be *lex Luci Lucerni*, (Bruns no. 104=FIRA III, no. 71[a]), *lex Osca* (Bruns no. 8= FIRA I no. 16). On the *lex Luci Lucerina* cf. José-Domingo Rodríguez Martín, 'Vollstreckungsprozess ohne Urteil im römischen Recht. Kommentar zur Lex Luci Lucerini', in Birgit Feldner, Verena Tiziana Halbwachs, Thomas Olechowski, Josef Pauser, Stefan Schima and Andreas Sereinig (eds.), *Ad Fontes* (Frankfurt am Main et al.: Peter Lang, 2002) 319–331. Max Kaser and Karl Hackl, 'Das römische Zivilprozessrecht', p. 133, note 15. The overview of the laws that introduced the *manus iniectiones pro iudicato* for different


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The creation of the legal figure *lege agere per manus iniectionem pro iudicato* is in my opinion a sign that even though a state judicial procedure and a judgment becomes the main basis for the execution, the extrajudicial ritualised individual execution, which emphasises a high level of personal autonomy, does not lose its importance. Gaius describes the procedure as follows (Gai 4.22, Gai 4.24)[144]:

| Introduction (Gai 4.22) | |
|---|---|
| *Postea quaedam leges ex aliis quibusdam causis pro iudicato manus iniectionem in quosdam dederunt, sicut lex Publilia in eum, pro quo sponsor dependisset, si in sex mensibus proximis, quam pro eo depensum esset, non soluisset sponsori pecuniam; item lex Furia de sponsu aduersus eum, qui a sponsore plus quam uirilem partem exegisset, et denique conplures aliae leges in multis causis talem actionem dederunt.* | Subsequently certain statutes dealing with various other cases appointed the action by the laying on of a hand against others, as if they were judgement debtors. For example, by the Publilian Act against a person on whose behalf a personal surety had expended money, if he had not repaid the money to the personal surety in the six months following the time at which the expenditure was made; again by the Furian Act on personal suretyship against one who exacted more than his share from a personal surety; and finally a large number of other statutes appointed an action of this kind in many cases. |
| Solemn ritual of *manus iniectio* (Gai 4,24) | |
| [...] cum hi, quibus PRO IUDICATO[145] actio data erat, nominata causa, ex qua agebant, ita inferebant: OB EAM REM EGO TIBI PRO IUDICATO MANUM INICIO. | [...] ...while those who had been granted the action as if for a judgment would introduce it thus: 'I accordingly lay my hand on you as if for a judgment debt'. |

cases can be found in Moriz Wlassak, *Römische Processgesetze. Ein Beitrag zur Geschichte des Formularverfahrens*, vol. I (Leipzig: Verlag von Duncker und Humblot, 1888) pp. 91s., note 61.

[144] Translation based on Gordon and Robinson, *The Institutes of Gaius,* pp. 421-423.

[145] The *pro iudicato* uses the ablative of *iudicatus*, while in the expression *manus iniectio iudicati* the "*iudicati"* is a genitive of *iudicatum*. For the understanding of *manus iniectio pro iudicato* this makes according Kaser no difference. See the sources and literature in Kaser, 'Unmittelbare Vollstreckbarkeit', p. 83, note 11.


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The speech act *OB EAM REM EGO TIBI PRO IUDICATO MANUM INICIO* (I accordingly lay my hand on you as if for a judgment debt) has an abstract character. Its solemn *formula* does not contain a reference to any statutes that allow this personal execution, such as, for example, the *lex Publilia* or the *lex Furia*, but designates the legal ground of this *manus iniectio* as *PRO IUDICATO*. This means "instead of by court judgment" or "as if on a judgment". This ritual, like the utterance *MEUM ESSE AIO* of the *lege agere per sacramentum*, does not mention the circumstances for the application of a personal execution. The text of the *formula* only briefly mentions the factual basis (*OB EAM REM*) for an effective enforcement. This allows its effect to be extrapolated to similar *causae* that are fixed in *leges*, i.e. laws.

### *3. Legis actio per manus iniectionem pura*

The *agere per manus iniectionem* as an instrument of unilateral legal execution gradually loses its importance during the Republic. A sign for this is the introduction of the *legis actio per manus iniectionem pura* (Gai. 4.23). This form of *manus iniectio* was introduced by the *lex Furia testamentaria*[146] and the *lex Marcia*[147] for the cases of application mentioned in these laws (Gai. 4.24). The peculiarity of this *manus iniectio* was that a debtor was allowed to challenge the creditor's laying on of his hand or to push his hand away (*manum sibi depellere*) and to declare for himself a speech formula (*pro se lege agere*). Gaius conveys the speech act of the *manus iniectio pura* as follows: *OB EAM REM EGO TIBI MANUM INICIO* (I accordingly lay my hand on you). Just like in the solemn formulae of *manus iniectiones iudicati* and *pro iudicato* the *causa* or factual ground for an application is not included in the speech formula. It is briefly mentioned in the words OB EAM REM (related to this case, accordingly). In this context, the expression OB EAM REM allows the ritual of *manus iniectio* to be used for numerous different situations. Compared to the *legis actio pro iudicato*, the speech formula of the *legis actio per manus iniectionem pura* is not formed in analogy to the *iudicatum*, i.e. it is not qualified as *pro iudicato*. Gaius emphasizes this as follows (Gai 4.24): *Nam et actor in ipsa legis actione non adiciebat hoc verbum PRO IUDICATO, sed nominata causa, ex qua agebat, ita dicebat: OB EAM REM EGO TIBI MANUM INICIO* (for the pursuer in that action did not

[146] The *lex Furia testamentaria* prohibited the legacies and donations in contemplation of death over the amount of 1000 assēs. The heir could reclaim from a legatee, that received more than 100 assēs, the *quadruplum*. For the formalisation of his claim he used the *manus iniectio pura*. The further sources see in Elster, *Die Gesetze der Mittleren Römischen Republik*, pp. 371-374.

[147] The second law was the *lex Marcia de fenore*. It prescribed that, against the usurers could be proceeded with *manus iniectio pura* for the return of these interests. See Elster, *Die Gesetze der Mittleren Römischen Republik*, pp. 458-459.


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add the words: "as if for a judgment debt" but, after specifying the grounds of the action, he would say: I accordingly lay my hand on you).[148]

The debtor's right to push away the creditor's hand and to begin proceedings highlights the change in the nature of this ritual that originally granted to the creditor an almost unlimited private autonomy and power over the unsuccessful debtor. The *agere per manus iniectionem pura* evolves from a ritual that creates an indisputable legal title for an individual execution into an act of extrajudicial execution that the debtor subject to it can contest. Even the placing of a hand (*manus iniectio*) transforms from an act that establishes legal power and force to a symbolic *gestus* of formal significance. The debtor, who in older forms of *agere per manus iniectionem* partly lost his legal subjectivity by the laying on of the creditor's hand, now retains his legal status.

### E. The controversy on the legal nature of *pignoris capio*

Another archetype of *agere* is the *legis actio per pignoris capionem*. The *legis actio per pignoris capionem* is a ritual that forms and constitutes a pledge (*pignoris capio*).

The *pignoris capio* provided the secured creditor a possibility of access to the debtor's property. In the time of Gaius, a controversy arose among jurists whether *pignoris capio* is a type of *legis actio* or not (Gai. 4.29)[149]:

| The procedure and the acceptance of *pignoris capio* as a form of *legis actio* | |
|---|---|
| *Ex omnibus autem istis causis certis verbis pignus capiebatur, et ob id plerisque placebat hanc quoque actionem legis actionem esse.* | In all these cases the pledge was taken with certain set words, and for this reason most [jurists] have agreed that this action is also in an action in the law. |
| The arguments against a pignoris capio as a form of *legis actio* | |
| *quibusdam autem placebat legis actionem non esse, primum quod pignoris capio extra ius peragebatur, id est non apud praetorem, plerumque etiam absente aduersario, cum alioquin ceteris actionibus non aliter uti quis* | Others, however, have disagreed, in the first place because the taking of the pledge was enacted out of court, that is, not before the praetor and generally also in the absence of the opponent, while other actions could not be |

[148] Translation based on Gordon and Robinson, *The Institutes of Gaius,* p. 423.

[149] Translation based on Gordon and Robinson, *The Institutes of Gaius,* pp. 425-427.


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| | |
|---|---|
| *posset quam apud praetorem praesente aduersario;* | employed except before the praetor and with the opponent present; |
| Performance of a *pignoris capio* during the *dies nefasti* | |
| *praeterea quod nefasto quoque die, id est, quo non licebat lege agere, pignus capi poterat.* | moreover, because a pledge could be taken even on a non-business day, that is, one on which actions in law could not lawfully take place. |

The passage cited is of central importance for an understanding of the legal nature of *agere* and *actio*. Gaius reports on the dispute among Roman jurists regarding the legal nature of the *legis actio per pignoris capionem*. The prevailing view was that this ritual was a kind of *legis actio* because it was done by a solemn pronouncement of speech formula (*certa verba*). The opinion of the majority of jurists is also consistent with other texts, quoted above, in which the main characteristic of *lege agere* is its performance by means of a speech *formula*.

A minority of jurists consider the performance of the ritual before the *praetor* in an institutionalised place, i.e. *in iure*, and on lawful days (*dies fasti*)[150] as essential characteristics of *agere* and *actio*. Since the *pignoris capio* did not take place in the presence of the *praetor* or *in iure*, these jurists did not consider it a kind of *legis actio*. This minority of jurists proceed from a later formed understanding of *agere* as a highly institutionalised legal figure that can take place only publicly and on specific days. It is noteworthy that the public character of the ritual was ensured not by its performance *in iure* as with other types of lege agere but by the presence of witnesses, who provided it with the necessary publicity and social control.

Gaius does not cite the oral formula *lege agere per pignoris captionem*. We can assume that this ritual consists of two phases that coincide in time. The pledgee (*pignus capiens*) speakes solemn prescribed words, *certa verba*, in the presence of witnesses and simultaneously takes the pledge. This follows from the words *ex omnibus istis causis certis verbis pignus capiebatur* (In all these cases the pledge was taken with certain set words). The creative role of the ritual, in my opinion, originates from the fact that if a material reason for the taking of a pledge is given, a right-generating effect is achieved by the performance of the ritual itself. By the declaration of the *certa verba*, which Gaius, however, does not cite, a legal title for the physical taking of the pledge (*pignoris capio*) is created. The physical act of *pignoris capio* that

[150] *Dies fasti* were special "lawful" days under the sacred roman calendar, on which it was allowed (*fas*) to perform a judicial rituals as well as to participate on the legal affairs.


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follows or is carried out simultaneously with the speech act thus enforces the right that was first constituted by the declaration of the formula. The moments of law-making and law-enforcement coincide in the performance of the *pignoris capio*.

In some cases, a *pignoris capio* was based on customs (*mores*), in others – on statutes (*leges*). Gaius transmits it as follows (Gai 4.27; Gai 4.28[151]):

| *Lege agere per pignoris capionem* based on customs (*mores*), Gai 4.27 | |
|---|---|
| *Introducta est moribus rei militaris. nam [et] propter stipendium licebat militi ab eo, qui aes tribuebat, nisi daret, pignus capere; dicebatur autem ea pecunia, quae stipendii nomine dabatur, aes militare. item propter eam pecuniam licebat pignus capere, ex qua equus emendus erat; quae pecunia dicebatur aes equestre. item propter eam pecuniam, ex qua hordeum equis erat comparandum; quae pecunia dicebatur aes hordiarium.* | Its origin in custom was in military affairs. For it was lawful for a soldier to take a pledge from the person required to contribute the money for his pay if that person failed to make the payment. This money, which was given in the name of pay, was called military dues. Again, he might lawfully take a pledge for money to buy a horse; this was called 'cavalryman's dues', or for money with which to procure barley for the horses, which was called 'barley dues'. |
| *Lege agere per pignoris capionem,* introduced by Twelve Tables, Gai. 4.28 | |
| *Lege autem introducta est pignoris capio velut lege XII tabularum adversus eum, qui hostiam emisset nec pretium redderet; item adversus eum, qui mercedem non redderet pro eo iumento, quod quis ideo locasset, ut inde pecuniam acceptam in dapem, id est in sacrificium, inpenderet; item lege censoria data est pignoris capio publicanis vectigalium publicorum populi Romani adversus eos, qui aliqua lege vectigalia deberent.* | The origin in statute of the taking of a pledge was in the Twelve Tables, against a person who had bought a victim for sacrifice and failed to pay for it; also, against someone who failed to pay the charge for a beast of burden which the hirer had let out so that he could use the money received for a feast, that is, a sacrifice. Again by censorian law tax gatherers collecting the public taxes of the Roman people were given the right to take a pledge from those owing taxes under any statute. |

[151] Translation of Gordon and Robinson, *The Institutes of Gaius,* pp. 423.

In custom (*mores*) we find the practice that a soldier could take as a pledge (*pignus capere*) something belonging to another person who was obliged to provide him with maintenance (*aes militare*) in case the other did not make the proper payments (Gai. 4.27). He could also take a pledge for money owed to him for the purchase of a horse (*aes equestre*) as well as for horse feed (*aes hordearium*). Gaius' description of a *pignoris capio* for military purposes (*aes militare*) as based on certain customs is of crucial importance because it calls into question the interpretations in the literature, according to which *lege agere* is a ritual that was introduced on the basis of the Twelve Tables.

Gaius (4.28) attributes to the Twelve Tables the taking of a pledge (*pignoris capio*) in case of non-payment for sacrificial animals (*emptio hostiae*) or rent for draught animals that was used for sacrificial purposes (*locatio iumenti*).

The buyer's obligation to pay the price and the obligation of the lessee to pay rent may be based on informal consensual agreements. The use of the specific words *emisset* and *locasset* in the quoted text of Gaius confirms this assumption. The strict formalism of the archaic and also republican period of Roman law, however, requires that the agreement between the parties must be in a form prescribed by law. It is doubtful that a debt of the buyer and a debt of the lessee can be formalised by a mere promise to pay the price. Thus, the *lege agere per pignoris capionem*, which consists not only of the physical capture of the pledge but also implies the recitation of a solemn speech formula, serves as legal formalisation of a claim that a creditor has against a debtor based on an informal agreement. The effect of *agere* here was the same as in the legal norm *Rem ubi pacunt, orato*.

Similarly, according to Gaius, the *legis actio per pignoris capio* was used to enforce claims arising from the *lex censoria* (Gai. 4.28), i.e. from a clause of the public law lease. The *publicani* were entitled, on the basis of the public leases (which contain a special clause, i.e. a *lex censoria*), to collect on behalf of the Republic for public purposes the monetary debts owed by debtors. It should be emphasized that among the cases of *pignoris capio* that date back to *mores*, soldiers were also granted the right to collect monetary claims for military and therefore public purposes. The publicans were private persons. The delegation of state functions to private individuals by taking pledges for the purposes of the Republic is a characteristic feature of early Roman statehood, in which sovereign functions were delegated to private individuals. The legal ritual of *agere per pignoris capionem* as a means of legal enforcement belongs to private persons who act both as subjects of private legal relations and as holders of public functions.


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### F. Preliminary conclusions

Based on the analysis in this section, we can draw the following conclusions: (1) regarding the republican period of Roman law, it is incorrect to regard *agere* solely as a ritual performed by a private person to which corresponds the power of the magistrate to determine the applicable law and to make a judgment; (2) *agere* describes the ritual activity of both private persons (*qui agebat... sic dicebat*) and representatives of the state (*agere cum populo*, *legis actio per pingoris capionem* exercised by the *publicanes*); (3) on the example of *lege agere per sacramentum* we can see how the unilateral linguistic act *MEUM ESSE AIO*, which represents the core idea of *agere* in the sense of an individual speech act of a private actor, contains the potential to formalise, acknowledge and create a property right for the claimant – *vindicans* or *contravindicans*; (4) this act *MEUM ESSE AIO* is also used to formalise the transfer of ownership or assignment of rights; (5) the boundaries between the formalisation of a right in a transaction and the pursuit of a right in court proceedings, formalised by means of *agere*, are blurred; (6) with *lege agere per manus iniectionem* a creditor could enforce his right against a debtor by means of a ritualised speech formula. The basis for such ritualised enforcement was either a judicial decision or an extrajudicial act. The significance of *manus iniectio* changes over time, from an act formalising unrestricted private autonomy (as shown by the *manus iniectio iudicati* and *manus iniectio pro iudicato*) to a contestable ritual (*manus iniectio pro iudicato*); (7) the most ancient form of *lege agere* - *per pignoris capionem* - shows that the essence of *agere* was precisely the utterance of a certain speech formula. It was the observance of the linguistic ritual which could authorise the physical taking of a pledge, even if it did not take place in the presence of the *praetor* and not on the court days intended for that purpose.

## IV. Some final remarks: What is to be gained from the study of *agere* and *actio* in Roman law?

A study of the Roman concepts of *agere* and *actio* has a significance not only for an understanding of the Roman legal experience, but shines also light on certain basic questions of legal theory.

It allows us to understand the process of the formation of legal language and the transformation of an abstract verb (*agere*) into concrete nouns (*actio*, *actus*, *actum*) that describe legal reality in a more differentiated way: *actio* means legal claim, *actus* and *actum* relate to the concept of a negotiation or a legal act of a contractual nature.

In a more ancient period the legal device *agere* evidences a higher level of individual autonomy. The legitimacy of *agere* and *actio* is provided primarily by the correct

observance of particular ritual rules and by the correct performance of speech *formulae*. The intervention of the court magistrate is limited to particular situations.

In the course of time this individual autonomy, described with the term *agere*, will be subjected to the expanded intervention of the Roman state. It is no longer the correctly performed ritual (*agere*) that makes the legal procedure legitimate but the *ius dicere* of *praetores* and the *iudicata* of *iudices*. The outcome of the institutionalisation of Roman civil procedere is that old oral rituals, *legis actiones*, reach a high degree of unpopularity (*in odium venerunt* as Gaius says) and the more rational and less formalistic formulary procedure becomes the main form of roman civil litigation.

Research on *agere* also shows that rituals, and generally the principle of orality, play a central role in ancient legal orders.[152] *Agere* in the sense of an individual performative speech act is a product of the oral legal culture of republican Roman law. The transition to the formulary procedure, which was for the most part carried out in written form, along with its 'rationalization' renders these complicated ceremonial and highly formalistic oral rituals obsolete.

The original concept of *agere*, as shown above, was a unilateral act of pronouncing a ritual speech formula. The performance of *agere* by a private actor could create a legal reality not only for him but also for the defendant and for the *civitas*. The old rituals received a norm-setting effect because they were performed either before an audience and observed publicly – in an institutionalised place (*in iure*) — or staged in the presence of citizen witnesses. The modern borders between the subjective and the objective were blurred.

This study has shown the significance of the principle of orality, in the form of speech acts, for lawmaking in republican and probably in archaic Rome. To paraphrase the famous title of J.L. Austin's work "how to do things with words", here we can say that the reconstruction of *agere* helps us to understand 'how to make *law* with words'.

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Tab. 1.6



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Tab. 3.3

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