Tertullian and Roman Law – What Do We (Not) Know?

Ian L.S. Balfour, Edinburgh, UK

Abstract

Whether Tertullian had expertise in Roman law before his conversion to Christianity, or whether his knowledge of it was non-specialist, through studying rhetoric as part of his education, has been debated in more than two dozen scholarly works since 1735. This article doesn't comment on that but asks, for the first time as far as I know, how far these studies recognize that we have almost no legal writings in the form in which Tertullian knew them, and almost no knowledge of legal practice at Carthage while he was there. The paucity of contemporary legal writings is examined and then illustrated from what we call criminal law. The implications of this for the credibility of Tertullian's challenge to the irregularity of legal proceedings against Christians concludes the first part of the article. The situation at Carthage is examined next, and illustrated from what we call civil law. Tertullian used the noun *praescriptio* and its cognate verb *praescribo* forty times in the juridical sense of 'objection' to an opponent's claim. We know that these words were employed in four different ways in litigation at Rome, but how were they used at Carthage? The second part of the article argues that three scholarly conclusions about Tertullian's use of these words are valid only if the words were used differently at Carthage from the way they were used at Rome. The article suggests that we don't know enough about the Courts at Carthage to give a definitive answer.

1. Tertullian's knowledge of Roman law

Whether Tertullian had expertise in Roman law before his conversion to Christianity, either as a *iurisconsultus* or as an *advocatus*,[1] or whether his knowledge of it was non-specialist, through studying rhetoric as part of his education,[2] has been debated in more than two dozen scholarly works between

[1] Jurists gave opinions but didn't appear in court; advocates pled cases in court. Siegmund Schlossman described their work and applied it to Tertullian in 'Tertullian im Lichte der Jurisprudenz', *Zeitschrift für Kirchengeschichte* 27 (1906), 251-75, 407-30, 257-68. A personal translation of 251-75 into English is available at <www.ianbalfour.co.uk>. For a catalogue of Tertullian's legal terminology, arranged according to subject divisions within Roman law, Paulo Vitton, *Concetti giuridici nelle opere di Tertulliano* (Rome, 1924, reissued 1972), 17-55.

[2] Because of Tertullian's knowledge of the Greek language and his listing of both Roman and Greek classical authors, it is generally assumed that he received a high standard of education. For how widely he read, Timothy D. Barnes, *Tertullian: An Historical and Literary Study* (Oxford, 1971, 2nd ed., London, 1984), 194-206.

Studia Patristica XCIV, 11-21.

1735 and the year 2000.[3] This article does not comment on that but asks, for the first time as far as I know, how far these studies recognize that we have almost no legal writings in the form in which Tertullian knew them, and almost no knowledge of legal practice at Carthage while he was there. The lack of contemporary writings will be examined in sections 2 and 3, illustrated by what we call criminal law, and the situation at Carthage examined in sections 4 and 5, illustrated by what we call civil law.[4]

Tertullian twice commented on developments in Roman law during his years at Carthage – that laws were 'daily being supplanted by new decrees and statutes'[5] and by 'the new axes of imperial rescripts and edicts'.[6] The concern of

[3] The first editors or critics of Tertullian's works, such as Grotius, Valesius and Pamelius, were against Tertullian being a *iurisconsultus* because Jerome did not describe him as such in *De viribus illustribus* 53.1. Debate began when the views of Johann Heinrich Blumbach, *De Senatusconsulto Quintus Septimius Florens Presbytero et Iureconcultio Tertullianus Liber* (Lipsiae, 1735), 1-20, were taken up by Johannis Alexandri Guinandi Pagenstechter, *De Jurisprudentia Tertulliana oratio* (Harderoviae, 1743), 51. David Rankin, 'Was Tertullian a Jurist?', *SP* 31 (1997), 335-42, analysed nineteen studies between 1904 and 1997 and noted that Harnack, 1904; de Labriolle, 1906; Beck, 1930; Evans, 1959; Rambaux, 1978; Hallonsten, 1984 and Quasten, 1992, favoured jurist; that von Campenhausen, 1964 and Rankin himself, 1997, favoured advocate; that Schlossman, 1906; Colson, 1924; Daly, 1947; Hanson, 1961; Sider, 1971; Barnes, 1971; Fredouille, 1972; Bray, 1977; Aziza, 1977 and Waszink, 1979, favoured rhetorician or other non-legal influence. Rankin did not mention Joseph Kaspar Stirnimann, *Die Praescriptio Tertullians im Lichte des römischen Rechts und der Theologie* (Freiburg, Switzerland, 1949), 'very probably a jurist', 4, 82, and René Braun, who preferred *causidicus* (from *causas dicere*, to plead the cause of others before the courts as an advocate), *Deus Christianorum: Recherches sur le vocabulaire doctrinal de Tertullien*, Études Augustiniennes (Paris, 1962, revised ed. 1977), 18. The most determined scholarly attempt to show Tertullian as a jurist was Alexander Beck, *Römisches Recht bei Tertullian und Cyprian* (Halle, 1930, reprinted with extended preface, Aalen, 1967), but a key reviewer of that monograph argued that the texts assembled by Beck showed Tertullian as a *causidicus*, not a jurist: Artur Steinwenter, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 52 (1932), 412-6, 415. Since Rankin 'some of the features traditionally ascribed to his legal background are readily understood in terms of his expertise in the ways of rhetoric': David Wright, 'Tertullian', in Philip F. Esler (ed.), *The Early Christian World*, vol. 2 (London, 2000), 1032. For Roman jurists generally, see Detlef Liebs, *Hofjuristen der römischen Kaiser bis Justinian* (München, 2010). For the ongoing debate about the distinction between jurists and advocates, see Caroline Humfress, *Orthodoxy and the Courts in Late Antiquity* (Oxford, 2007).

[4] When jurisdiction was conferred by the State on a Roman magistrate, he acquired all the powers necessary to deal with both crimes (*imperium merum*) and questions of private right (*imperium mixtum*); however, the boundary between criminal and civil procedure was hardly delineated at the turn of the second and third centuries: Lord Mackenzie, *Studies in Roman Law*, 7th ed. (Edinburgh, 1898), 350.

[5] *Ad nationes* 1.10.4: *novis de die consultis constitutisque obruistis*.

[6] *Apologeticum* 4.7: *novis principalium rescriptorum et edictorum securibus*. Decrees were judgments given by the emperor in lawsuits; statutes were legislation by the senate, although, by the end of the second century, often the emperor's own wishes clothed with the respectability of a servile senate; rescripts were answers given by the emperor to those who consulted him; edicts were general laws laid down by the emperor. W.W. Buckland, *A Text-book of Roman Law from*

this article is that, for the most part, neither the old laws nor the new ones are available to us as Tertullian knew them.

2. Our knowledge of Roman law

Tertullian was a near contemporary of four lawyers described as 'the great lights of jurisprudence for all time', Gaius, Papinian, Ulpian and Paul.[7] They were prolific writers, but none of their works has come down to us in the form in which Tertullian knew them. When the only known complete copy of the *Institutes* of Gaius, published c. 161 AD, was rediscovered in 1816 AD, the chemicals used to decipher the text damaged parts of it so badly that its contents are known only 'with the aid of many conjectures'.[8] For example, Gaius wrote about *praescriptiones*, the subject of the fourth and fifth sections of this article, but a substantial part of his description is illegible.[9]

Almost everything which the others wrote was edited, three hundred years later, when the Emperor Justinian I appointed a Commission in 530 AD to go through about two thousand works of jurists and praetors, containing three million lines, with instructions to condense and update and publish them as contemporary law.[10] They discarded about ninety-five percent of the material and amended and published the other five percent in 533 AD as the *Digest*.[11] What they did not use has almost entirely disappeared, leaving us impoverished, because what is left of the jurists' work tells us more than any other writings

Augustus to Justinian, 3rd ed. (Cambridge, 1963), 17-20; Lord Mackenzie, *Studies in Roman Law* (Edinburgh, 1898), 14-6; Frederick P. Walton, *Historical Introduction to the Roman Law*, 2nd ed. (Edinburgh, 1912), 269-81.

[7] Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society* (London, 1861), 41; Gaius (alive in 178), Papinian (murdered in 212), Ulpian (writing from 211-21) and Paul (dates unknown, but a contemporary of Ulpian).

[8] F.P. Walton, *Historical Introduction* (1912), 289. Gaius' *Institutes* disappeared after the fall of the Roman Empire, until an almost compete copy was discovered in Verona in 1816.

[9] Gaius, *Institutes*, 4, 130-7. 'Gaius distinguishes between *praescr. pro actore* (130-1a, 134-7) and *pro reo* (133). The illegible page after 133 must have contained more about *praes. p. reo* before it returned, by a train of thought which is irrecoverable, to *praescr. p. actore*.' Francis de Zulueta, *The Institutes of Gaius* (Oxford, 1953), II 285. Furthermore, the text we possess had been altered over many years after Gaius published it as copyists incorporated glosses written in the margins of manuscripts into the text: W.W. Buckland, *A Text-book of Roman Law* (1963), 25.

[10] *Ibid*. 40, 42. 'Almost everything': most of what else we have from the classical age is described in *ibid*. 34-39; other works of less importance were collected by Gustavus Haenel, *Corpus Juris Antejustinianeum*, 5th ed. (Leipzig, 1886).

[11] Justinian, *C. Tanta* 1 said that the Commissioners read nearly 2,000 *libri*, containing three million *versus* (lines) and reduced them to 150,000 *versus* – five percent; H.F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge, 1972), 482, suggest that only 1,528 *libri* were consulted, not 'nearly 2,000', which increases the 'five percent'.

about the law of the classical age.[12] 'There is moreover the probability that some of these texts reached Justinian's compilers in a form which had already been altered to some extent in the immediately post-classical period.'[13] The Commission's amendments are known as 'Interpolations' and much ingenuity has been exercised to date them.[14] Our knowledge of what Tertullian knew is even more restricted, because the *Institutes* of Gaius' do not mention criminal law and Justinian's *Corpus Iuris Civilis*[15] dealt, as the name says, almost entirely with civil law.[16]

3. Tertullian's 'ignorance' of Roman law – or is it ours?

The clincher of Timothy Barnes' argument that Tertullian was not a *iuris-consultus* was twofold: (1) that Tertullian 'never makes this telling point' that 'no specific *lex, senatus consultum* or imperial decree proscribed Christianity as illegal',[17] and (2) that Tertullian did not mention a work where Ulpian listed imperial pronouncements about punishment of Christians.[18] Barnes pronounced Tertullian 'ignorant' of Roman law on both counts.[19] While Christianity was

[12] The classical age of Roman law, its golden period, was from the beginning of the second century to the middle of the third. 'Other writings' include imperial rescripts embodied in various collections of the later empire.

[13] H.F. Jolowicz and B. Nicholas, *Historical Introduction* (1972), 405.

[14] W.W. Buckland, *A Text-book of Roman Law* (1963), 43-4. Justinian said that the amendments were *multa et maxima* (*C. Tanta* 10), as centuries-old texts were adapted to expound existing law.

[15] The *Digest* and three other works commissioned by Justinian have been collectively known as the *Corpus Iuris Civilis* since Denys Godefroi used the phrase for his 1583 edition, to distinguish it from the compilation of Canon Law called *Corpus Juris Canonici*.

[16] For Gaius, Lord Mackenzie, *Studies in Roman Law* (1898), 396; for Justinian, only a small section at the end of the fourth book of the *Digest*, 4.18, and the last title of his *Institutes*, touched on criminal law.

[17] *Tertullian* (1971), 27.

[18] A chapter in the seventh book of Ulpian's *De officio proconsularis*. Unsurprisingly, there is no trace of it in Justinian's *Digest*, because his Commissioners had no interest in now-obsolete laws about persecution of Christians; we know about it only because it was quoted by a Christian writer, Lactantius, early in the fourth century, in his *Divinae institutiones* V 11.19 – an example of how fragmented is our knowledge of criminal law in Tertullian's time.

[19] *Tertullian* (1971), 28. The second point is scarcely fair because, as far as we know, Ulpian's work was not available until 211, more than a decade after Tertullian's main challenge to the irregularity of proceedings against Christians in *Ad nationes* and *Apologeticum* in 197. Of the many attempts to construct a chronology for Tertullian's writings, two of the most recent – Jean-Claude Fredouille, *Tertullien et la conversion de la culture antique*, Collection des Études Augustiniennes, Série Antiquité 47 (Paris, 1972), 487 and T.D. Barnes, *Tertullian* (1971), 55 – agree on dating both *Ad nationes* and *Apologeticum* in 197. Tertullian's only other work about the legality of persecution was an open letter in 212 to Scapula, the Proconsul of Africa from 211-213, but we don't know if Ulpian's *De officio proconsularis* was available to Tertullian then.

illegal – there is no doubt about that – Barnes' first point was that no enactment before 250 AD made it so and that Trajan's advisory rescript to Pliny, *conquirendi non sunt*[20] (not to be sought out), defined the legal position of Christianity until Decius, but didn't proscribe it. 'There is no evidence to prove earlier legislation by the Senate or the emperor.'[21] There may be no extant laws, but Tertullian's point, in his carefully reasoned appeal to the 'leaders of Rome' who met on the Byrsa at Carthage,[22] was that Trajan's rescript ameliorated existing *leges* (Tertullian's word).[23] Would he have jeopardized his credibility by saying that, if his opponents could have responded in ridicule, 'but there were no such laws'?

We do not know what *leges* Tertullian was referring to, but if many if not most of the legal writings which he knew, and his readers knew, have been lost, perhaps 'ignorance' of them is not Tertullian's but ours? Barnes elsewhere accepted that 'it is not clear whether Trajan, in his reply, made a change in the legal position of Christians or not'.[24] In short, we just don't have the legal records as Tertullian knew and used them.

So much for the general position; what about the local situation at Carthage?

4. Roman law at Carthage

Many efforts have been made to understand Tertullian's use of the noun *praescriptio* and its cognate verb *praescribo*, appearing 106 times across twenty-five of his thirty-one extant works.[25] This article looks only at his forty

[20] Pliny, *Epistulae* 10.97.2.

[21] Timothy D. Barnes, 'Legislation against the Christians', *The Journal of Roman Studies* 58 (1968), 32-50, 48. He scrutinized twenty 'scattered and often difficult to evaluate' passages, six of them quoted by Tertullian, attributed to fourteen emperors, and argued that none of them went further than the guidance given by Trajan to Pliny (my footnote 20). In his monograph, *Tertullian* (1971), 27, Barnes added *lex* to the list: 'No specific *lex*, *senatus consultum* or imperial decree proscribed Christianity as illegal.' He disagreed with John A. Crook, *Life and Law of Rome* (London, 1967), 279: 'The equation "Christian = man to be punished" can only have been established by government directive.' After commenting that Nero may have provided a precedent, Crook added: 'This is not enough. There must have been a legal order, a rescript to the urban prefect or something of the sort.'

[22] Most are now agreed that *Apologeticum* was addressed to the 'leaders of Rome' who met on the Byrsa at Carthage and not to the leaders in Rome itself; T.D. Barnes, *Tertullian* (1971), 109.

[23] *Apologeticum* 5.7: *Quales ergo leges istae … quas Traianus ex parte frustrates est vetanda inquiri Christianos*.

[24] 'Legislation against the Christians' (1968), 37.

[25] J.-C. Fredouille, *Tertullien et la conversion* (1972), 196-218, 232-4, counted 106 usages and showed that the words have two meanings in Tertullian's works, (1) forty-two places where the secular meaning 'preface' or 'information given in advance' had acquired the technical value in juridical language of 'prior objection', and (2) sixty-four places where the meaning was 'rule' or 'precept'. He went on to show how Tertullian combined the two meanings into a 'personal

or so uses of these words in the juridical sense of 'objection' to an opponent's claim.[26] Despite the reservations in the first part of this article, we know that *praescriptio* was employed in four different ways in litigation at Rome,[27] but how was it used at Carthage? It is a fair question, because until the third century Rome made no attempt to impose a unified system of law on the diverse peoples of her Empire; until then, Phoenecian and Berber laws and customs inter-related with Roman law at Carthage.[28] Noting that Gaius' *Institutes* do not mention acquiring title to land by *praescriptio*, one commentator surmised '… probably in his day there was no general system, the matter being left to the particular law of each province',[29] and another said more generally, that 'Roman law was in practice probably interpreted in the light of local traditions'.[30]

'Probably' is the key word. 'The literature of the classical period was mostly written from the standpoint of Rome, … Even when the great jurists of the capital have provincial cases in mind, they are representative of the official point of view, which is conservative and Roman.'[31] Furthermore, almost all the works quoted in Justinian's *Digest* were by lawyers who lived in Rome;[32]

semantic neologism' (*néologisme sémantique personnel*) – an example of Tertullian taking a word with a technical meaning and using it in a non-technical sense.

[26] The first to distinguish juridical and non-juridical uses of *praescriptio* in Tertullian's works was Jean-Léon Allie, *L'argument de prescription dans le droit romaine, en apologétique et en théologie dogmatique* (Ottawa, 1940), 48. In 1949, J. Stirnimann identified thirty-nine of Tertullian's uses of *praescriptio* as having juridical meaning: *Die Praescriptio Tertullians* (1949), 83-5. In 1970, Dimitri Michaélidès listed everything previously written on this in *Sacramentum chez Tertullien* (Paris, 1970), 154-62, and supported the traditional view that Tertullian took the word from a judicial background.

[27] For the rest of this paper, the noun and the verb are both encompassed by the one word, *praescriptio*.

[28] Jean-Michel Carrié, 'Developments in provincial and local administration', in A.K. Bowman, P. Garnsey and A. Cameron (eds), *The Cambridge Ancient History*, 2nd ed, vol. XII, *The Crisis of Empire A.D. 193-337* (Cambridge, 2005), 269-309; he dated Carthage's transition from 'a Latin colony to a colony under Italic law' at c. 208 (271). Caroline Humfrees broadly concurred with his conclusions, but saw provincial cities increasingly choosing to use Roman law, rather than having it imposed on them, after Caracalla's *Constitutio Antoniniana* granted Roman citizenship to almost all free inhabitants of the Roman Empire in 212: 'Law's Empire: Roman Universalism and Legal Practice', in Paul J. du Plessis (ed.), *New Frontiers, Law and Society in the Roman World* (Edinburgh, 2013), 77-90.

[29] F. Zulueta, *The Institutes of Gaius* (1953), II 70-1.

[30] Greg Woolf, *Becoming Roman: the Origins of Provincial Civilization in Gaul* (Cambridge, 1998), 67, illustrated by one of Trajan's letters to Pliny, who had written for advice because several cities claimed they were exempt from the usual laws on bankruptcy. Trajan replied: 'It depends on the charter of each city. If they have such a privilege, uphold it, but I am making no general rule to the detriment of private creditors.' Pliny, *Epistulae* 10.108-9.

[31] H.F. Jolowicz and B. Nicholas, *Historical Introduction* (1972), 405.

[32] Paul Monceaux, *Histoire littéraire de l'Afrique chrétienne depuis les origines jusqu'à l'invasion arabe* (Paris, 1901), II 181.

Gaius does not mention Carthage and the *Digest* refers to it only once.[33] Even if Tertullian lived in Rome for a while – doubted by some[34] – he was brought up in Carthage,[35] which had its own law school,[36] yet we know almost nothing about regional variations of Roman law (if any) at Carthage. With two caveats, the remainder of this article examines four scholarly views about Tertullian's use of *praescriptio*, and argues that three of them can be valid only if the word was used differently at Carthage from the way it was used at Rome. The first caveat acknowledges that Tertullian transposed the judicial use of *praescriptiones* into theological ones, which 'oscillate between various shades of meaning, according to the context'.[37] Jean-Claude Fredouille remarked on the irony that the word chosen by Tertullian to silence heretics 'simply, quickly and effectively' has led 'the learned … to a disconcerting variety of conclusions'.[38] The second caveat is that neither the number of *praescriptiones* used by Tertullian – opinion has ranged from one to ten[39] – nor the adjectives he added to

[33] *Digest* 32.11. *pr*.

[34] Johannes Quasten summarized the pre-Barnes majority view that Tertullian lived in Rome, although he provided no conjecture as to dates: *Patrology* (Utrecht and Brussels, 1963), II 246; following T.D. Barnes' view that *gemmarum quoque nobilitatem uidemus Romae* (*De cultu feminarum* 1.7.2) was not intended to be autobiographical (*Tertullian* [1971], 245), recent scholarship has largely ignored the question.

[35] It is widely accepted that Africa Proconsularis was his *patria* or homeland, although he himself never dwelt on autobiographical details and no extant contemporary writer mentions him: Geoffrey D. Dunn, *Tertullian* (London, 2004), 4.

[36] Franz Peter Bremer, *Die Rechtslehrer und Rechtsschulen im römischen Kaiserreich* (Berlin, 1868), 571; Berhhard Kübler, *Geschichte des römischen Rechts* (Leipzig, 1925), 258.

[37] '… oscillent, selon les contextes, entre diverses nuances', so J.-C. Fredouille, *Tertullien et la conversion* (1972), 218. Similarly, 'Tertullian … keeps of the Roman procedure only the framework, and the general idea of prescription, for he transposes this juridical expedient into the theological domain, and gives it a quite different meaning' ('Tertullien … ne garde de la procédure romaine que le cadre et l'idée générale de prescription, car il transpose cet expédient juridique dans la domaine théologique et lui donne un contenu tout différent' [own trans.]). R.F. Refoulé in *Tertullien: Traité de la prescription contre les hérétiques*, edited and translated by R.F. Refoulé and P. De Labriolle (Paris, 1957), 24. Likewise J. Stirnimann, *Die Praescriptio Tertullians* (1949), 93: 'These examples demonstrate sufficiently that Tertullian takes over the *praescriptio* of the Roman lawsuit only in its outer form. He fills the *praescriptio* with a completely new content and puts it in the service of the apologism. He transfers the *praescriptio* of the lawsuit into the language of theology. The juridical *praescriptio* becomes a theological *praescriptio* in the hand of Tertullian' ('Diese Beispiele legen zur Genüge dar, dass Tertullian die Präskription des römischen Prozesses nur in ihrer äussern Form übernimmt. Er erfüllt die Präskription mit ganz neuem Inhalt und stellt sie in den Dienst der Apologetik. Er transponiert die Präskription des Prozesses in die Sprache der Theologie. Die juristische Präskription wird in der Hand Tertullians eine theologische Präskription' [own trans.]).

[38] 'Ironie … son avantage n'est-il pas, aux yeux de Tertullien, sa simplicité, sa brièveté, son efficacité? … stimulé la perspicacité des érudites … tant la diversité de leurs conclusions est déconcertante', *Tertullien et la Conversion* (1972), 195.

[39] R.F. Refoulé, *Tertullien: Traité de la prescription* (1957), 25-6, cited Mgr Freppel, P. Monceaux, P. de Labriolle and G. Bardy as finding one *prescriptio*; D. van den Eynde as finding two; G. Esser, K. Adam, A. d'Alès, B. Altaner and P. Battifol as finding three (the most popular view

them,[40] nor the *praescriptio longi temporis*, which he didn't mention by name but some scholars believe he had in mind,[41] affect the remainder of this article.

5. Four *praescriptiones* at Rome

5.1. *A plaintiff's* praescriptio *in formulary procedure*

Ordinary litigation at Rome in Tertullian's time was in two stages, known as the 'formulary procedure',[42] because a praetor prepared a written *formula*, outlining the issues, and forwarded it to a *iudex*, who decided the case.[43] A plaintiff could ask the praetor to enter a *praescriptio pro actore* because, as the name says, it was written at the beginning of the *formula*.[44] This kept the plaintiff's options open. For example, if a creditor was suing for money payable

until J. Stirnimann, *Die Praescriptio Tertullians* [1949], 50-4, 127-34, established two); U. Hüntemann as finding four and J.L. Aillie as finding up to ten. Refoulé came down in favour of two (30-1), but didn't acknowledge Stirnimann's analysis which established this, although he did commend Stirnimann for making 'un progrès décisif à l'interprétation de cet ouvrage' (8). Stirnimann's work was taken forward by André Sergène, 'Tertullien "de praescriptione haereticorum" XXXVII, 4 et la "longi temporis praescriptio"', in *Études offertes à Jean Macqueron* (Aix-en-Provence, 1970), 605-12. The two *praescriptiones* which they identified were that heretics have no right to use scripture (*De praescriptione haereticorum* 1-15) and that only the universal Catholic Church has communion with the Apostolic Church (*Ibid*. 21).

[40] He added only two adjectives to *praescriptio* in its judicial sense – *praescriptio novitatis* (*Adversus Marcionem* 1.1.6-7) and *originis praescriptionem* (*Ad nationes* 2.12.37-8). The priority of truth over error was a main part of his general argument in his antiheretical treatises, but he did not rely only on this technical point and wrote detailed refutations of the individual doctrines of Hermogenes, Marcion and Praxeas.

[41] Tertullian did not use the phrase *praescriptio longi temporis* but many have seen it in *De praescriptione haereticorum* 37, where he stressed the priority of the Church's possession of Scripture. In both formulary and cognition procedure (5.1 and 5.4 below), a person with uninterrupted possession of property over a defined period, who fulfilled other conditions, could ask to be given occupancy rights or even ownership; this was called *praescriptio longi temporis*, even when invoked by a defendant in a formula. Tertullian's use of it (without naming it) was first suggested in 1906 by Joseph Partsch, *Die* longi temporis praescriptio *im klassischen römischen Rechte* (Leipzig, 1906), 76, 109; he was followed by Umberto Moricca, *Storia della letteratura latina christiana* (Turin, 1923), I, 195-6. The idea was fully explored by J. Stirnimann, *Die Praescriptio Tertullians* (1949), 28-36, 99-126, who concluded that Tertullian 'pointed to it rather than used it' (126), because Stirnimann thought it implied the Church's title to Scripture was acquired rather than inherited, and by R.F. Refoulé, *Tertullien: Traité de la prescription* (1957), 32-6. A balanced antidote to Stirnimann's concern is Henry Chadwick's review of Stirnimann's monograph in *The JTS* n.s. 1 (1950), 210-1.

[42] Summarized and applied to Tertullian by J. Stirnimann, *Die Praescriptio Tertullians* (1949), 11-27, and by R.F. Refoulé, *Tertullien: Traité de la prescription* (1957), 20-4, both citing authorities on Roman law and both identifying Tertullian's *praescriptio* as taken from the cognition procedure (5.4 below).

[43] For the role of the praetor and the *iudex*, J.A. Crook, *Law and Life of Rome* (1967), 73-83.

[44] Gaius, *Institutes* 4.132.

by instalments, he might enter a *praescriptio* that this case was about only the overdue instalment, and not the whole debt.[45]

Herbert Bindley in 1893[46] and James Morgan in 1928[47] believed that Tertullian based his *praescriptio* on this.[48] However, at Rome it was available only to plaintiffs who, by definition, wanted their case to proceed, safeguarded by their *praescriptio*. Tertullian's *praescriptio*, by contrast, was intended to paralyse the heretics' claim without their being heard. Unless the Courts at Carthage used *praescriptio pro actore* differently from the Courts at Rome – and that we don't know – it could not have been Tertullian's source.

5.2. *A defendant's* praescriptio *in formulary procedure*

A defendant could ask the praetor to incorporate a preliminary plea; to continue the example of a suit for money, a debtor might admit the loan but plead a subsequent agreement to extend the repayment date. This was originally called *praescriptio pro reo* but by Tertullian's time it had been renamed at Rome as *exceptio*.[49] Dimitri Michaélidès in 1969[50] and Peter Jones in 1973 believed that Tertullian used *praescriptio* 'in the older sense of the term'.[51] That

[45] An example given by Gaius, *Institutes* 4.131.

[46] Thomas Herbert Bindley, *Tertulliani*, *De Praescriptione Haereticorum: Ad Martyras: Ad Scapulam* (Oxford, 1893), 4.

[47] James Morgan, *The Importance of Tertullian in the Development of Christian Dogma* (London, 1928), 28.

[48] They said that Tertullian saw the Church as plaintiff and the heretics as defendants; most scholars see it the other way round. J.-C. Fredouille said that he found it *difficile* to see Tertullian's *praescriptio* as the *praescriptio pro reo* of the formulary procedure, but 'if one insists absolutely on again finding in this treatise the circumstances of a law-suit, it would be necessary to concede that Tertullian is taking part … not as the defence counsel, but rather as the prosecutor' ('si l'on tient absolument à retrouver dans ce traité les conditions d'une action en justice, il faudrait admettre que Tertullien fait figure … non pas de défendeur, mais bien de demandeur' [own trans.]), *Tertullien et la Conversion* (1972), 224-5.

[49] Gaius, *Institutes* 4.133: 'In our days, as already stated, all the *praescriptiones* are introduced by the plaintiff; formerly, some were introduced by the defendant' (*His temporibus, omnes praescriptiones ab actore profisciscuntur*. *Olim autem quaedam et pro reo opponebantur* [own trans.]) Lord Mackenzie, *Studies in Roman Law* (1898), 365. It was entered at the end of the *formula*; the *iudex* had to look at the merits of the plaintiff's case before deciding whether the defendant's *objectio* answered it. Tertullian used *exceptio* only once, to make a different point, saying that 'there is no *exceptio* which protects those people who don't know the Lord' (*Cum etiam ignorantes dominum nulla exceptio tueatur ad poenam*: *De paenitentia* 5). It was therefore not a synonym for *praescriptio* for Tertullian.

[50] *Foi, Écritures et Tradition, Les 'praescriptiones' chez Tertullien* (Paris, 1969).

[51] Peter W. Jones, *The Concept of Community in Tertullian's Writings, in the Light of Contemporary, Legal, Philosophical and Literary Influences*, Ph.D. thesis presented to McGill University (Montreal, 1973); the quotation is from Part 1, end of Chapter 4. The problem with this understanding of *praescriptio* is that a defendant's *praescriptio* in this sense did not deny the accuracy of the plaintiff's claim but introduced a new factor, such as the example given about the

can be correct only if the Courts at Carthage were more conservative and traditional than those at Rome, still using *praescriptio* although Rome had renamed it *exceptio*. Was that so? We don't know.

5.3. *A defendant's* praescriptio *dealt with by a praetor*

If a defendant's objection was fundamental to the case, for example that the Court had no jurisdiction, the praetor didn't append it to a *formula* and send it to a *iudex*, but ruled on the objection himself. This was known at Rome as *praescriptio fori*.[52] Philip Schaff in 1884 identified this as Tertullian's source;[53] Joseph Stirnimann in 1949 said that 'perhaps' Tertullian employed it in this sense.[54] Was it used in this way at Carthage while Tertullian was there? We don't know.

5.4. Praescriptio *in cognition procedure*

By Tertullian's time,[55] the rigidity of the formulary procedure had made it increasingly unfit for purpose, so in a typically Roman way of reforming the law, a new and more flexible procedure, *cognitio extraordinaria*, was introduced alongside the old, letting the old die gradually away. It 'assumed different forms at different periods and in different parts of the empire'.[56] In it, a single judicial officer, not a praetor, dealt with the whole case and *praescriptio* (not *exceptio*) was used for every kind of defence.[57]

suit for money, which set aside the usual outcome of the claim. As mentioned at 5.1, Tertullian's *praescriptio* admitted nothing and denied heretics the right even to be heard.

[52] 'A formal objection to a claim against a person based on the tribunal's lack of jurisdiction over the person objecting.' Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford, 2009), taken from *praescriptio fori* in the 2011 on-line version.

[53] '… before the merits of the case are discussed, showing *in limine* that the plaintiff ought not to be heard', *History of the Church* (Edinburgh, 1884), II 830.

[54] *Die Praescriptio Tertullians* (1949), 19, 26. He accepted that Roman lawyers used the phrase but contended at 19 that they did so in the cognition procedure (5.4 below). However at 26 he said that 'perhaps' Tertullian used it as a praetor would in making a judgement, although he believed that the praetor's role had disappeared in the provinces by Tertullian's time.

[55] William Turpin, *Formula, cognitio, and proceedings extra ordinem*, <http://local.droit.ulg.ac.be/sa/rida/file/1999/TURPIN.pdf> (accessed on August 31, 2015).

[56] H.F. Jolowicz and B. Nicholas, *Historical Introduction* (1972), 406-8. The two processes existed side by side for a long time. The cognition procedure made quicker progress in the provinces than in conservative Rome. Jolowitz and Nicholas suggested two reasons for this: (1) provincial governors were permitted more initiative than the praetors at Rome, and (2) they couldn't find enough suitable *iudices* – it was an unpaid appointment (408). The formulary procedure remained available until Diocletian enacted in 294 that all cases should be heard from beginning to end by one judicial officer, but it remained in use by habit until expressly abolished by the sons of Constantine in 342.

[57] *Digest* 44.1. C.7.40. 8.35.

In 1906, J. Partsch identified this as Tertullians's source;[58] Joseph Stirnimann in 1949 and R.F. Refoulé in 1957 agreed with him.[59] If they are correct, the Courts at Carthage were more progressive than those at Rome, using the cognition procedure while Rome kept the formulary procedure as the norm until the middle of the third century; were they? We don't know.

6. Conclusion

This article suggests that the contemporary significance at Carthage of some of the legal words used by Tertullian is not available to us, and that we should allow for this in our understanding of his works.

[58] *Die* longi temporis praescriptio *im klassischen römischen Rechte* (1906), 71.

[59] J. Stirnimann, *Die Praescriptio Tertullians* (1949), 1, 20-7, 86-7, 96; R.F. Refoulé, *Tertullien: Traité de la prescription* (1957), 23-4, although Refoulé disagreed with Partsch on which *praescriptio* Tertullian used.

Volume 1

STUDIA PATRISTICA LXXV

STUDIA PATRISTICA

PLATONISM AND THE FATHERS

MAXIMUS CONFESSOR

Volume 2

STUDIA PATRISTICA LXXVI

EL PLATONISMO EN LOS PADRES DE LA IGLESIA
(ed. Rubén Pereto Rivas)

Volume 3

STUDIA PATRISTICA LXXVII

BECOMING CHRISTIAN IN THE LATE ANTIQUE WEST
(3rd-6th CENTURIES)

(ed. Ariane Bodin, Camille Gerzaguet and Matthieu Pignot)

Volume 4

STUDIA PATRISTICA LXXVIII

LITERATURE, RHETORIC, AND EXEGESE IN SYRIAC VERSE

(ed. Jeffrey Wickes and Kristian S. Heal)

Volume 5
STUDIA PATRISTICA LXXIX

CLEMENT OF ALEXANDRIA
(ed. Piotr Ashwin-Siejkowski)

Volume 6

STUDIA PATRISTICA LXXX

THE CLASSICAL OR CHRISTIAN LACTANTIUS

(ed. Oliver Nicholson)

Volume 7

STUDIA PATRISTICA LXXXI

HEALTH, MEDICINE, AND CHRISTIANITY IN LATE ANTIQUITY

(ed. Jared Secord, Heidi Marx-Wolf and Christoph Markschies)

METHODOLOGICAL CONSIDERATIONS

CHRISTIANS, DOCTORS, AND MEDICAL KNOWLEDGE

CHRISTIAN PERSPECTIVES ON DEATH, DISABILITY, AND ILLNESS

CONCEPTIONS OF VIRGINITY

Volume 8

STUDIA PATRISTICA LXXXII

DEMONS

(ed. Sophie Lunn-Rockliffe)

Volume 9

STUDIA PATRISTICA LXXXIII

EMOTIONS

(ed. Yannis Papadogiannakis)

Volume 10

STUDIA PATRISTICA LXXXIV

EVAGRIUS BETWEEN ORIGEN, THE CAPPADOCIANS, AND NEOPLATONISM

(ed. Ilaria Ramelli, with the collaboration of Kevin Corrigan, Giulio Maspero and Monica Tobon)

Volume 11

STUDIA PATRISTICA LXXXV

AMBROSE OF MILAN

Volume 12

STUDIA PATRISTICA LXXXVI

AUGUSTINE ON *CONSCIENTIA*

(ed. Diana Stanciu)

Volume 13

STUDIA PATRISTICA LXXXVII

AUGUSTINE IN LATE MEDIEVAL PHILOSOPHY AND THEOLOGY

(ed. John T. Slotemaker and Jeffrey C. Witt)

Volume 14

STUDIA PATRISTICA LXXXVIII

LATREIA AND IDOLATRY:
AUGUSTINE AND THE QUEST FOR RIGHT RELATIONSHIP
(ed. Paul Camacho and Veronica Roberts)

Volume 15

STUDIA PATRISTICA LXXXIX

THE FOUNTAIN AND THE FLOOD: MAXIMUS THE CONFESSOR AND PHILOSOPHICAL ENQUIRY

(ed. Sotiris Mitralexis)

Volume 16

STUDIA PATRISTICA XC

CHRIST AS ONTOLOGICAL PARADIGM IN EARLY BYZANTINE THOUGHT

(ed. Marcin Podbielski)

Volume 17

STUDIA PATRISTICA XCI

BIBLICA

PHILOSOPHICA, THEOLOGICA, ETHICA

HAGIOGRAPHICA

ASCETICA

Volume 18

STUDIA PATRISTICA XCII

LITURGICA AND TRACTATUS SYMBOLI

ORIENTALIA

CRITICA ET PHILOLOGICA

HISTORICA

Volume 19

STUDIA PATRISTICA XCIII

THE FIRST TWO CENTURIES

APOCRYPHA AND GNOSTICA

Volume 20

STUDIA PATRISTICA XCIV

FROM TERTULLIAN TO TYCONIUS

Volume 21

STUDIA PATRISTICA XCV

THE FOURTH CENTURY

CAPPADOCIAN WRITERS

Volume 22
STUDIA PATRISTICA XCVI

THE SECOND HALF OF THE FOURTH CENTURY

NACHLEBEN

Volume 24
STUDIA PATRISTICA XCVIII

ST AUGUSTINE AND HIS OPPONENTS