CHAPTER 10

Reliance in the Face of Death: Considerations on Roman Economy and *Fideicommissa*

Ulrike Babusiaux

Inheritances and legacies were a major source of income in ancient Rome.* In fact, the economic relevance of the law of succession was not limited to the rather static and once in a lifetime takeover of the father's property. Rather, acquisition due to death took place permanently and by virtue of the social interdependencies of the Roman upper class and their clientele.[1] Roman inheritance law was thus an important factor for acquiring ownership and accumulating wealth. This function becomes apparent in the topical complaint in Latin literature about *captatores* ("legacy hunters") who obtain the favour of a rich and childless man in order to be considered in his will.[2]

So far, the law of succession has been rather neglected in the discussion of the legal framework for the economic development of the Roman Empire.[3] This omission is astonishing in view of the quantitative and qualitative significance of inheritance law in the Justinian tradition. This disregard can be partly explained by the technical complexity of Roman inheritance law.[4] The difficulties stem from the fact that the Roman law of succession is drawn from various, sometimes contradictory, legal sources. This multitude is the result of sequential historical "layers of law" that overlap to form—as Fritz Schulz

* Many thanks to José Luis Alonso for his comments and to Anna Elisa Stauffer for her linguistic help. All remaining errors are mine.

1 On the economic importance of inheritances and legacies in Rome, see K. Verboven, *The Economy of Friends. Economic Aspects of Amicitia and Patronage in the Late Republic* (Brussels 2002), 183–201; on the historiography on the question, see R. Swedberg, 'The case for an economic sociology of law', *Theory and Society* 32 (2003), 1–37.

2 On *captatores* and *captatio*, see E. Champlin, *Final Judgements. Duty and Emotion in Roman Wills 250 B.C.–A.D. 250* (Berkeley 1991), 87–102; Chr. Paulus, *Idee der postmortalen Persönlichkeit* (Berlin 1992), 246–251; Verboven 2002, op. cit. (n. 1), 196–199.

3 It would also be interesting to consider the role of the fisc in this respect; on some aspects of fiscal evasion, see U. Babusiaux, 'Il valore della terra e il *fideicommissum familiae relictum*. Una configurazione giuridica motivata da fattori economici?', in C. Lorenzi and M. Navarra (eds.), *Atti dell'Accademia Romanistica Costantiniana XXII. Questioni della terra. Società. Economia. Normazioni. Prassi* (Perugia 2017), 405–435.

4 See also D. Johnston, *The Roman Law of Trusts* (Oxford 1988), vii.

aptly observed—"a labyrinthine law".[5] In fact, starting from the traditional *ius civile* of the city-state of Rome, the *praetor* as judicial magistrate of the Roman Republic developed a complementary regime of legal remedies for and against heirs, before the constitutions of the Roman emperors added further aspects and arguments to the existing layers of the republican law.[6] Under the empire, all these strata or layers coexisted and it was up to the deciding institution or jurist to combine, adapt or balance the different prescriptions for the specific legal question of a case.

From a historical point of view, these legal divergences may be used for the analysis of social, political, and economic change. In fact, due to the importance of the law of inheritance for Roman society, changes within the law of succession might indicate transformations occurring in society, politics and economy.[7] Augustus, who allowed the enforcement of non-formal fideicommissa ("trusts") before imperial courts, initiated the most fundamental change of the law of succession.[8] This innovation stood in clear contradiction to the traditional civil (*ius civile*) and praetorian law (*ius praetorium*), both of which prescribed formal words in a ritually established will in order to institute an heir or to defer a bequest. It can be seen as a typical feature of the Janus-headed character of the Principate that the testamentary system of republican origin was not abrogated by the *princeps* but continued to coexist alongside the imperial innovation of *fideicommissa*.[9]

Although formal wills were never abolished, it is equally clear that the permanent competition with informal *fideicommissa* gradually relaxed the severity of the traditional law for wills. While the political implications of the Augustan reform have often been studied,[10] their economic impact and back-

5 F. Schulz, *Classical Roman Law* (Oxford 1951), 204: "The labyrinthine law cries out for historical analysis; available materials are unusually rich; all factors in Roman legal evolution are clearly visible, in particular the strength of Roman jurisprudence as well as its limits and shortcomings."

6 For a recent overview, see U. Babusiaux, *Wege zur Rechtsgeschichte. Römisches Erbrecht* (Köln, Weimar, Wien 2015), 266–273.

7 S. Ogilvie, 'Whatever is, is right? Economic institutions in pre-industrial Europe', *Economic History Review* 60 (2007), 649–684, 668 rightly observes that institutions are made for many purposes.

8 Iust. *Inst*. 2.23 and 2.25, on which see Johnston 1988, op. cit. (n. 4), 25–34. For the use of the English word "trust" to translate *fideicommissa*, see Johnston 1988, op. cit. (n. 4), 1f.

9 On the post-classical development of *fideicommissa*, see Johnston 1988, op. cit. (n. 4), 213–221.

10 M. Kaser and K. Hackl, *Römisches Zivilprozessrecht* § 69.III.1 (Munich 1996, 2nd ed.), 462 f.; Johnston 1988, op. cit. (n. 4), 277; at the latest M. Peachin, 'Die neue Gerichtsbarkeit der Konsuln und Prätoren in der frühen Kaiserzeit', in K. Wojciech and P. Eich (eds.), *Die Ver-*

ground have rarely been examined. It seems worthwhile, therefore, to analyse the main differences between *fideicommissa* and formal wills in order to determine the possible economic implications of this reform. For this purpose, I will first provide an overview of the main substantial differences between "trusts" and formal testaments (I), and then compare the procedural specificities of both (II). The last part of the paper will try to correlate the enforceability of *fideicommissa* with the economic development of imperial Rome (III).

1 Differences between the Traditional Law of Wills and *Fideicommissa*

A study of the essential differences between testamentary law in *ius civile* and *ius praetorium* on the one hand and the imperial *fideicommissa* on the other hand must begin with the *Institutiones* of Gaius (around 160 CE).[11] In fact, Gaius' work gives a faithful account of the Roman imperial law, whereas the Justinianic sources deliberately equate formal bequests (*legata*) and *fideicommissa*.[12] Despite the omissions and simplifications due to its didactic intention, Gaius shows that the differences between the two kinds of testamentary disposition were subject to change.[13]

1.1 *The Catalogue of Differences according to Gaius*

With regard to pecuniary *fideicommissa*,[14] Gaius mentions the following essential differences in comparison to traditional wills. A *fideicommissum* allows appointing a temporary heir, that is, to request the formally instituted heir to pass over the inheritance to the beneficiary of a *fideicommissum*.[15] Moreover, a

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waltung der Stadt Rom in der Hohen Kaiserzeit. Formen der Kommunikation, Interaktion und Vernetzung (Paderborn 2018), 79–94, esp. 93 f.

11 On Gaius, see U. Babusiaux and D. Mantovani (eds.), *The Institutes of Gaius. Adventures of a Bestseller. Transmission, Use and Transformation of the Text* (Pavia 2019).

12 Schulz 1951, op. cit. (n. 5), 315 nr. 552; Johnston 1988, op. cit. (n. 4), 256–271; on *Dig.* 30.1 Ulp. 67 *ad* (*ed.*), see also U. Babusiaux, 'Zum Rechtsschutz von Fideikommissen im Prinzipat', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 136 (2019), 140–213, 203–205.

13 Cf. Gai. 2.268 in comparison Gai. 2.284; the text of Gaius follows U. Manthe (ed.), *Gaius Institutiones* (Darmstadt 2004, 2nd ed.).

14 This excludes the *fideicommissa* granting freedom to slaves, as they are subject to special rules. For a recent account, see F.M. Silla, *Libertates fideicommissae. Profili processuali* (Padua 2008).

15 Gai. 2.249–251. For an application, see also Gai. 2.184.

trust may be given in favour of persons incapable of receiving under civil law.[16] In addition, *fideicommissa* offer the possibility of leaving an object that was not owned by the deceased, which implies the obligation of the appointed person to acquire the property.[17]

In contrast to legacies, *fideicommissa* can be suspended until the time of death of the heir.[18] In the case of a universal *fideicommissum* it is thus permitted to institute a provisional heir according to *ius civile* and a final "heir" via *fideicommissum*.[19] In the same way, it is possible to charge not only an heir (as in the case of the legacy) but also any other person who has received an advantage from the will. Hence, there can be beneficiaries of *fideicommissa* at the expense of heirs, legatees and (primary) *fideicommissarii*.[20] Furthermore, *fideicommissa* can be imposed on an intestate successor, that is, even without an actual and valid will.[21] Finally, they can be requested in an informal supplement to a will (codicil) without requiring formal confirmation,[22] and they can be written in Greek, whereas bequests under Roman civil law were only effective if written in Latin.[23] This, by no means exhaustive, list shows—as Gaius himself observes—that the scope of *fideicommissa* is in many respects wider than that of legacies.[24] This assessment proves even more significant if we consider the main characteristics of a traditional Roman will.

1.2 *Main Characteristics of a Traditional Will in Roman Civil Law*

Wills under *ius civile* and *ius praetorium* were formal acts, subject to specific external and internal formal requirements. For the evolved *ius civile* this included the performance of a *mancipatio* through which the testator made the written will public (*nuncupatio*) and thereby valid.[25] *Ius praetorium* still required the written act and corresponding seals of the witnesses.[26] Also the

16 Namely *Latini Iuniani* (cf. Gai. 2.275) and women, as far as they are excluded by the *lex Voconia* (cf. Gai. 2.274). Note that slaves can be appointed as heirs and receive bequests as legatees insofar as they represent their masters.

17 Gai. 2.261–262.

18 Gai. 2.269.

19 Gai. 2.277.

20 Gai. 2.271.

21 Gai. 2.270.

22 Gai. 2.270a; see also Gai. 2.273.

23 Gai. 2.281.

24 Gai. 2.289.

25 Gai. 2.101–102 *testamentum per aes et libram*; on the ritual cf. Gai. 2.104.

26 Gai. 2.119; on the evolution of the will of civil and praetorian law, see Th. Rüfner, 'Testamentary formalities in Roman law', in K.G.C. Reid and M.J. De Waal and R. Zimmermann (eds.), *Testamentary Formalities* (Oxford 2011), 1–26.

internal formal requirements imposed limitations.[27] Some of the most important were the following: The testator had to be legally capable of making a will; he had to be a Roman citizen, free from his father's power (*sui iuris*) and of age; women, in addition, needed the consent of their legal guardian.[28] Both the appointment of heirs and the attribution of bequests had to be carried out in predefined words and they had to be phrased as orders.[29] Thus, the heir had to be instructed to be heir (*heres esto* = 'shall be heir').[30] The same is true for bequests that required different wordings, depending on the intended effects. Moreover, bequests were only valid if the appointment of an heir (*institutio heredis*) was in force,[31] as the institution of an heir constituted the very essence of the testament (*caput testamenti*).[32] The testator could appoint substitutional heirs in the event that the first heir decided not to take up the inheritance or died before the opening of the will;[33] he could also appoint a replacement heir for underage children in case they died before the age of majority.[34]

In principle, the testator was free to appoint family members or even so-called "strangers" (*extranei*) as heirs, that is, persons from outside the family. However, the will was only valid if sons in his power (*filii familias*) had been disinherited or appointed as heirs by name, i.e., individually; other descendants could be disinherited in a blanket manner (*inter ceteros*) but still needed to be considered in the father's or grandfather's testament.[35] The *pater familias* also had to disinherit children born after his death (*postumi*) if he did not want to risk the invalidity of the will at the birth of the posthumous offspring.[36] The praetorian law extended these rules to emancipated children.[37]

Other limitations derived from the unwritten rules of the Roman law of succession. One important principle was the strict separation of testamentary succession and intestate succession.[38] It meant that if at least one testamentary heir was willing to take up the inheritance, the law of intestacy could not

27 On the adaptations of *praetorian law*, see inter alia Gai. 2.147–148.
28 Gai. 2.122.
29 Gai. 2.115–116 speaks about *institutio heredis sollemni more facta sit*.
30 Cf. Gai. 2.116–117.
31 Gai. 2.232.
32 Gai. 2.229.
33 *Substitutio vulgaris*, on which see Gai. 2.176–178.
34 *Substitutio pupillaris*, on which see Gai. 2.179–183.
35 Gai. 2.123–129.
36 Gai. 2.130–134.
37 Gai. 2.135.
38 The rule is transmitted in *Dig*. 50.17.7 Pomp. *3 ad Sab.*; on the text (which deals with the *testamentum militis*), see Babusiaux 2015, op. cit. (n. 6), 84 f.

apply.[39] According to another basic rule, universal succession could not be limited in time.[40] Therefore, a temporal division of the inheritance into a provisional and a final succession ("Vor- und Nacherbfolge") was impossible under civil and praetorian law. Furthermore, due to the strong rituality of the Roman civil law, the revocation of the will required establishing a new one.[41] Even if the testator burned the deed or erased the disposition, the civil testament validated by *mancipatio* remained in force.[42] Furthermore, penal legacies were invalid[43] and the testator could not leave bequests to unspecified persons.[44]

These peculiarities show that civil and praetorian law regarded wills as a means of structuring family succession.[45] They pushed the testator to decide which children of his he wanted to appoint as heir(s) and which of them he wanted to exclude from the estate. Due to the ritual and the solemn form of the will, the planning was designed to be permanent and difficult to change. The rules for posthumous children and the possibility of appointing a substitute heir allowed to react to births and deaths but could only prevent the will from being invalid if the testator had considered all eventualities. In the event of the testament's invalidity, intestacy law gave full right to family succession.[46] All this indicates that the will was one way to organise the family's estate, but that, in any event, the family would get the estate.[47] Testamentary formalities

39 See *Dig*. 50.16.64 Paul. 67 *ad* (*ed.*); on the shares of the testamentary heirs who are unwilling to take over the inheritance are acquired by this heir via accretion, see *Dig*. 29.2.53.1 Gai. 14 *ad leg. Iul. et Pap*.

40 The rule is called *semel heres, semper heres*, on which see *Dig*. 28.5.34 Pap. 1 *def*. with Babusiaux 2015, op. cit. (n. 6), 149 f. Exceptions are allowed for the *testamentum militis*, cf. *Dig*. 29.1.15.4 Ulp. 45 *ad ed*.; see also B. Nicholson, *An Introduction to Roman Law* (Oxford 1962), 241.

41 Gai. 2.144–145.

42 Gai. 2.151–151a.

43 Gai. 2.235.

44 Gai. 2.238; see also Gai. 2.244 f.

45 Chr. Paulus, 'Die Verrechtlichung der Familienbeziehungen in der Zeit der ausgehenden Republik und ihr Einfluß auf die Testierfreiheit', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 111 (1994), 425–435.

46 First the children and other descendants of the deceased are entitled to take up the inheritance; praetorian law equates emancipated children to children *in patria potestate* and allows considering women's cognates as entitled to taking the estate too. In the absence of descendants, the closest relative in the male line, the *proximus agnatus*, is the intestate heir. In the absence of any legitimate heir, relatives by blood (*cognati*) and husbands and spouses can claim the estate; see Nicholson 1962, op. cit. (n. 40), 246–250.

47 *Dig*. 28.2.11 Paul. 2 *ad Sab*., on which see A. Wacke, 'Erbrechtliche Sukzession als Persönlichkeitsfortsetzung? Personelle Identifikation mit dem Verstorbenen—oder Rollenverschiedenheit von Nachlassinhaber und Erben. Rechtsgeschäftliche Abwicklung versus

thus intended to guide the testator's planning and to preserve the interests of all (namely male) family members.

1.3 *Reliance as the Core of* Fideicommissa

The reason for the disparate configuration of *fideicommissa* lies in their origin outside the legal sphere. In fact, *fideicommissa* sanction the legitimate expectations that the deceased invested in his heir or any other person who profited from the inheritance. In this respect, *fideicommissa* form a kind of pact between the testator and the "trustee". On one side, the deceased leaves the inheritance or part of it to the trustee who is on the other side and promises to pass it over entirely or partially to a third person, the beneficiary.[48] Thus, *fidei committere* is "to hand over to somebody's trustfulness".

Fides in the sense of unilateral faith, reliance, trust, and confidence applies to other relations that are characterised by a one-sided position of power where the strong party is bound by its loyalty (*fides*) to the weak. Illustrations of this unilateral reliance (*fides*) are the *deditio in fidem* of a vanquished foe to his Roman victor, the *fides patroni* of the manumitting slave-owner for his former slave (*libertus*) and the *fides tutoris* expected from the guardian for minors.[49] In all these situations, *fides* derives from an effective bearing of power over a person or a piece of property. The same idea applies to *fideicommissa*, since the trust was only valid if the trustee had actually acquired from the estate.[50] This also explains why intestate heirs who had benefited from the inheritance had also to comply with *fideicommissa*.[51]

These considerations show that *fideicommissa* added a new dimension to the Roman law of succession. In contrast to the *ius civile* and *ius praetorium*, the imperial law did not defend the interests of the family but focussed on the invested trust (*fides*) and the testator's volition.[52] This new scope also explains

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Konfusion', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 123 (2006), 197–247, esp. 210–216.

48 The very detailed rules of the *Senatus consultum Trebellianum* and the *Senatus consultum Pegasianum* limiting the obligation of the trustee in case of a universal *fideicommissum* will not be dealt with here; for a recent account, see Babusiaux 2019, op. cit. (n. 12), 167–185.

49 The classical account is still L. Lombardi, *Dalla 'fides' alla 'bona fides'* (Milano 1961) esp. 47–104.

50 See *Dig*. 31.70pr. Pap. 20 *quaest*., on which see Johnston 1988, op. cit. (n. 4), 19; U. Babusiaux, *Papinians Quaestiones. Zur rhetorischen Methode eines spätklassischen Juristen* (Munich 2011), 41–44, 200 f.; *Dig*. 30.78 Ulp. 8 *disp*.

51 See Gai. 2.270; *Dig*. 29.7.8.1 Paul. l. *sing. de iur. cod*., on both, see Babusiaux 2015, op. cit. (n. 6), 270 f.

52 Cf. E. Genzmer, 'La genèse du fidéicommis comme institution juridique', *Revue historique de droit français et étranger* 40 (1962), 319–350, esp. 329 f.

the innovations within the judicial enforcement of *fideicommissa*, the *cognitio extra ordinem*.

2 Innovations in Procedure within the *Cognitio extra Ordinem* for *Fideicommissa*

In his account of the various deviations from the traditional testamentary law, Gaius also deals with the procedural rules for *fideicommissa*:

> *praeterea legata per formulam petimus; fideicommissa vero Romae quidem apud consulem vel apud eum praetorem, qui praecipue de fideicommissis ius dicit, persequimur, in provinciis vero apud praesidem provinciae.*
>
> Gai. 2.278

> Further, we sue for legacies by formula, but claim trust gifts at Rome before a consul or the praetor having special jurisdiction over trusts, in the provinces before the provincial governor.
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> Translation by DE ZULUETA [1946]

He states that in contrast to formal bequests, *fideicommissa* are neither enforced in the formulary procedure (*agere per formulas*) nor before the ordinary *praetor*. Rather, the imperial "trust law" is in the hands of the *consul* and the specialised *praetor fideicommissarius*, an imperial servant.[53] This special jurisdiction follows its own standards for proceedings[54] and is therefore "out of the ordinary" (*extra ordinem*).[55] The simplest exception from existing procedural rules refers to the judicial vacations that do not apply to *fideicommissa*. Thus, claims for informal "trusts" can be filed at any time, whereas bequests are restricted to court days.[56] Further differences concern the scope of the action.

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53 Cf. also Gai. 2.23.1.

54 It might be seen as a disadvantage that the beneficiary of a *fideicommissum* cannot sue the reluctant heir for twice the amount while the legatee of a *legatum per damnationem* is entitled to sue the *infitiatus* for the *duplum* of the value of the bequest. See Gai. 2.282.

55 The extraordinary character of these proceedings has been discussed from different perspectives. For an overview, see I. Buti, 'La 'cognitio extra ordinem' da Augusto a Diocleziano', in H. Temporini (ed.), *Aufstieg und Niedergang der römischen Welt*, II.14 (Berlin, New York 1982), 29–59, notably 30–32; the continuity between the formulary procedure and the *cognitio* has been stressed by G. Scherillo, *Lezioni sul processo, Introduzione alla 'cognitio extra ordinem'. Corso di diritto romano* (Milano 1960), 209–213.

56 Gai. 2.279.

While beneficiaries of *fideicommissa* get interests and fruits from the time of death (of the trustor), legatees only acquire accessory rights in the case of delay (*mora*).[57] In contrast to formal bequests that cannot be recovered if paid erroneously, *fideicommissa* fulfilled in error can be reclaimed.[58]

The brief account of Gaius does not allow us to grasp the procedural divergences between formal testaments and the *cognitio extra ordinem* on account of *fideicommissa*. Scholarship has filled this lacuna with general considerations on the differences between the formulary procedure orchestrated by the ordinary *praetor* and the *cognitio extra ordinem* overseen by an imperial official.[59] In this comparison, *cognitio extra ordinem* has received a very poor evaluation. Since *agere per formulas* continues to be praised as the well-ordered procedure of the free republican Roman citizen, *cognitio extra ordinem* is discredited as a manifestation of the imperial officer's recklessness and nearly uncontrolled discretion.

A more nuanced view seems appropriate. First, one should not overestimate the differences between the two procedures since the *formulae* were in place for the *cognitio* as well. Second, the sentence of the imperial officer in the *cognitio extra ordinem* intends to give effect to the testator's intention and, thus, has to meet the standards of reasonable interpretation.[60] Finally, this interpretation has to follow legal precedence decided by the *imperator* himself and must be in harmony with essential values, such as *pietas* (piety), *verecundia* (modesty) and *benevolentia* (goodwill).[61] In sum, all innovations of the *cognitio extra ordinem* for *fideicommissa* can be seen as manifestations of these standards.

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57 Gai. 2.280.

58 Gai. 2.283.

59 M. von Bethmann-Hollweg, *Der Civilprozeß des gemeinen Rechts in der geschichtlichen Entwicklung: Der römische Civilprozeß 3: Cognitiones* (Bonn 1866), 32 (on the Diocletian era); the subsisting influence of this account can be seen in M. Kaser and R. Knütel and S. Lohsse, *Römisches Privatrecht. Ein Studienbuch* (Munich 2017, 21st ed.), § 87, no. 4, 476: "Der Kaiser stattet die Kognitionsrichter mit einem *weiten Ermessensspielraum* aus, der es ihnen gestattet, das Verfahren den Bedürfnissen der Zweckmäßigkeit anzupassen. Die Parteien unterwirft er ihnen gegenüber einer stärkeren *Zwangsgewalt*. Die Gewähr für eine *unparteiische* Rechtspflege suchen die Kaiser nicht mehr durch die Unabhängigkeit des Urteilsrichters zu erreichen, sondern dadurch, daß die Partei, die sich durch ein ungerechtes Urteil verletzt fühlt, dieses Urteil durch *Appellation* anfechten kann, (…)." (emphasis in original).

60 For a recent account, see Babusiaux 2019, op. cit. (n. 12), 149–155 with further references.

61 The classical reference would be F. Wieacker, 'Offene Wertungen bei den römischen Juristen', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 94 (1977), 1–42, esp. 32–38; the question on the function of these values, however, needs further research, cf. D. Mantovani, 'L'Aequitas romana, Una nozione in cerca di equilibrio',

2.1 Condemnatio in Ipsam Rem *and* Adiudicatio

The first and foremost innovation of *cognitio extra ordinem* is the power of the imperial court to condemn the trustee to restitution in kind (*condemnatio in ipsam rem*).[62] In fact, the traditional formulary procedure is characterised by the limited power of condemnation of the *iudex privatus*. According to the *formula*, he can either condemn or acquit, and the condemnation is limited to compensation for loss of value. This is even true in a suit for protection of property (*rei vindicatio*), where the judge will not be able to force the defendant to surrender the object to the claimant. Instead, the defendant will be condemned to paying the sum the court considers to be equivalent to the value of the object (*condemnatio pecuniaria*),[63] which means that he can keep it if he chooses to pay.[64]

The shift from the pecuniary condemnation to the *condemnatio in ipsam rem* under the *cognitio extra ordinem* for *fideicommissa* can be justified by the full respect of the testator's trust and volition. The request of the deceased addressed to the trustee can be understood as an instruction for the apportioning of the estate.[65] In fact, whenever courts decide on the division of an inheritance, they consider the testator's wishes. Under the formulary procedure, the court can divide the estate by means of a so-called *adiudicatio*, i.e., a special part of the *formula*. Since *fideicommissa* do not need particular wording to be valid, it seems to be consequential that the court enforcing them does not need any formal authorisation to put them into force. The parallel between *fideicommissum* and *adiudicatio* is also visible in Roman legal writing, since the Roman jurists use instructions for the apportioning of an estate as a basis for *fideicommissa*.[66] Hence, the testator's volition to distribute his estate in a cer-

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Antiquorum Philosophia 11 (2017), 15–60, 50 f. who underlines (with regard to Cicero): "I loci *aequitatis* si inseriscono in una visione complessiva dell'uomo in società: (…) la ricerca dell'*aequitas* coinvolge la *natura* e la legislazione positiva, e che per quanto riguarda la *natura* richiama virtù e valori come *religio*, *pietas*, *vindicatio*, *observantia*, *veritas*. Questo significa che *l'aequitas* presuppone un'antropologia politica, cioè un'idea dell'uomo nella sua vita in società."

62 For an overview, see Babusiaux 2019, op. cit. (n. 12), 156–167 with further references.

63 Gai. 4.48, on which see J.M. Kelly, *Roman Litigation* (Oxford 1966), 69–84; M. Pennitz, *Der 'Enteignungsfall' im römischen Recht der Republik und des Prinzipats* (Wien, Köln, Weimar 1991), 249–263.

64 This consequence has been referred to as 'expropriation of the claimant', cf. E. Levy, 'Die Enteignung des Klägers im Formularprozeß', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 42 (1921), 476–514.

65 In the same vein, see A. Romano, 'Condanna 'in ipsam rem' e condanna pecuniaria nella storia del processo romano', *Labeo* 1 (1982), 131–149, 132–134.

66 Some examples are *Dig.* 31.69pr.-1 Pap. 19 *quaest.*; *Dig.* 36.1.30 Marcian. 4 *inst.*, on which

tain manner among his heirs is interpreted as *fideicommissum* for one co-heir that can be enforced in the procedure of the *cognitio extra ordinem* against all the others. Therefore, the availability of restitution in kind for *fideicommissa* is not completely new, but represents a modification of existing procedural rules in line with the informal character of *fideicommissa* and the greater power of the judicial officer involved in the procedure.

2.2 Fideicommissa *and Third Parties*

Another specificity of *fideicommissa* is their effect against third parties. The most striking example of this effect *erga omnes* is the *fideicommissum familiae relictum* that entails the bequest of an estate in favour of all family members of the deceased:[67]

> *Dig.* 31.69.1 Pap. 19 *quaest*.[68]
> *Praedium, quod nomine familiae relinquitur, si non voluntaria facta sit alienatio, sed bona heredis veneant, tamdiu emptor retinere debet, quamdiu debitor haberet bonis non venditis, post mortem eius non habiturus quod exter heres praestare cogetur.*
>
> A plot of land that has been left within the family may, in the event of the heir's goods being disposed of under a forced sale, be retained by the buyer for as long as the debtor would have had them if the goods had not been sold. After his death he will not retain what an outside heir would be compelled to give.
>
> Translation: BROWN 1985[69]

The testator left a *fideicommissum* to his family over a plot of land. Apparently, the heir has accepted the inheritance and thus has to fulfil the *fideicommis-*

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see Babusiaux 2019, op. cit. (n. 12), 152–159; on *Dig*. 34.4.30.3 Scaev. 22 *dig*., see M. Wimmer, *Das Prälegat* (Vienna 2004), 27–31; A. Häusler, 'Letztwillige Verfügungen in griechischer Sprache bei Q.C. Scaevola, Paulus und Modestinus', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 133 (2016), 420–444, 434 f.

67 On this effect of the *fideicommissum de familia*, see G. Impallomeni, 'L'efficacia del fedecommesso pecuniario nei confronti dei terzi. La *in rem missio*', *Bullettino dell'Istituto di Diritto Romano Vittorio Scialoja* 70 (1967), 1–104; D. Johnston, 'Prohibitions and perpetuities: family settlements in Roman law', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 102 (1985), 220–290.

68 On the text, see S. Solazzi, *Il concorso dei creditori nel diritto romano III* (Napels 1940), 195–200; Babusiaux 2011, op. cit. (n. 50), 159–162 with further references.

69 In A. Watson, *The Digest Vol. 3* (Philadelphia 1985), 54 (with modifications, U.B.).

sum. Before the heir can fulfil the request, his property, including the inherited land, is sold in an insolvency procedure (*venditio bonorum*).[70] This forced sale aims at finding a buyer (*bonorum emptor*) who is ready to take over the estate and the debts accumulated by the holder of the assets. In his bid, the buyer will specify the price he is willing to pay for the take-over of the assets, and this price will determine the quota the creditors can expect to get instead of full satisfaction.[71]

In principle, the *fideicommissum* is also a debt of the heir. However, according to this fragment, the beneficiaries of the *fideicommissum familiae relictum* are in a privileged position in comparison with other creditors. As the jurist explains, the *bonorum emptor* can only keep the property bound by the *fideicommissum* as long as the trustee (*fiduciarius*) could have kept it. If the heir dies, the obligation stemming from the *fideicommissum* to leave the property to the family is thus transferred onto the *bonorum emptor*. This effect of the "trust" is reminiscent of a preferential right on liquidation that normally derives from a property or another real right giving a privileged access to the object under sale.[72] The reason why the plot of land reserved for the family is not part of the heir's assets is that the land is considered as pledged for the family. Even though this privilege does not apply if there is fraudulent intention against creditors or the fisc, it stands out in comparison to legatees of a *legatum per damnationem*[73] who are simple creditors.[74] The justification for this "real effect" of the *fideicommissum familiae relictum* seems to derive from the testator's wishes to leave the land to the family.

2.3 *Résumé of the Changes in the Civil Procedure of the* Cognitio

Summing up the main differences between the *agere per formulas* for legacies and the *cognitio extra ordinem* applicable to *fideicommissa*, it could be said that the *fideicommissa* enjoy procedural privileges which reflect their formlessness.

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70 On these insolvency proceedings, see M. del Pilar Pérez Álvarez, *La bonorum venditio, Estudio sobre el concurso de acreedores en Derecho Romano clásico* (Madrid 2000).

71 For details, see Kaser and Hackl 1996, op. cit. (n. 10), § 58.1.4, 397 f.; Pilar Pérez Álvarez 2000, op. cit. (n. 70), 227–328.

72 For an overview of the preferential rights in insolvency procedures, see Kaser and Hackl 1996, op. cit. (n. 10), § 59, 401–403.

73 The situation of legatees of a *legatum per vindicationem* might have been different, but Justinian deleted all references to this *legatum in rem*. One notable exception is *Dig.* 32.78.6 Paul. 2 *ad Vitell.*, where a legatee tries to obtain *condemnatio in ipsam rem* for a *legatum per vindicationem* from the *praetor fideicommissarius*. On the text, see Babusiaux 2011, op. cit. (n. 50), 206–208.

74 That legatees are to be satisfied after all the other creditors is only true in the case of insolv-

However, it would be an exaggeration to consider the *cognitio extra ordinem* as pure discretion of the imperial official; both the execution in kind and the effect against third parties can be explained as analogies and extensions of existing rules and principles.[75]

Since the law of *fideicommissa* and the correlative *cognitio extra ordinem* thus certainly stand up to rationality, we may ask if they meet new economic needs.

3 Economic Implications of the Change in Roman Testamentary Law

When investigating economic implications of Roman law, the modern perspective of benefit maximization or efficiency must be set aside.[76] A less anachronistic approach consists in analysing law as part of the institutional framework which also covers cultural beliefs[77] and values that shape the law.[78] This perspective takes into account the statements of Roman jurists who express economic insights in terms and categories of morals and ethics, such as *aequitas* or *fides*.[79] However, a reliable assessment of the economic aspects of these concepts needs corroboration by other sources. Since Augustus' life and example are of relevance for the enforcement of *fideicommissa*, Suetonius' biography on Augustus is a valuable complementary source in this respect.

A first step in this analysis is to look at the framework of testamentary law, i.e., the paradigm that was partially overcome by allowing *cognitio extra ordinem* for *fideicommissa*.

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ency of the inheritance itself, see Kaser and Hackl 1996, op. cit. (n. 10), § 59.11, 403 with further references.

75 Cf. H. Wagner, *Die Entwicklung der Legalhypotheken am Schuldnervermögen im Römischen Recht* (*bis zur Zeit Diokletians*) (Cologne, Vienna 1974), 70–87 (on the special rights of the fisc).

76 A nuanced criticism in Ogilvie 2007, op. cit. (n. 7), 649–684, 653–656, 665–667.

77 On cultural beliefs, see V. Nee, 'The new institutionalism in economics and sociology', in N.J. Smelser and R. Swedberg (eds.), *The Handbook of Economic Sociology* (Princeton 2005, 2nd ed.), 49–74; K. Verboven, 'Cité et réciprocité. Le rôle des croyances culturelles dans l'économie romaine', *Annales. Histoire, Sciences Sociales* 67 (2012), 913–942, 914.

78 This does not necessarily imply including culture as part of the institution; on this problem, see Ogilvie 2007, op. cit. (n. 7), 660 f. and 668 f.; Verboven 2012, op. cit. (n. 77), 921–923.

79 D. Mantovani, 'Inter aequum et utile. Il diritto come economia nel mondo romano?', in E. Lo Cascio and D. Mantovani (eds.), *Diritto romano e economia. Due modi pensare e organizzare il mondo* (*nei primi tre secoli dell'Impero* (Pavia 2018), 785–809, 787.

3.1 *The Roman Will as a Manifestation of Citizenship*

Even if the proverbial 'horror of intestacy' might be a misleading exaggeration, Roman citizens are expected and called upon to make a (formal) will.[80] These public expectations exist due to the eminently political function of the Roman testament. Thus, the will is considered as the final expression of the testator's mind, which reveals his true opinions about the persons who took part in his lifetime.[81] Therefore, the opening of the will is a public act of high importance for the family, friends, and enemies of the deceased. A telling example is Augustus' reading of Marc Antony's will in the Senate. Marc Antony appointing Cleopatra and her children as his heirs was the irrefutable evidence that he had lost his Roman identity.[82] Through his will, he sealed his fate and his eventual downfall as 'traitor to the Roman people'.

The close connection between testamentary law and citizenship is also reflected in the fact that the drawing up of wills is regarded as a social duty, not a natural right.[83] In all legal sources, testamentary freedom is traced back to the law of the Twelve Tables, a legal enactment of the early Republic (around 450 BCE).[84] Initially, the power to write testaments (*testamenti factio*) is only conferred on free male citizens that are *sui iuris*, hence no longer under their father's authority but *patres familias* themselves. Similarly, the capacity to obtain an inheritance through wills is, at its origin, confined to Roman citizens, male and female (even if women could not obtain the same amount as men).[85] The imperial Roman jurists refer to these limitations of (active and passive) *testamenti factio* as public law (*ius publicum*), meaning that it cannot be changed on private initiative.[86]

The social role of the will is twofold. On the one hand, testamentary inheritances and legacies provide maintenance to family members who are not privileged by the agnatic system, especially the testator's wife.[87] On the other hand,

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80 D. Daube, 'The preponderance of intestacy at Rome', in D. Cohen and D. Simon (eds.), *Collected Studies in Roman Law* (Frankfurt/M. 1991), 1087–1096 (= Tulane Law Review 39 [1965], 187–196) who underlines that the social expectation for a Roman to leave a will does not mean that all Romans died leaving valid wills.

81 On *supremum iudicium*, cf. Champlin 1991, op. cit. (n. 2), 11–28.

82 Suet. *Aug*. 17.1.

83 Genzmer 1962, op. cit. (n. 52), 323.

84 *Dig*. 50.16.120 Pomp. 5 *ad Q. Muc*.

85 On women as heirs, see U. Manthe, 'Das Erbrecht der römischen Frauen nach der lex Papia und die ratio Voconiana', in P. Nève and C. Coppens (eds.), *Vorträge gehalten auf dem 28. Deutschen Rechtshistorikertag in Nimwegen 1990* (Nijmegen 1992), 33–36.

86 P. Leuregans, 'Testamenti factio non privati sed publici iuris est', *Revue historique de droit français et étranger* 53 (1975), 225–257.

87 Champlin 1991, op. cit. (n. 2), 120–126; see also J.A. Crook, 'Women in Roman succession',

bequests fulfil a political function, a dimension that is illustrated by Suetonius' characterisation of Augustus' concept of friendship:[88]

> *Exegit et ipse in vicem ab amicis benivolentiam mutuam, tam a defunctis quam a vivis. Nam quamvis minime appeteret hereditates, ut qui numquam ex ignoti testamento capere quicquam sustinuerit, amicorum tamen suprema iudicia morosissime pensitavit, neque dolore dissimulato, si parcius aut citra honorem verborum, neque gaudio, si grate pieque quis se prosecutus fuisset* (…).
>
> Suet. *Aug*. 66.4

> He required from his friends their good will in return, as much from the dead as from the living. For, although he was far from seeking to be made people's heir and would never accept anything left to him in the will of someone he did not know, the final judgements of his friends he scrutinized with the greatest of care, nor was his regret feigned if his treatment was too mean or unaccompanied by compliments, nor his joy, if he was acknowledged with gratitude and affection. (…)
>
> Translation by EDWARDS [2000]

Because of their *amicitia*, Augustus expects to receive a benefaction (*benivolentia*) from his friends. As Suetonius points out, this does not mean a morally reprehensible *captatio* but a legitimate expectation to be honoured in his friends' wills. A legacy exceeding symbolic value[89] is an expression of amicable affection[90] and serves to acquire wealth from outside the family.[91] Thus,

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in B. Rawson (ed.), *The Family in Ancient Rome. New Perspectives* (Ithaca 1986), 58–82. For the hereditary status of wives and spouses, see L. Monaco, *Hereditas e mulieres. Riflessioni in tema di capacità successoria della donna in Roma antica* (Napoli 2000).

88 On Suet. *Aug*. 66.4, see Paulus, op. cit. (n. 2), 69–71; Verboven 2002, op. cit. (n. 1), 190.

89 Another opinion is expressed by Champlin 1991, op. cit. (n. 2), 11: "economic advantage was the least of his concerns"; on symbolic legacies, see also Verboven 2002, op. cit. (n. 1), 195.

90 *Amicitia* is especially well attested for emperors, on which see R.S. Rogers, 'The emperors as heirs and legatees', *Transactions and Proceedings of the American Philological Association* 78 (1947), 140–158; on the special clause for the *princeps*, see Chr. Paulus, *Die Idee der postmortalen Persönlichkeit im römischen Testamentsrecht. Zur gesellschaftlichen und rechtlichen Bedeutung einzelner Testamentsklauseln* (Berlin 1992), 93–143.

91 In fact, Augustus, who set out a great number of legacies, disposed that bequests to individual persons should only be paid out one year after the opening of the will. This delay is explained by lack of liquidity. In Suetonius' words (Suet. *Aug*. 101.3.): *quamvis viginti proximis annis quaterdecies milies ex testamentis amicorum percepisset, quod paene omne cum duobus paternis patrimoniis ceterisque hereditatibus in rem p. absumpsisset. Iulias filiam*

bequests serve to maintain the socio-political network of friendships and clientele in order to reciprocate the support provided and thus leave the successor in favourable conditions.[92]

The legal enforcement of *fideicommissa* must have changed some of the existing structures and expectations.

3.2 Fides *and* Fideicommissa

The origin of the judicial enforcement of *fideicommissa* is only mentioned in passing, both in Gaius' and Justinian's *Institutiones*. Gaius mentions the previously existing possibility of considering non-Romans in *fideicommissa*, which in his time had been abolished by a *senatus consultum*.[93] In this context, he observes *et fere haec fuit origo fideicommissorum* ("indeed, this was probably the origin of trusts"). Therefore, Gaius seems to state that *fideicommissa* were designed to overcome the strict concept of *testamenti factio* linked to Roman citizenship.[94] Since *fides* is known to apply to both Romans and peregrines and has its first apparitions in Roman treaties with other city-states,[95] Gaius' explanation is in line with the all-embracing character of *fides*, also referred to as *ius gentium*, a law applicable to all mankind.[96]

In contrast, Justinian mentions the wish of many testators to leave inheritances or bequests to persons who could not acquire from a formal will.[97]

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neptemque, si quid iis accidisset, vetuit sepulcro suo inferri. The excuse brought forward by Suetonius clearly shows that Augustus had accumulated the fortune that he spent for the sake of the Roman people both through legacies (through the wills of his friends) and through his status as heir.

92 See Verboven 2002, op. cit. (n. 1), 210–220.

93 Gai. 2.285. *Ut ecce peregrini poterant fideicommissa capere, et fere haec fuit origo fideicommissorum. sed postea id prohibitum est, et nunc ex oratione diui Hadriani senatus consultum factum est, ut ea fideicommissa fisco uindicarentur*. "Thus peregrines could take under trusts—indeed, this was probably the origin of trusts—but later this was forbidden, and now on the proposition of the late emperor Hadrian a senatus-consult has enacted that such trusts should be claimed for the fisc." (Translation by De Zulueta [1946]).

94 See also Verboven 2002, op. cit. (n. 1), 221.

95 Still fundamental in this respect D. Nörr, *Die Fides im römischen Völkerrecht* (Karlsruhe 1991); in this respect, it is not helpful to distinguish between private and public law, cf. É. Jakab, 'Privatrechtliche Rechtsfiguren im Völkerrecht der Republik', in H. Altmeppen et al. (eds.), *Festschrift für Rolf Knütel* (Heidelberg 2009), 439–350, 449.

96 Gai. 1.1. Curiously, the label of *ius gentium* cannot be found for any legal institution within the law of succession; one could be tempted to explain this lacuna by Hadrian's initiative to rule out peregrines from *fideicommissa*.

97 *Inst Iust*. 2.23 (…) *quibus enim non poterant hereditates vel legata relinquere, si relinquebant, fidei committebant eorum qui capere ex testamento poterant: et ideo fideicommissa appellata sunt, quia nullo vinculo iuris, sed tantum pudore eorum qui rogabantur*. "Some people

He explains that testators left "trusts" to a person who could acquire with the request to give to those who could not acquire through the formal testament. For Justinian, *fides* is not an instrument to overcome the limitations of citizenship but an ethical foundation of *fideicommissa*.[98] In fact, according to his account, *fideicommissa* were morally binding thanks to the *pudor* ("honour") of the trustee.

The concept of *pudor* covers "displeasure with oneself, vulnerability, just criticism and social loss".[99] Due to the structure of the Roman society, *pudor* was exclusively reserved for the adult elite male[100] and was assorted according to the social rank: "the more exposed you were to *pudor*, the more embedded in the community you were, the more complete and multi-faceted was your social identity".[101] In Justinian's account, Augustus' reform was necessary to re-establish ethical behaviour, which is why claims were at first only accepted in very objectionable cases. Justinian's Institutes name three motives for the imperial intervention: 1) *gratia personarum motus* ("moved by the esteem for the persons"); 2) *quia per ipsius salutem rogatus quis diceretur* ("because it was contended that somebody had been asked for his (i.e., Augustus') salvation"); and 3) *ob insignem quorundam perfidiam* ("because of somebody's outstanding perfidy").[102]

The first case concerns particularly respected persons who do not comply with the *fideicommissum* despite their high social status and *pudor*.[103] The second situation refers to the frequent practice of vowing to the emperor's welfare.[104] Since the emperor's salvation is involved, the *princeps* cannot ignore

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lack the capacity to take under a will. If you wanted such a person to get your estate, or a legacy, the way to do it was to leave it to someone who did have capacity and rely on his honour. Trusts, in Latin 'fideicommissa', are so called because the trustee was bound only by his conscience, not at law." (Translation by Birks and McLeod [2001]).

98 On *fides* as the cement of personal relations, see Verboven 2002, op. cit. (n. 1), 39–41.

99 R.A. Kaster, 'The shame of the Romans', *Transactions of the American Philological Association* 127 (1997), 1–19, 4–6.

100 Kaster 1997, op. cit. (n. 99), 10–12.

101 Kaster 1997, op. cit. (n. 99), 15. On the central role of 'honneur' in the evolution of Roman norms, see also Verboven 2012, op. cit. (n. 77), 926 f.

102 These translations are mine. U.B.

103 The predominant interpretation of the text is that Augustus did favours for these very honourable and influential persons, i.e., that they were the beneficiaries, cf., e.g. O. Behrends and R. Knütel and B. Kupisch and H.H. Seiler, *Corpus Iuris Civilis. Die Institutionen.* (Heidelberg 2013, 4th ed.): "mit Rücksicht auf das Ansehen der Betreffenden". In the context of *pudor*, the adverse interpretation seems to be more plausible, i.e., that they are the trustees; in this sense, cf. also P. Birks and G. McLeod, *Justinian's Institutes* (London 2001): "as a favour to petitioners".

104 On linkages between the emperor's well-being and that of the state, see D. Wardle,

the non-fulfilment by the heir, even if the vow does not entail a legal but a moral obligation. The third motive is the reproach against the trustee for having blatantly breached the trust invested by the testator. Theophilus' paraphrasis of the Justinian *Institutiones* cites as an example of perfidy the case of a rich man who had been asked to pass over property to poor and very young children, or to the aged parents of the deceased, and had then broken his word.[105] Non-compliance with the promise to surrender the inheritance to a person in need constitutes an evident breach of *fides* and must be punished.[106]

The comparison of Justinian's and Gaius' report about the origin of *fideicommissa* shows that both seem to agree on the importance of *fideicommissa* for handing over inheritances or bequests to persons unable to receive in a formal will. However, whereas Justinian concentrates on the ethical function of the *fideicommissa* within the Roman society, Gaius stresses the importance of *fideicommissa* when giving to non-Romans. These differences arise due to the reduced importance of citizenship in Justinian's time. However, there is no contradiction between the two narratives. First, both aspects—the integration of peregrines and the elementary moral appeal—cover different aspects of the Roman concept of *fides*. In fact, the Roman jurists consider the law applicable to both Romans and non-Romans (*ius gentium*) in line with elementary and hence universal justice.[107] Second, Justinian's account does not exclude the extension of *fideicommissa* to peregrines put forward by Gaius. Justinian's ethical emphasis is simply a generalisation of the more acute report given by Gaius.[108] In fact, the Justinianic interpretation only stresses the importance of

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Suetonius. Life of Augustus. Vita Divi Augusti. Translated With Introduction and Historical Commentary (Oxford 2014), 396 f.

105 Theoph. *Par*. 2.23.1: "(…) … through his gracious consideration for those in whose favour trust had been left (for sometimes such persons were known to him, or, it might be, were worthy of honour on account of their accomplishment or of some other excellence), or again, because the heirs, though they had sworn by his safety, yet frequently contemned the oath; or by reason of a very serious breach of faith (for sometimes a rich man had been asked to make over property to poor and very young children, or to aged parents of the deceased, and then had broken his word) (…)." (Translation by Murison [2010]); on this passage, see V. Giodice-Sabbatelli, *La tutela giuridica dei fedecommessi fra Augusto e Vespasiano* (Bari 1993), 44–49.

106 See also Suet. *Aug*. 66.4 and Dio 56.23.3, on both, see Wardle 2014, op. cit. (n. 104), 433.

107 On the universal character of *ius gentium*, see L.C. Winkel, 'Einige Bemerkungen über *ius naturale* und *ius gentium*', in M. Schermaier and Z. Végh (eds.), *Festschrift für Wolfgang Waldstein* (Graz 1993), 443–449; R. Fiori, 'La nozione di ius gentium nelle fonti di età repubblicana', in I. Piro (ed.), *Scritti per Alessandro Corbino III* (Tricase 2016), 109–129.

108 In this respect, it is noteworthy that Theoph. *Par*. 2.23.1 still mentions the *peregrini*, see also Giodice-Sabbatelli 1993, op. cit. (n. 105), 46 f.

fides as a legal correlate of the moral and societal concept of *pudor*,[109] whereas Gaius looks at the legal function of *fides*, that is, the application to non-Romans as well.

3.3 *On the Economic Implications of* Fideicommissa *and* Cognitio extra Ordinem

If the opening of Roman inheritance law for non-Romans and the control of unethical behaviour can be seen as motives for the enforceability of *fideicommissa* since the Augustan times, one can—if law is regarded as an institutional framework for the economy—question the corresponding developments in the Roman economy of the Principate.

On the one hand, the possibility of bequeathing to persons unable to receive in a formal will might have a link to the expansion of the Roman Empire, which Augustus promoted and institutionalised. On the other hand, it might relate to social distortions in Rome. Both phenomena can be explained by the necessity for men within the Roman provincial administration, since the Roman elite was frequently obliged to leave the city of Rome for extensive periods. In this respect, Justinian mentions that additions to formal wills via confirmed codicils were allowed because of the long *peregrinationes*, i.e., travelling activities, mainly for the fulfilment of public duties.[110] Being abroad made testamentary dispositions more complicated. In this respect, the accuracy of testamentary planning presupposed the availability of current information on the family's well-being and on the political activity of friends and enemies. While staying in a faraway province, the testator did not always know what was going on in Rome and he could not be sure about how up to date his information was. Despite the steady improvement of the *cursus publicum*, news did not travel rapidly.[111] It could therefore happen that the testator died without knowing or upon learning too late that important changes had occurred at home. *Fideicommissa* that could be established, even orally, on the deathbed could help in

109 This is indeed a moral understanding of *fides*; on the evolution, see Lombardi 1961, op. cit. (n. 49), 3–46 with further references.

110 Iust. *Inst*. 2.25, on which see Giodice-Sabbatelli 1993, op. cit. (n. 105), 49–54; Peachin 2018, op. cit. (n. 10), 85 f. On the term of *peregrinatio* as "traveling outside Italy", see M.A. Claussen, *'Peregrinatio* and *peregrini* in Augustine's *City of god*', *Traditio* 46 (1991), 33–75, 37 f.; on motives for mobility, see A. Kolb, 'Communication and mobility in the Roman Empire', in Chr. Bruun and J. Edmondson (eds.), *Oxford Handbook of Roman Epigraphy* (Oxford 2014), 649–670, 660 f.

111 On the time for news to travel, see A. Kolb, *Transport und Nachrichtentransfer im Römischen Reich* (Berlin 2000), 321–332.

these situations and seem to have been used quite frequently for short-term modifications of estate planning.[112]

Not only could the situation in Rome be handled flexibly via *fideicommissa*; the informal "trusts" were also very useful in the provinces and could help to fulfil the administrative duties properly. In fact, the Roman administration in the provinces operated according to proven principles of *amicitia* and *clientela*.[113] Despite bringing their own staff and men, the provincial governors had to connect with certain locals, which implied distinguishing them from others. Such connections, in turn, created legitimate expectations to be honoured in the governor's and his staff's wills. Since the limitations of *testamenti factio* did not allow giving to peregrines, *fideicommissa* were—until the interdiction imposed by Hadrian—a way to fulfil the amical duties between Romans and local elites.

Finally, also the protection of minors, needy or weak persons by universal *fideicommissa* can be explained by the geographical extension of the Roman Empire. As can be shown for the province of Egypt thanks to the rich documentary evidence, Roman courts and governors were confronted with testamentary practices that were very different from Roman civil law.[114] To name just one example, one might think of the property division by the parents, typical for testaments from Egypt. These divisions cannot be apprehended by the Roman concept of universal succession, but they can be interpreted as mutual *fideicommissa* for and against the other children of the dividing parent.[115] Thus, the enforcement of *fideicommissa* offered a useful tool that allowed a Roman

112 The best examples are codicils with the request to pass over the inheritance to another beneficiary; these codicils cannot be used as additions to the will (like in the Lentulus-case, Iust. *Inst*. 2.25) but are valid as *fideicommissa*, see, e.g., *Dig*. 36.1.61 Paul. 14 *resp*., on which see Babusiaux 2015, op. cit. (n. 6), 274 f.

113 See, e.g. A. Coşkun, 'Freundschaft, persönliche Nahverhältnisse und das Imperium Romanum. Eine Einführung', in A. Coşkun (ed.), *Freundschaft und Gefolgschaft in den auswärtigen Beziehungen der Römer (2. Jh. v.Chr.–1. Jh. n.Chr.)* (Frankfurt/M. 2008), 11–27; Chr. Wendt, *'More clientium*. Roms Perspektive auf befreundete Fürsten', in E. Baltrusch and J. Wilker (eds.), *Amici—socii—clients? Abhängige Herrschaft im Imperium Romanum* (Berlin 2015), 19–35; M.A. Speidel, 'Fernhandel und Freundschaft. Zu Roms *amici* an den Handelsrouten nach Südarabien und Indien', *Orbis Terrarum* 14 (2016), 155–193.

114 For an overview, see B. Strobel, *Römische Testamentsurkunden aus Ägypten vor und nach der Constitutio Antoniniana* (Munich 2014); M. Nowak, *Wills in the Roman Empire. A Documentary Approach* (Warsaw 2015).

115 E.g. *P.Oxy*. 6.907; *P.Oxy*. 27.2474, on which see Strobel 2014, op. cit. (n. 114), 197–288; U. Babusiaux, 'Rez. Benedikt Strobel, Römische Testamentsurkunden aus Ägypten vor und nach der Constitutio Antoniniana (München 2014)', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 133 (2016), 517–533, 528 f.

understanding or interpretation of the autochthone legal traditions. These tools made it possible to balance the claim of having jurisdictional power over the non-Roman territory and the notion of reserving the formal testament for Roman citizens.[116] Traces of this inner struggle can also be seen in legal writings collected in the Justinianic law books,[117] although most allusions to citizenship and peregrine law have been eliminated since they were no longer of interest after 212 CE.

If the enforceability of *fideicommissa* is in line with the shift of paradigm from a city-state to an empire, one can also try to correlate the transformation observed in the procedural respect, namely the change from *condemnatio pecuniaria* to *condemnatio in ipsam rem* with the political and economic development. On this topic, scholars have presented two almost contradictory theories. The more common opinion assumes that the *condemnatio in ipsam rem* is a backlash against growing inflation under the Principate,[118] even though its event and extent are still under discussion.[119] A minority opinion has advocated the thesis that the abandonment of *condemnatio pecuniaria* was rather the result of a clearer differentiation between natural and monetary economy,[120] which only became possible when sufficient liquidity was available for private individuals through the increased minting of coins in the imperial time.[121]

116 Cf. J.L. Alonso, 'The status of peregrine law in Egypt: 'customary law' and legal pluralism in the Roman Empire', *Journal of Juristic Papyrology* 43 (2013), 351–404.

117 The most visible traces are the Greek "wills", on which see Häusler 2016, op. cit. (n. 66), 69 with further references. A comparative reading of the so-called Gnomon (*BGU* 5.1210) and the Digest reveals additional information, see U. Babusiaux, 'Römisches Erbrecht im Gnomon des Idios Logos', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 135 (2018), 108–177.

118 Romano 1982, op. cit. (n. 65), 149 f.; important modifications in Kelly 1966 op. cit. (n. 63), 76–81, who argues, not very convincingly, that *condemnatio pecuniaria* was introduced as a measure of social discrimination.

119 For an overview on the traditional position, see T. Pekáry, 'Studien zur römischen Währungs- und Finanzgeschichte von 161 bis 235 n. Chr.', *Historia* 8 (1959), 443–489; see also M. De Cecco, 'Monetary theory and Roman history', *The Journal of Economic History* 45 (1985), 809–822, 815–818; A. Wassink, 'Inflation and financial policy under the Roman Empire to the price edict of 301 A.D.', *Historia* 40 (1991), 465–493, based on R. Duncan-Jones, *Money and Government in the Roman Empire* (Cambridge 1994).

120 A. Bürge, 'Geld- und Naturalwirtschaft im vorklassischen und klassischen römischen Recht', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 99 (1982), 128–157, 140 f. on the role of *aestimatio*; this view is corroborated by Duncan-Jones 1994, op. cit. (n. 119), 29–32.

121 Bürge 1982, op. cit. (n. 120), 155–157. On monetisation in the late Republic and early Empire, see D.B. Hollander, 'The demand for money in the late Roman Republic', in W.V. Harris (ed.), *The Monetary Systems of the Greeks and Romans* (Oxford 2008), 112–136.

When considering legal theories, generalisations and direct derivations from the economic or social development must be met with scepticism due to the autonomy of the legal discourse.[122] However, it could be worth looking at an aspect that has been stressed in ancient historical research but not yet fully acknowledged by legal historians. Indeed, Peter Fibinger Bang has underlined the variability and volatility of prices in local markets, which leads him to characterise the Roman economy as a 'bazaar':

> (…) the bazaar is distinguished by high uncertainty of information and relative unpredictability of supply and demand. This makes the prices of commodities in the bazaar fairly volatile. As a consequence, the integration of markets is often low and fragile; (…). Considerable fragmentation of markets prevails.[123]

The model of the bazaar fits perfectly into the strategies which can be observed in Roman contract law and that is characterised by personal relations between friends and clientele.[124] Moreover, this analysis can also be fruitful for the understanding of Roman *fideicommissa*. If they were enforced to allow wills in favour of non-Romans and to react to unforeseen situations due to the testator's absence from home, the specificities of *cognitio extra ordinem* could be explained by the economic requirements of the unintegrated imperial market. As can be proven by texts from the Digest, a problem that occurred frequently was the geographical separation between a beneficiary of a *fideicommissum* living in Rome and a trustee living in the province; it was also possible that the inheritance was mostly located in the province, but both heir and beneficiary of the *fideicommissum* were in Rome. In these cases, the Roman jurists do not only discuss questions of territorial jurisdiction. Rather, they also deliberated

122 L. de Ligt, 'Roman law and Roman economic history: some methodological problems', in E. Lo Cascio and D. Mantovani (eds.), *Diritto romano e economia. Due modi di pensare e organizzare il mondo* (*nei primi tre secoli dell'Impero*) (Pavia 2018), 209–221, 219–221. See also Johnston 1988, op. cit. (n. 4), 271 f.: "General theories of legal change are hard to construct, and readily undermined. It is hard to determine how far the course of development of any legal institution is conditioned by external social factors, and how far it is a matter of the 'autonomous' development of a legal doctrine in the hand of lawyer".

123 P.F. Bang, *The Roman Bazaar. A Comparative Study of Trade and Markets in a Tributary Empire* (Cambridge 2008), 4 f.

124 Bang 2008, op. cit. (n. 123), 5. "Merchants in the bazaar seek to cultivate personal and lasting relations of exchange with particular business partners"; on the organisational element of *fides*, see also Verboven 2012, op. cit. (n. 77), 929–932.

on where to fulfil the *fideicommissum* and whether the trustee could deduct debts accumulated in another province.[125]

Since the *condemnatio pecuniaria* is an estimation of values, it assumes a certain comparability of living conditions which certainly existed in the city-state of the Republic. In contrast, the *condemnatio in ipsam rem* associated with the *cognitio extra ordinem* is to be regarded as an adequate mechanism in a situation of segmented markets and locally different prices.[126] In this respect, the restitution in kind does not only guarantee a very faithful execution of the testator's volition, but also allows the trustee to free himself from his obligation by simply surrendering the object of the *fideicommissum*. Through the execution in kind it is ensured that the trustee will not suffer losses beyond the object itself and will not have to pay for the additional value if the prices of goods rise due to new economic conditions or if they differ from one province to another.[127]

These considerations show that the geographical divergences were of high relevance for the parties. Due to the unintegrated markets of the Roman Empire, geographical distortions did not only lead to costs and questions of risk for the transport, but also implied differences in the estimation of an estate or of single objects from the inheritance. With regard to commercial goods and mobiles, the amount of the delivery and the reliability of supply certainly influenced the price; for plots of land and other immobile objects, the amount of available money, that is metal and coins in the market, had a direct effect on their valuation.

The contemporary awareness of these interrelations is visible in Suetonius' report on the impact of imperial booty on the value of land:

> (…). Nam et invecta urbi Alexandrino triumpho regia gaza tantam copiam nummariae rei effecit, ut faenore deminuto plurimum agrorum pretiis accesserit, et postea, quotiens ex damnatorum bonis pecunia superflueret, usum eius gratuitum iis, qui cavere in duplum possent, ad certum tempus indulsit.
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> Suet. *Aug*. 41.1

125 See, e.g., *Dig*. 5.1.50pr-2 Ulp. 6 *fideicomm*.; *Dig*. 36.3.5.3 Pap. 28 *quaest*., on which see Kaser and Hackl 1996, op. cit. (n. 10), § 72.II.1, 483.

126 On the greater efficiency of the *cognitio extra ordinem*, see also Verboven 2012, op. cit. (n. 77), 936 f.

127 See also Hollander 2008, op. cit. (n. 121), 125 f., who stresses the low costs of exchanges 'in kind'.

> For when the regal treasures were brought to the city in the Alexandrian triumph, he made ready money so plentiful that interest rates fell and land values greatly increased, and afterwards, whenever there was a surplus from the property of those who had been condemned, he loaned it without interest for fixed periods to those who could give security for double the sum.
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> Translation by EDWARDS [2000][128]

According to Suetonius, Augustus used the captured treasures to mint coins, which made interest rates fall and land values rise. The historian's observation shows that he was aware of the correlation between land prices and available money. Against this background, the procedural specialities of *fideicommissa* are not only an expression of faithful compliance with the testator's will; rather, they also correspond to the economic situation of the empire. Since the value of objects, including land, can vary greatly both in time and place, it is consistent to charge the beneficiary rather than the burdened party with the risk of change in value. This is precisely what happens when the condemnation from a *fideicommissum* is not for a sum of money but for restitution in kind.

4 General Résumé

An examination of the special features of *fideicommissa* shows that inheritance law, as a central area of Roman property law, is of particular interest for the analysis of the Roman economy. Just as in contract and commercial law, the typical structures of the clientele economy and the economy of friendship can also be found in the law of succession. The uncovering of these structures in inheritance law reveals that the testamentary dispositions must necessarily be considered in the analysis of economic activities. At the same time, the examination of the correlations between the law of *fideicommissa* and the economic reality allows us to speculate about the motives that led to this fundamental change within the Roman law of testaments in the imperial era. Thus, it can be said that the introduction of the enforceability of *fideicommissa* by Augustus should by no means be regarded as a coincidence but must be interpreted as an answer to meet the needs of the expanding *imperium*.

128 Cf. also Wardle 2014, op. cit. (n. 104), 310; see also C. Nicolet, 'Les variations des prix et la 'théorie quantitative de la monnaie' à Rome, de Cicéron à Pline l'Ancien', *Annales. Histoire, Sciences Sociales* 26 (1971), 1203–1227, 1213 f.; E. Lo Cascio, 'State and coinage in the late Republic and early Empire', *Journal of Roman Studies* 71 (1981), 76–86, 84 f.