

# Managing Crises by Way of Ritualization and Exception in Roman Testamentary Succession Law

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Abstract – In principle, a Roman citizen could make a will only when observing a set of strictly ritualized testamentary formalities. However, in times of crises, sticking to time consuming and labor intensive rituals entails high transaction costs, while at the same time the threats experienced as a consequence of the crisis at hand increase the individual need to stipulate one's last will. In this paper, it will be argued that throughout the centuries, from archaic times to late antiquity, Roman testamentary succession law looked for a compromise between ritualization and exception, thus managing crises in an effective way.

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## I. Preliminary remarks

Stipulating one's last will under Roman law was a highly formalized affair.<sup>1</sup> However, before addressing the different steps in the development of testamentary formalities<sup>2</sup> as forms of ritualized ways to pass on one's assets on death, it must be remembered that is does not go without saying that a person is free to choose the fate of his or her patrimony after his or her death and that thereby the

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<sup>1</sup> See D. Johnston, *Roman Law in Context* (Cambridge 1999), 45.

<sup>2</sup> For an overview see P. du Plessis, *Borkowski's Textbook on Roman law*, 6th ed. (Oxford 2020), 221–24; for details, see T. Rübner, "Testamentary Formalities in Roman Law," in K. G. C. Reid, M. J. de Waal, and R. Zimmermann, eds., *Testamentary Formalities* (Oxford 2011), 1–26.

affairs of the living are governed by a “dead hand.”<sup>3</sup> In a recent paper, the German succession lawyer Anne Röthel even raised the question whether the institution of a “law of succession” itself should not be regarded as being fundamentally unjust, as it perpetuates individual wealth and thereby is an obstacle to equality.<sup>4</sup> This being said, concepts of succession and consequently succession laws are as old as mankind. This may be due to the fact that it gives relief to know, at least concerning one’s property rights, what is going to happen after one’s death, that loved ones are cared for, and outstanding debts are settled.<sup>5</sup>

Presumably the oldest idea of a law of succession in Roman law is based on the principle that wealth must remain within the respective families. Consequently, at the time of the Twelve Tables (ca. 450 BCE), there was a “preponderance of intestacy”<sup>6</sup> in Roman succession law.<sup>7</sup> If someone died, the assets remained within the

<sup>3</sup> On this, see C. Willems, *Justinian als Ökonom. Entscheidungsgründe und Entscheidungsmuster in den quinquaingenta decisiones* (Cologne 2017), 61–62, with further references.

<sup>4</sup> A. Röthel, “Ist es gerecht, dass es ein Recht zu vererben gibt?,” *Archiv für die civilistische Praxis*, 202 (2020), 19–50. See also D. Halliday, *The Inheritance of Wealth. Justice, Equality, and the Right to Bequeath* (Oxford 2018). On this question, see also A. Dutta, *Warum Erbrecht? Das Vermögensrecht des Generationenwechsels in funktionaler Betrachtung* (Tübingen 2014).

<sup>5</sup> On the testator’s motivation, see C. G. Paulus, *Auf der Suche nach Unsterblichkeit: zur mentalitätsgeschichtlichen, sozialen und rechtlichen Bedeutung des Testaments im antiken Rom* (Berlin 2018), 48–73. See also Dutta (note 4), 151–302.

<sup>6</sup> See D. Daube, “The Preponderance of Intestacy at Rome,” *Tul. L. Rev.*, 39 (1965), 253; on this issue, see also D. Johnston, “Succession,” in D. Johnston, ed., *The Cambridge Companion to Roman Law* (Cambridge 2015), 201–202, and Johnston (note 1), 51. M. Humbert, *La loi des XII Tables. Édition et commentaire* (Rome 2018), 198, however, clings to the fact that there has always been a “conceptual priority” of the testament: “Le terme *in-testatus*, témoigne de la priorité conceptuelle du testament sur la succession légitime. Tester est l’hypothèse *normae* dès l’époque la plus archaïque et le restera par la suite.”

<sup>7</sup> Concisely on intestate succession in Roman law: T. Rüfner, “Intestate Succession in Roman Law,” in K. G. C. Reid, M. J. de Waal, and R. Zimmermann, eds., *Intestate Succession* (Oxford 2015), 1–32. See also U. Babusiaux, *Wege zur Rechtsgeschichte: Römisches Erbrecht*, 2nd ed. (Vienna 2021), 47–82; M. Kaser, R. Knütel, and S. Lohsse, *Römisches Privatrecht*, 22nd ed. (Munich 2021), 445–51; du Plessis (note 2), 211–17; and F. Schulz, *Classical Roman Law* (Oxford 1951), 220–38. On intestate succession according to the Twelve Tables, see Humbert (note 6), 195–204,

nuclear family: with the death of the *de cuius*, his *fili familias* and his *uxor in manu*<sup>8</sup> stepped into his position,<sup>9</sup> the law of succession therefore being just part of family law.<sup>10</sup> But already in archaic times, the interest of the *de cuius* to determine what is going to happen with his assets after his death was acknowledged, especially in situations in which the *de cuius* had no sons who could inherit *ab intestato*.

## II. Testaments in front of the assembled people – ritual and exception

### 1. Ritual: *testamentum calatis comitiis*

Originally, in such situations, a will could be declared in front of the assembly of the people (*testamentum calatis comitiis*).<sup>11</sup> The ritual procedure used was the same as or at least from the outward appearance quite similar to<sup>12</sup> the one used when adopting a son into

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and G. Finazzi, “La successione ab intestato,” in M. F. Cursi, ed., *XII Tabulae. Testo e commento*, 1 (Naples 2018), 231–296.

<sup>8</sup> Correspondingly, marriage also changed the family structure and had an influence on intestate succession. For the rituals used to this end, see C. Möller, “The Crisis of the *confarreatio* Marriage: A Ritual Through the Ages” (another fruit of the workshop mentioned in the opening note, to be published separately).

<sup>9</sup> See M. Wimmer, “Gesetzliche Erbfolge,” in U. Babusiaux, C. Baldus, W. Ernst, F. S. Meissel, J. Platschek, and T. Rübner, eds., *Handbuch des römischen Privatrechts* (Tübingen 2022) (in press), § 54 nos. 7–8; Kaser, et al. (note 7), 445–46; du Plessis (note 2), 211–12; Rübner (note 7), 7–8; R. P. Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge 1994), 163.

<sup>10</sup> See Kaser, et al. (note 7), 441.

<sup>11</sup> Babusiaux (note 7), 142; du Plessis (note 2), 221; Kaser, et al. (note 7), 452; Rübner (note 2), 3; O. F. Robinson, *The Sources of Roman Law. Problems and Methods for Ancient Historians* (London 1997), 4–5; A. Watson, *The Law of Succession in the Later Roman Republic* (Oxford 1971), 8. There is some uncertainty whether the testament presupposed in XII Tab. V.3 (*uti legassit suae rei, ita ius esto*) refers to the *testamentum calatis comitiis* or to the *testamentum per aes et libram*; on the current state of the discussion, see Humbert (note 6), 190–93.

<sup>12</sup> The discussion on this point is summarized by G. Pfeifer, “Das *testamentum per aes et libram* und andere Formen letztwilliger Verfügungen,” in U. Babusiaux, C. Baldus, W. Ernst, F. S. Meissel, J. Platschek, and T. Rübner, eds., *Handbuch des römischen Privatrechts* (Tübingen 2022) (in press), § 18 nos. 5–9.

the family, the so-called *arrogatio*:<sup>13</sup> eventually, making an *extraneus* to the family one's heir meant accepting him as one's son at the moment of one's death. It has been argued that this procedure was used especially in cases in which someone had no son and therefore the family was "in danger of dying out."<sup>14</sup> To change the family membership was indeed regarded as something of relevance to the whole community of free Roman men,<sup>15</sup> which is why this procedure had to take place publicly.

## 2. Exception: *testamentum in procinctu*

However, the *comitia curiata*,<sup>16</sup> at least in later times,<sup>17</sup> assembled only twice per year, namely on March 24 and May 24.<sup>18</sup> There was a strong religious component to this: the procedure was performed on the days after the *tubilustria*, the festive ritual cleaning of the trumpets used for military purposes and in the context of funerals

<sup>13</sup> On this procedure, see in detail A. M. Seelentag, *Ius pontificium cum iure civili coniunctum. Das Recht der Arrogation in klassischer Zeit* (Tübingen 2014), and in brief e.g. du Plessis (note 2), 137.

<sup>14</sup> J. A. Crook, *Law and Life of Rome, 90 BC – AD 212* (Ithaca, NY 1967), 111; see also du Plessis (note 2), 136.

<sup>15</sup> Pfeifer (note 12), § 18 no. 6, calls this "social control" ("sozial[e] Kontrolle"); see also E. Jakab, "Inheritance," in P. J. du Plessis, C. Ando, and K. Tuori, eds., *The Oxford Handbook of Roman Law and Society* (Oxford 2016), 500 ("publicity and transparency"); O. Behrends, "Der Vertragsgedanke im römischen Gesetzesbegriff auf den verschiedenen Stufen seiner Entwicklung. Der erfragte Wille der Wehrgemeinde, die Fortbildung der Rechtsordnung durch die Bürgervertretung und die Ideologie des Gesetzgebungsauftrags," in O. Behrends and C. Starck, eds., *Gesetz und Vertrag*, 1 (Göttingen 2004), 27 (= M. Avenarius and C. Möller, eds., *Okko Behrends. Zur römischen Verfassung. Ausgewählte Schriften* (Göttingen 2014), 243) (stressing that it is a matter for citizens to watch over the fact whether the testament at hand deserved the force of law). On the latter aspect, see also M. Avenarius, "Die tabulae ceraeve des klassischen Manzipationstestaments als Archaismus. Die Testamentsurkunde als Ausdruck der Vorstellung vom Gesetzescharakter der letztwilligen Ausgestaltung der römischen Familienverfassung," *Iura*, 60 (2012), 215.

<sup>16</sup> On these, see A. Corbino, "La nozione di comitia calata," *Iura*, 42 (1991), 145–50.

<sup>17</sup> See Pfeifer (note 12), § 18 no. 7, with reference to J. Rüpke, *The Roman Calendar from Numa to Constantine: Time, History, and the Fasti* (Chichester 2011), 27–29.

<sup>18</sup> See Pfeifer (note 12), § 18 no. 7; Behrends (note 15), 24 (= *Ausgewählte Schriften*, 240).

at which, *inter alia*, a lamb was sacrificed.<sup>19</sup> Therefore, in times of crises like imminent warfare, this ritual could not be practiced on the spur of the moment, while at the same time, the risk of falling in combat without having had the chance to dispose what was deemed necessary for the case of one's own death was of course elevated.<sup>20</sup> As we can see in the Institutes, the famous elementary textbook for law students written by the second century CE jurist Gaius,<sup>21</sup> Roman law therefore granted an exception for such cases:

Gaius, Institutes 2.101. Testamentorum autem genera initio duo fuerunt: nam aut calatis comitiis testamentum faciebant, quae comitia bis in anno testamentis faciendis destinata erant, aut in procinctu, id est, cum belli causa arma sumebant: procinctus est enim expeditus et armatus exercitus. Alterum itaque in pace et in otio faciebant, alterum in proelium exituri.

Initially, there were two kinds of wills. To wit, they made a will either before the assembled people (*calatis comitiis*), which assembly was destined twice a year to the making of wills, or “with togas girded up” (*in procinctu*),<sup>22</sup> namely if they took up

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<sup>19</sup> See Behrends (note 15), 25 (= *Ausgewählte Schriften*, 241); for details on the ritual, see Rüpke (note 17), 26–30, and J. Quasten, *Musik und Gesang in den Kulturen der heidnischen Antike und christlichen Frühzeit* (Münster 1930), 17–20.

<sup>20</sup> See also Pfeifer (note 12), § 18 no. 12: “Dass den Bürgern, die sich in unmittelbare Lebensgefahr begaben, Gelegenheit gegeben wurde, letztwillig zu verfügen, ohne den Termin der nächsten *comitia calata* abwarten zu müssen, liegt nahe.” Pointedly, Behrends (note 15), 25 n.33 (= *Ausgewählte Schriften*, 241 n.33) refers at first to K. Latte, *Römische Religionsgeschichte* (Munich 1960), 118, stating that it might owe too much to the modern mind that the Romans made their testaments before going to war (“[E]s sei vielleicht etwas modern gedacht, daß die Römer, bevor sie in den Krieg zogen, ihr Testament machten.”), and then comments that this thought is not only modern, but in Roman times followed from the necessity of an heir to continue the family rites (“Aber was ist an dem Gedanken modern? Daß die Besorgnis, im Kampf zu fallen, dazu mahnte, für einen familienrechtlichen oder testamentarischen Erben zu sorgen, folgt vielmehr aus der damaligen Bedeutung der vom Erben fortzuführenden *Sacra* der einzelnen Familien.”). The latter point is also made by B. Sirks, “Reform and Legislation in the Roman Empire,” *Mélanges de l’Ecole Française de Rome – Antiquité*, 125–22 (2013), at no. 8.

<sup>21</sup> On Gaius, see A. M. J. Honoré, *Gaius* (Oxford 1962); on his Institutes, see D. Ibbetson, “High Classical Law,” in A. K. Bowman, ed., *The Cambridge Ancient History*, 12 (Cambridge 2005), 186, with further references.

<sup>22</sup> On the etymology, see L. Minieri, “Il testamentum in procinctu,” *SDHI*, 64 (1998), 256–65.

arms because of war, as *procinctus* means the army, ready for the battle and armed. Hence, they made the first in times of peace and leisure, the latter before going to battle.<sup>23</sup>

Already in earlier times (*initio*),<sup>24</sup> the *testamentum in procinctu* allowed for a somewhat alleviated procedure in the face of imminent warfare: instead of a declaration of the will in front of the assembly of the people, which assembled only twice per year on certain, holy dates, it resorted exceptionally *ad hoc* to the assembly of the army, standing ready for battle, togas girded up.<sup>25</sup> However, as the Roman army consisted of all the Roman citizens who would otherwise assemble in the *comitia*, it was at least the same body of people which was used, only under other, namely less gracious and more profane circumstances.<sup>26</sup> We are therefore not confronted with another ritual, but with a mere modification of the original ritual of the *testamentum calatis comitiis*.<sup>27</sup> The ritual character was held up inasmuch as there was a certain point in the procedure when such a *testamentum in procinctu* could be made: during the second auspices, immediately before the battle was about to start.<sup>28</sup> Even if, later in republican times, there may have been differences as to the legal quality of the testament,<sup>29</sup> still, exceptionally allowing such a *testamentum in procinctu* for the first time in a situation of imminent warfare can be regarded as an early example in Roman testamentary succession law in which crises were managed by way

<sup>23</sup> Author's translation. See also the translation by W. M. Gordon and O. F. Robinson, *The Institutes of Gaius* (London 1988), 169 and 171.

<sup>24</sup> On the difficulties of establishing at what time the *testamentum de procinctu* emerged, see Minieri (note 22), 254–56.

<sup>25</sup> Babusiaux (note 7), 142; Rűfner (note 2), 3–4; Watson (note 11), 8–10.

<sup>26</sup> Behrends (note 15), 25 (= *Ausgewählte Schriften*, 242) therefore calls the *comitia* fittingly the “unarmed army of the people” (“das . . . Wehraufgebot der Bürger, . . . waffenlos auf das Comitium geladen”).

<sup>27</sup> See also Pfeifer (note 12), § 18 no. 12 (“bloße Abwandlung des Testaments vor der Volksversammlung”).

<sup>28</sup> See Pfeifer (note 12), § 18 no. 13; Schulz (note 7), 241; see also Minieri (note 22), 270–73 on Schol. Veron. ad Aen. 10.241, one of the scholia on Vergil's Aeneid found in a palimpsest located in the Biblioteca Capitolare at Verona.

<sup>29</sup> Behrends (note 15), 26 (= *Ausgewählte Schriften*, 242) stresses that the republican *testamentum in procinctu* is no formal *lex* anymore, but has become an act of publicity of a testament according to private law (“Das republikanische Soldatentestament ist kein formelles Gesetz mehr. Das kampfbereite Heer ist nicht Verfassungsorgan einer Gesetzgebung, sondern nur noch Publizitätsform eines privatrechtlichen Testaments.”).

of creating (still ritualized<sup>30</sup>) exceptions from the usual rituals, performed in times of ease.

### III. Witnessed testaments – ritual and exceptions

#### 1. Ritual: *testamentum per aes et libram* and derivatives (witnessed testaments)

Later,<sup>31</sup> formalities were generally alleviated and another form of will was introduced, the *testamentum per aes et libram*.<sup>32</sup> Again, Gaius tells us:

Gaius, Institutes 2.102. Accessit deinde tertium genus testamenti, quod per aes et libram agitur: qui enim neque calatis comitiis neque in procinctu testamentum fecerat, is, si subita morte urguebatur, amico familiam suam, id est patrimonium suum, mancipio dabat eumque rogabat, quid cuique post mortem suam dari uellet. Quod testamentum dicitur per aes et libram, scilicet quia per mancipationem peragitur.

Later, a third kind of will was conceived, which was performed by the aid of copper and scales (*per aes et libram*). The one who had made his will neither in front of the assembled people nor “with togas girded up”, transferred, if he was urged by approaching death, his “family” (*familia*), i.e. his patrimony, to a friend and told him what he wanted to be given to whomsoever after his death. This was of course called will by the aid of

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<sup>30</sup> Behrends (note 15), 26 (= *Ausgewählte Schriften*, 242) points to the continuity between the initial *testamentum calatis comitiis* and the later ritual of the *testamentum in procinctu*.

<sup>31</sup> Minieri (note 22), 285–95, mentions 142 BCE as the last instance of a *testamentum in procinctu* (Vell. Pat. 2.5.2–3) and states that this kind of will fell out of use afterwards, due to a change or even crisis concerning the rituals performed (“crisi degli auspici,” 288); A. Guarino, “Sull’origine del testamento dei militari nel diritto romano,” in *Pagine di diritto romano*, 6 (Naples 1995), 350–51, however, argues that the *testamentum in procinctu* still existed in Caesar’s time (“[I] *testamentum in procinctu* non era ancora, ai tempi di Cesare, del tutto scomparso.”).

<sup>32</sup> Pfeifer (note 12), § 18; Babusiaux (note 7), 143–47; Kaser, et al. (note 7), 452–53; du Plessis (note 2), 221–22; Johnston (note 6), 202; Růfner (note 2), 4–5; Watson (note 11), 11–21; V. Arangio-Ruiz, “Intorno alla forma scritta del *testamentum per aes et libram*,” in *Atti del Congresso internazionale di diritto romano e di storia del diritto. Verona 27–28–29 settembre 1948*, 3 (Milan 1953), 81–90; Schulz (note 7), 240–44.

copper and scales as it was performed by way of formalized transfer of ownership (*mancipatio*).<sup>33</sup>

This third kind of will was, as Gaius tells us, based on the formalities of the *mancipatio* ritual, originally used in Roman law to transfer property on important goods such as slaves, cattle, Italic land, and servitudes on the latter.<sup>34</sup> Again, the original ritual procedure might have had a religious core.<sup>35</sup>

As for the *testamentum per aes et libram*, we are, in the words of Ernst Rabel, confronted with a “copied” or “postformed” legal transaction (“nachgeformtes Rechtsgeschäft”).<sup>36</sup> The procedure used built on the idea of a ritual sale for a symbolic purchase price (*mancipatio nummo uno*), performed in front of a certain number of witnesses. In the presence of namely five witnesses and of a *libripens*, holding a pair of scales, the *de cuius* symbolically sold his assets to a third party, the *familiae emptor*.<sup>37</sup> In the course of such *imaginarium venditio*, the *de cuius*<sup>38</sup> could also pronounce solemn *nuncupationes*, stating what the *familiae emptor* should do with certain assets upon the testator’s death.<sup>39</sup>

In the course of time, this way of stipulating one’s last will

<sup>33</sup> Author’s translation. See also the translation by Gordon and Robinson (note 23), 171.

<sup>34</sup> See du Plessis (note 2), 182–83; B. W. Frier and T. A. J. McGinn, *A Casebook on Roman Family Law* (Oxford 2004), 344–45.

<sup>35</sup> In this sense G. Pfeifer, “Libralakte (mancipatio, nexum, solutio per aes et libram),” in U. Babusiaux, C. Baldus, W. Ernst, F. S. Meissel, J. Platschek, and T. Rübner, eds., *Handbuch des römischen Privatrechts* (Tübingen 2022) (in press), § 17 no. 4–5 (“II. Ritual- und Symbolcharakter”) and du Plessis (note 2), 182; see also G. MacCormack, “Hägerström’s Magical Interpretation of Roman Law,” *The Irish Jurist*, 4 (1969), 153–67, 166, with further references in note 48.

<sup>36</sup> E. Rabel, “Nachgeformte Rechtsgeschäfte,” *ZSS* (RA), 40 (1906), 290–335 and 41 (1907), 311–79. On this, see also Pfeifer (note 35), § 17 no. 6–8. For another example, the marriage by way of *coemptio*, which is also based on the *mancipatio* ritual, see Möller (note 8).

<sup>37</sup> See Pfeifer (note 12), § 18 no. 26.

<sup>38</sup> Pfeifer (note 12), § 18 no. 1; Kaser, et al. (note 7), 454; M. F. Cursi, “La *mancipatio* e la *mancipatio familiae*,” in M. F. Cursi, ed., *XII Tabulae. Testo e commento*, 1 (Naples 2018), 359–60 (with reference to G.2.104: “è il *mancipio dans* ad avere un ruolo fondamentale nell’indicare la destinazione dei propri beni”); Rübner (note 2), 4, however, deems these as uttered by the purchaser.

<sup>39</sup> On the role of these *nuncupationes*, see G. G. Archi, “Oralità e scrittura nel *testamentum per aes et libram*,” in *Studi in onore di Pietro De Francisci*, 4 (Milan 1956), 292 and 294 (“il fulcro del *testamentum per aes et libram*”; “il momento più importante del negozio”).



developed and was modified. Gaius reports for his times:

Gaius, Institutes 1.103. Sed illa quidem duo genera testamentorum in desuetudinem abierunt; hoc vero solum, quod per aes et libram fit, in usu retentum est. Sane nunc aliter ordinatur, quam olim solebat; namque olim familiae emptor, id est, qui a testatore familiam accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator, quid cuique post mortem suam dari vellet; nunc vero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius dicis gratia propter veteris iuris imitationem familiae emptor adhibetur.

But these two kinds of wills fell out of use; only the one made by the aid of copper and scales was kept in use. Of course, now it is handled otherwise than it was formerly practiced, as formerly the “purchaser of the family” (*familiae emptor*), i.e. the one who received the “family” from the testator to his ownership, took the position of the heir, and therefore the testator gave him as a mandate what he wanted to be given to whomsoever after his death, but now one person is instituted in the will as the heir, who is also burdened with the bequests (*legata*), while another person, as a pure formality, to imitate the old law, is called in as purchaser of the family.<sup>40</sup>

The final lines make it clear that at that time, the institution of *familiae emptor* had become a purely formal one (*dicis gratia*), and served to imitate the requirements of the old, established law (*propter veteris iuris imitationem*).<sup>41</sup> As a consequence, by and by, the *testamentum per aes et libram* from the times of old came into “disintegration” or better “degeneration,” caused by “irregularities of practice.”<sup>42</sup>

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<sup>40</sup> Author’s translation. See also the translation by Gordon and Robinson (note 23), 171.

<sup>41</sup> See Pfeifer (note 12), § 18 no. 2.

<sup>42</sup> C. Sánchez-Moreno Ellart, “The Late Roman Law of Inheritance: The Testament of Five or Seven Witnesses,” in B. Caseau and S. R. Huebner, eds., *Inheritance, Law and Religions in the Ancient and Mediaeval Worlds* (Paris 2014), 229 and 231. On legal practice in this regard see M. Avenarius, “Formularpraxis römischer Urkundenschreiber und *ordo scripturae* im Spiegel testamentrechtlicher Dogmatik,” in M. Avenarius, R. Meyer-Pritzl, and C. Möller, eds., *Ars iuris: Festschrift für Okko Behrends zum 70. Geburtstag* (Göttingen 2009), 13–42.

Once the ritual had lost its significance,<sup>43</sup> it was only a small step to accept written wills sealed by a certain number of persons as well. In the course of this process, the Roman praetor accepted also wills which had been sealed by seven persons (i.e., the same number of persons required for a *testamentum per aes et libram*: one scale holder, one *familiae emptor*, and five witnesses make a total of seven persons, besides the testator himself).<sup>44</sup> While this is often styled as *testamentum praetorium*,<sup>45</sup> Carlos Sánchez-Moreno Ellart precisely states: “The so-called *testamentum praetorium* was actually not a kind of testament in itself but merely an invalid testament according to the *ius civile* that was deemed valid by the praetor when some formalities required by the *ius civile* had not been correctly observed.”<sup>46</sup>

In later times of the Roman empire, the development of the derivatives of the *testamentum per aes et libram* continued: the focus, however, was now the requirements on witnesses, who had to sign and seal the will, in order to be in the position to certify later on that the document produced upon the testator’s death was indeed the one he used to utter his last will.<sup>47</sup>

## 2. Possible exception: *testamentum militium*?

Yet, even if formalities in the *testamentum per aes et libram* were

<sup>43</sup> See Pfeifer (note 12), § 18 no. 2: “Das Testament der klassischen Zeit erscheint . . . als seines Sinns beraubtes, nur mehr historisch erklärbares Ritual.”

<sup>44</sup> See e.g. Babusiaux (note 7), 170–71; Kaser, et al. (note 7), 454; du Plessis (note 2), 222.

<sup>45</sup> Babusiaux (note 7), 167–79; du Plessis (note 2), 222 (“praetorian will”); Rübner (note 2), 6–8; P. Voci, “Testamento pretorio,” in *Studi in onore di Giuseppe Grosso*, 1 (Turin 1968), 98–133.

<sup>46</sup> Sánchez-Moreno Ellart (note 42), 233; see also Pfeifer (note 12), § 18 no. 38.

<sup>47</sup> Pfeifer (note 12), § 18 nos. 53–61; Jakab (note 15), 501–502; M. Nowak, *Wills in the Roman Empire. A Documentary Approach* (Warsaw 2015), 88–94; B. Strobel, *Römische Testamentsurkunden aus Ägypten vor und nach der Constitutio Antoniniana* (Munich 2014), 63; M. Nowak, “The Function of Witnesses in the Wills from Late Antique Egypt,” in P. Schubert, ed., *Actes du 26e Congrès international de papyrologie Genève, 16–21 août 2010* (Geneva 2012), 575: “[T]he function of witnesses evolved from the secondary role of testifying to the act of *mancipatio* to the primary role of guarantors of the authenticity of documents, composed in secret in order to preserve the content of a testator’s disposition.” See also L. Migliardi Zingale, “Il testamento tardoromano tra oriente e occidente: Alcune riflessioni sui documenti della prassi,” in *Atti dell’Accademia Romanistica Costantiniana*, 17.1 (Rome 2010), 43–61.

much easier to comply with than those of the *testamentum calatis comitiis*, for soldiers in the Roman army it could be very difficult to assemble seven other Roman citizens while being out on a military campaign.<sup>48</sup> In Roman law, we find evidence that soldiers were exempted even from performing the ritual of the *testamentum per aes et libram* and from gathering witnesses. In the Digest, the jurist Ulpian informs us on measures taken by various Roman emperors from Julius Caesar to Trajan:<sup>49</sup>

Digest 29.1.1 pr. (Ulpian 45 *ad edictum*). Militibus liberam testamenti factionem primus quidem divus Iulius Caesar concessit: sed ea concessio temporalis erat. Postea vero primus divus Titus dedit: post hoc Domitianus: postea divus Nerva plenissimam indulgentiam in milites contulit: eamque Traianus secutus est et exinde mandatis inseri coepit caput tale. Caput ex mandatis: “cum in notitiam meam prolatum sit subinde testamenta a commilitonibus relicta proferri, quae possint in controversiam deduci, si ad diligentiam legum revocentur et observantiam: secutus animi mei integritudinem erga optimos fidelissimosque commilitones simplicitati eorum consulendum existimavi, ut quoquomodo testati fuissent, rata esset eorum voluntas. Faciant igitur testamenta quo modo volent, faciant quo modo poterint sufficiatque ad bonorum suorum divisionem faciendam nuda voluntas testatoris.”

The deified Julius Caesar was the first to grant soldiers the ability to make a will (*testamenti factio*) free [from any formal-

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<sup>48</sup> See du Plessis (note 2), 223.

<sup>49</sup> On this text, see also Pfeifer (note 12), § 18 no. 41; J. F. Stagl, “Das Soldatentestament unter den Soldatenkaisern,” in U. Babusiaux and A. Kolb, eds., *Das Recht der Soldatenkaiser. Rechtliche Stabilität in Zeiten politischen Umbruchs?* (Berlin 2014), 110–11; I. de Falco, “I giuristi e il testamentum militis. L’orientamento di Iavolenus Priscus,” *SDHI*, 80 (2014), 419–21; F. Scotti, *Il testamento nel diritto romano. Studi esegetici* (Rome 2012), 567–69; J. Meyer-Hermann, *Testamentum militis – das römische Recht des Soldatentestaments. Entwicklung von den Anfängen bis zu Justinian* (Aachen 2012), 7–8; Guarino (note 31), 349–52; V. Scarano Ussani, “Il testamentum militis nell’età di Nerva a Traiano,” in V. Giuffrè, ed., *Sodalitas. Scritti in onore di Antonio Guarino*, 3 (Naples 1984), 1383–86; S. von Bolla, “Zum römischem Soldatentestament,” in M. Lauria, ed., *Studi in onore di Vincenzo Arangio-Ruiz*, 1 (Naples 1953), 273; V. Arangio-Ruiz, “L’origine del testamentum militis e la sua posizione nel diritto romano classico,” *BIDR*, 18 (1906), 164–67.

ities<sup>50</sup>], but this concession was of a temporary nature. Later, however, it was granted again, first by the deified Titus, then by Domitian. Even later, the deified Nerva conferred the fullest grace onto the soldiers. Trajan followed this and since then, this kind of chapter was inserted in the mandates [to his magistrates<sup>51</sup>]. Chapter from the mandates: “As it has been brought to My notice that, repeatedly, wills left by Our fellow soldiers were produced which could lead to dispute if one insisted on the diligence and observance of the laws, following the integrity of My heart towards Our excellent and most faithful fellow soldiers, I thought I should acknowledge their simplicity, so that regardless of the way in which they made their will, their intention should be confirmed. They shall therefore make their wills the way they wish, they shall make them the way they can, and it shall suffice the testator’s bare intention (*nuda voluntas testatoris*) for the division of their property.”<sup>52</sup>

At the end of this development,<sup>53</sup> soldiers were allowed to make a will in whatever way they wanted (*quo modo volent*); any proof of the testator’s last will, the *nuda voluntas testatoris*, was deemed sufficient.<sup>54</sup> Thereby, soldiers were exempted from the ritualized testamentary formalities. One might be tempted to explain this privilege as taking into account the special situation of soldiers, being far from home and exposed to increased threats to their lives. However, the fact that soldiers were authorized to resort to these alleviations at any time during their service, even in times of peace, shows that these provisions “were not only intended for situations

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<sup>50</sup> See in this regard the German translation by M. J. Schermaier in R. Knütel, B. Kupisch, T. Rüfner, and H. H. Seiler, eds., *Corpus Iuris Civilis. Text und Übersetzung*, 3 (Heidelberg 2012), 141 (“die Fähigkeit, formfrei zu testieren”).

<sup>51</sup> See du Plessis (note 2), 41–42; D. Ibbetson, “Sources of Law from the Republic to the Dominate,” in D. Johnston, ed., *The Cambridge Companion to Roman Law* (Cambridge 2015), 32. On the written record of this very chapter of Trajan’s *mandata* in P. Fayum 10, see Scarano Ussani (note 49), 1390 n.23.

<sup>52</sup> Author’s translation. See also the English translation by W. M. Gordon in A. Watson, ed., *The Digest of Justinian*, 2 (Philadelphia, PA 1985), 433.

<sup>53</sup> See Babusiaux (note 7), 186–94; Rüfner (note 2), 14–15; Scarano Ussani (note 49), 1383–96; Watson (note 11), 10–11.

<sup>54</sup> See Pfeifer (note 12), § 18 no. 42; Stagl (note 49), 111; Scarano Ussani (note 49), 1390.

of immediate danger.<sup>55</sup> Thus, it would be over-simplifying to interpret the rules on *testamentum militis* only as another example of managing crises by way of ritualization and exception in Roman testamentary succession law. Rather, the rules were also intended to give soldiers of non-Roman origin, stemming from the provinces, the possibility of stipulating their last will in a valid way.<sup>56</sup> This measure therefore can be regarded as an attempt to make military service more attractive. The same is true for another imperial measure concerning soldiers and their capacity to make a will:<sup>57</sup> soldiers who were still subject to the power of a *pater familias* were exceptionally granted the right to bequeath what constituted their *peculium castrense*, the special fund containing their military income, “unconstrained by the usual rules of testamentary form.”<sup>58</sup> This exception was originally granted to soldiers in active service only, and only later, from the times of Hadrian, extended to veterans.<sup>59</sup>

As to the *testamentum militis*, it was the other way around. It was only Justinian in the sixth century CE who limited this privilege to be exempted from the ritualized testamentary formalities to soldiers *in expeditione* only.<sup>60</sup> A constitution passed down to us in Justinian’s Code states:

Justinian, Code 6.21.17 (529). Imperator Justinianus A. Me-  
nae pp. Ne quidam putarent in omni tempore licere militibus  
testamenta quomodo voluerint componere, sancimus his solis,  
qui in expeditionibus occupati sunt, memoratum indulgeri cir-  
ca ultimas voluntates conficiendas beneficium. d. IIII id. April.  
Constantinopoli Decio vc. cons.

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<sup>55</sup> Růfner (note 2), 14; see also Pfeifer (note 12), § 18 no. 41.

<sup>56</sup> Pfeifer (note 12), § 18 no. 41; Kaser, et al. (note 7), 453; Růfner (note 2), 14; Guarino (note 31), 354; Scarano Ussani (note 49), 1384–85. On the integration of soldiers who were not Roman citizens into the Roman army from republican times onwards, see von Bolla (note 49), 274–75.

<sup>57</sup> du Plessis (note 2), 117.

<sup>58</sup> Saller (note 9), 119; see also du Plessis (note 2), 218, Jakab (note 15), 502, and Meyer-Hermann (note 49), 67–68.

<sup>59</sup> See J.2.12 pr.; C.I. 12.36.4 (Gordian 238–241); du Plessis (note 2), 117; D. Rodak, *Entwicklungslinien des militärischen Sonderguts (peculium castrense) von Augustus bis Hadrian* (Vienna 2022), 46–47.

<sup>60</sup> Pfeifer (note 12), § 18 no. 62; R. Zimmermann, “Testamentsformen: Willkür oder Ausdruck einer Rechtskultur?,” *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 76 (2012), 490; Růfner (note 2), 21; Meyer-Hermann (note 49), 173–75; Arangio-Ruiz (note 49), 160.

Emperor Justinian to Mena, praetorian prefect. In order that nobody should think that soldiers may compose their wills at any time the way they want, We ordain that only those who are occupied in campaigns shall indulge the remembered grace concerning the confection of their last wills. Given on the third day before the ides of April in Constantinople in the consulate of the most honourable Decius.<sup>61</sup>

Thereby, only at its final stage, the *testamentum militis* became a way of quickly making one's will granted to soldiers out on a military campaign, or even on the eve of battle.<sup>62</sup> This, like the *testamentum in procinctu*, can be seen as a way of managing an imminent crisis by means of granting exceptions from the ritualized formalities of Roman succession law. Thus, the classification of the *testamentum militis* in the categories of ritualization and exception depends strongly on the particular stage in the historical development.

### 3. Exceptions: *testamentum tempore pestis conditum* and holograph testaments

However, in times of other crises, it could prove from hard to impossible even for non-soldiers to produce the required number of witnesses.

#### a) *testamentum tempore pestis conditum*

This is especially the case in times of epidemics. That Roman law took care of this special situation can be seen in an imperial enactment on the so-called *testamentum tempore pestis conditum*,<sup>63</sup>

<sup>61</sup> Author's translation. See also the translation in B. W. Frier, D. P. Kehoe, and T. A. J. McGinn, eds., *The Codex of Justinian. A New Annotated Translation with Parallel Latin and Greek Text Based on a Translation by Justice Fred H. Blume*, 2 (Cambridge 2016), 1493.

<sup>62</sup> Růfner (note 2), 22. See also Pfeifer (note 12), § 18 no. 62, who stresses that thereby the military testament developed from a soldiers' privilege to a testament for times of life peril, like the archaic *testamentum in procinctu* ("Damit war das formlose *testamentum militis* von einem Vorrecht des Soldatenzustandes wieder zu einem Nottestament in Todesgefahr geworden, wie es das archaische *testamentum in procinctu* gewesen war.>").

<sup>63</sup> On this, see Pfeifer (note 12), § 18 no. 76; C. Willems, "Zwischen Infektionsschutz und Schutz des Erblasserwillens: Das sogenannte *testamentum tempore pestis conditum* in C. 6,23,8 (290)," *ZSS (RA)*, 138 (2021), 616–34; Kaser, et al. (note 7), 455; A. Cherchi, "L'indulgenza nell'em-

mentioned in a rescript of emperor Diocletian from 290 CE, also passed down to us in Justinian's Code:

Justinian, Code 6.23.8 (Diocl./Maxim. 290). Impp. Diocl. et Maxim. AA. Marcellino. Casus maioris ac novi contingentis ratione adversus timorem contagionis, quae testes deterret, aliquid de iure laxatum est: non tamen prorsus reliqua etiam testamentorum sollemnitas perempta est. 1. Testes enim huiusmodi morbo oppresso eo tempore iungi atque sociari remissum est, non etiam conveniendi numeri eorum observatio sublata. s. k. Iul. ipsis IIII et III AA. cons.

Emperors Diocletian and Maximian to Marcellinus. Because of a major new event, something in the law has been relaxed, directed against the fear of contagion, which frightens witnesses; however, not each and every solemnity of the wills has been exempted from. 1. To wit, the witnesses have been exempted from joining and meeting with someone who is struck by the disease at such a time, with no corresponding relaxation in the number who come together. Written on the kalends of July in the fourth respectively third consulate of the emperors themselves.<sup>64</sup>

In view of the COVID-19 pandemic,<sup>65</sup> this constitution on the subject of alleviated testamentary formalities in times of a contagious disease is of special interest. In another paper,<sup>66</sup> I have

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ergenza. Brevi note sul c.d. testamentum tempore pestis nel diritto romano," in V. Corona and M. F. Cortesi, eds., *Emergenza e diritti tra presente e futuro* (Naples 2020), 143–61; M. Vinci, "Il testamento redatto in tempo di malattia contagiosa: radici romanistiche e letture attualizzanti," *BIDR*, 114 (2020), 283–313; L. Desanti, "Dominare la prassi. I rescritti diocleziani in materia di successioni," in W. Eck, S. Puliatti, eds., *Diocleziano: la frontiera giuridica dell'impero* (Pavia 2018), 538–43; Zimmermann (note 60), 489; Rűfner (note 2), 23; V. Kappeřer, *Die Nottestamente des BGB. Eine Untersuchung zur Entwicklungsgeschichte, zur Dogmatik und zur praktischen Bedeutung des Bűrgermeistertestaments und des Dreizeugentestaments de lege lata und de lege ferenda* (Berlin 1995), 38; H. von der Beck, *Norminhalt und Formenstrenge im Recht der Nottestamente* (Berlin 1995), 28; O. E. Tellegen-Couperus, *Testamentary Succession in the Constitutions of Diocletian* (Zutphen 1982), 27–30; P. Voci, *Diritto ereditario romano* [II. Parte speciale. Successione ab intestato, Successione testamentaria] (Milan 1963), 62.

<sup>64</sup> Author's translation. See also the translations by Tellegen-Couperus (note 63), 27 and in Frier, et al. (note 61), 1505.

<sup>65</sup> See also Cherchi (note 63), 143; Vinci (note 63), 283.

<sup>66</sup> Willems (note 63), 618–27.

argued that the imperial rescript, issued *casus maioris ac novi contingentis ratione*, is to be understood against the background of an epidemic raging at that time, maybe to be identified as the smallpox. In the third century CE, the Roman empire was first struck by the so-called Cypriatic plague (249 – 262 CE), “a transcontinental disease event of rare magnitude”<sup>67</sup> which Kyle Harper identifies as influenza or a viral hemorrhagic fever, caused by a filovirus, comparable to today’s Ebola.<sup>68</sup> In Diocletian’s times, again, several waves of the smallpox hit the Roman Empire.<sup>69</sup> With C.I. 6.23.8, the emperor clarifies that a former piece of legislation, not passed down to us, exempted the testamentary witnesses in such times (*eo tempore*) from some, but not all testamentary formalities (*aliquid de iure laxatum est: non tamen prorsus reliqua etiam testamentorum sollemnitas perempta est*). It is argued in the paper mentioned that *huiusmodi morbo oppresso eo tempore iungi atque sociari* should be interpreted as exempting the witnesses from assembling as a group with the person of the testator. This double sense is – according to our reading of the constitution – expressed by the double infinitives *iungi atque sociari*, which are no hendiadys,<sup>70</sup> but mean joining the testator (*iungi*) and assembling as a group (*sociari*).<sup>71</sup> The person who is *huiusmodi morbo oppressus* consequently can either be the testator, but also one of the witnesses.<sup>72</sup> However, there is no exemption from the general requirement of calling in the accustomed number of witnesses (*non etiam conveniendi numeri eorum observatio sublata*).<sup>73</sup> Thus, the imperial legislation takes account of the testator’s need to stipulate his last will in times of crisis, while at the same time having an eye to the witnesses’ fear of contagion (*timor contagionis, quae testes deterret*). This balancing approach between creating an exceptional rule for the exceptional situation of a pandemic and maintaining as much of the usual, ritualized formalities as possible<sup>74</sup> is another

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<sup>67</sup> K. Harper, *The Fate of Rome: Climate, Disease, and the End of an Empire* (Princeton, NJ 2017), 137.

<sup>68</sup> Id., 136–45.

<sup>69</sup> S. Winkle, *Geißeln der Menschheit: Kulturgeschichte der Seuchen*, 3rd ed. (Berlin 2014), 840.

<sup>70</sup> See however Cherchi (note 63), 148 (“utilizzo sostanzialmente pleonastico”).

<sup>71</sup> Willems (note 63), 630–33.

<sup>72</sup> Id., 632–33.

<sup>73</sup> Id., 634.

<sup>74</sup> Vinci (note 63), 283, calls this in his (English) abstract “the balance between need for formal simplification and maintenance of certain essential



example of managing crises by way of ritualization and exception in Roman succession law.

#### b) Holograph testaments

Later, in 446 CE, emperor Valentinian III<sup>75</sup> even allowed a holograph will. However, unlike Diocletian's law, this imperial novel was not incorporated into Justinian's Code.<sup>76</sup> In the case at hand, as laid down in Nov. Val. 21.2 pr.,<sup>77</sup> a woman called Misce wanted to institute another woman called Pelagia as her heiress. Not being able to gather the required number of witnesses, she wrote down her will by hand and passed the will on to her nephew, Caesarius, who made its contents known after Misce's death. Pelagia, in turn, did not dare to accept her position as heiress without imperial consent and submitted her case to the emperor. Valentinian, however, did not constrain himself to judge the case at hand, but used the opportunity to issue a general statement to guide similar cases:

*Novellae Valentiniani* 21.2.1 (446). Ne tamen huius statuti salubritatem generi negemus humano, mansura iugiter lege decernimus, ut quisquis per holografam scripturam supremum maluerit ordinare iudicium habeat liberam facultatem. Multis enim casibus saepe contingit, ut morientibus testium numerus et copia denegetur. Quibus erit de legibus nostris inter ipsa vitae deficientis pericula causatio, si propriae manus litteris

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guarantees for the testator," while he uses the fitting topos of the two-lane nature of the measure in the Italian (id., 285): "modello del doppio binario: semplificazione della disciplina ordinaria e mantenimento delle garanzie essenziali per il testatore."

<sup>75</sup> On Valentinian III, see J. D. Harries, "Valentinian III," in S. Hornblower, A. Spawforth, and E. Eidinow, eds., *The Oxford Classical Dictionary*, 4th ed. (Oxford 2012).

<sup>76</sup> See Pfeifer (note 12), § 18 no. 68; Zimmermann (note 60), 478; Rübner (note 2), 19.

<sup>77</sup> On this, see G. Wesener, "Ephemere Besonderheiten des spät-römischen Erbrechts. Zur Frage des Fortlebens rechtlicher Institute," in H. Altmepfen, et al., eds., *Festschrift für Rolf Knütel zum 70. Geburtstag* (Heidelberg 2009), 1415; A. J. B. Sirks, "Making a Request to the Emperor: Rescripts in the Roman Empire," in L. de Blois, ed., *Administration, Prosopography and Appointment Policies in the Roman Empire: Proceedings of the First Workshop of the International Network Impact of Empire (Roman Empire, 27 B.C - A.D. 406), Leiden, June 28 - July 1, 2000* (Amsterdam 2001), 132–33; M. Beutgen, *Die Geschichte der Form des eigenhändigen Testaments* (Berlin 1992), 14–15; P. Voci, "Il diritto ereditario romano nell'età del tardo impero. II. Le costituzioni," *SDHI*, 48 (1982), 19 = P. Voci, *Studi di diritto romano*, 2 (Padua 1985), 199.

scribere quos voluerint non sinantur heredes. Aliis testes itinerum necessitas, aliis solitudo villarum, aliis navigatio servitantum comitibus expedita subducit. Aliorum testatas esse prohibent voluntates hi, qui velut obsessos conclavibus suis solent custodire languentes. Nostrae posthac beneficio sanctionis intestatus nemo morietur, cui fuerit sollicitudo testandi. Late viam supremis aperimus arbitriis: Si holographa manu testamenta condantur, testes necessarios non putamus. scripto enim taliter sufficet heredi adserere etiam sine testibus fidem rerum, dummodo reliqua congruere demonstrat, quae in testamentis debere servari tam veterum principum quam nostrae praecipiant sanctiones, ut in hereditariorum corporum possessionem probata scripturae veritate mittatur.

In order that we shall not deny the human race the helpful assistance of this statute, by a law which shall remain continuously in force We decree that whosoever preferred to order his last will by his own hand shall have the free opportunity [to do so]. In many cases, to wit, it often happens that the dying are denied the number and quantity of witnesses. There would be, by Our laws, a case of grief for the dying at the very danger to their lives if they are not permitted to write the heirs they wanted in letters by their own hand. Some are deprived of witnesses by the necessity of voyage, some by the solitude of their houses, some by a sea passage undertaken only in the company of slaves; for others, those who used to keep the languished as prisoners under lock in custody prohibit their wills to be witnessed. By the benefit of Our order, nobody shall die intestate henceforth who took care for establishing a will. We open a broad way for last wills: if holograph wills were made, We do not deem witnesses necessary. Concerning something written this way, it is sufficient for the heir to assert the integrity of the affair, also without witnesses, as long as he shows that the other things which are ordered to be observed concerning wills are in conformity, according to the orders of the old emperors and Our own, so that, once the authenticity of the script is proved, he shall be admitted to the possession of the inheritance.

With this rescript,<sup>78</sup> Valentinian completely waived the requirement of witnesses (*testes necessarios non putamus*) in cases of dire

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<sup>78</sup> On this, see Zimmermann (note 60), 478; Rñfner (note 2), 19; Wessener (note 77), 1414–15; Sirks (note 77), 133; Beutgen (note 77), 11–16; Voci (note 77), 199.

circumstances which made it impossible to gather the required number of witnesses or even any witnesses at all. Such exceptional cases in which the testator is isolated comprise situations in which there is a distance to be covered between testator and witnesses (*itinerum necessitas*), whether he is alone in his villa (*aliis solitudo villarum*) or on a sea voyage, accompanied only by his slaves (*navigatio servis tantum comitibus expedita*). Besides, there are cases in which ill persons are held under lock and key by those who should take care of them, thereby hindering them from gathering witnesses and stipulating their last will (*aliorum testatas esse prohibent voluntates hi, qui velut obsessos conclavibus suis solent custodire languentes*). In such cases which made the presence of witnesses and thus the realization of the required ritual impossible, according to Valentinian's law, a will was deemed valid if entirely written by the testator in his own hand (*holographa manu*). However, all other testamentary formalities had to be observed (*dummodo reliqua congruere demonstret, quae in testamentis debere servari tam veterum principum quam nostrae praecipiant sanctiones*). Thus, again, the imperial legislation takes account of the testator's need to stipulate his last will in times of crisis. In this case, however, we are not confronted with a general, public crisis as in the instances discussed above (imminent war, pandemic), but with an individual, private crisis of the testator, who is in a difficult situation. Again, the law aims at a balancing approach between creating an exceptional rule for this exceptional individual situation, while at the same time maintaining as much of the usual, ritualized formalities as possible. Nov. Val. 21.2 can therefore be seen as another example of managing crises by way of ritualization and exception in Roman testamentary succession law.

#### IV. Excursus: gifts *mortis causa*

This paper focusses on testamentary formalities when discussing crisis management by way of ritualization and exception in the Roman law of succession. There were, however, also other aspects related to dispositions *mortis causa* made in times of crises, one of them being *donationes mortis causa*. Such gifts in anticipation and contemplation of death<sup>79</sup> have been acknowledged in Roman law

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<sup>79</sup> On these, see only, with further references, D. Rüger, "Schenkung von Todes wegen (donatio mortis causa)," in U. Babusiaux, C. Baldus, W. Ernst, F. S. Meissel, J. Platschek, and T. RUFNER, eds., *Handbuch des römischen Privatrechts* (Tübingen 2022) (in press), § 99 nos. 1–20; Kaser, et al. (note 7), 494–95; du Plessis (note 2), 206–207.

since the first century BCE.<sup>80</sup> The oldest instances presumably go back to cases in which the donor was *imminente periculo commotus*, i.e. moved by an imminent event of danger to his life (*ex metu mortis aut ex praesenti periculo*), which could for instance be a serious disease, a dangerous sea voyage, or military service.<sup>81</sup> At least in the later Roman law, the jurists accepted the possibility of revoking such donations in cases in which the donor survived the event of imminent death which had motivated his donation in the first place, i.e. once he had recovered from his disease or returned safely from his dangerous voyage.<sup>82</sup>

Justinian implies that the old jurists, the *prudentes*, discussed whether such special donations, upon condition precedent or subsequent of the donor's passing away,<sup>83</sup> should be ruled by the law of donations *inter vivos* or rather be classified as a special case of a legacy (*legatum*).<sup>84</sup> The emperor ordained in C.I. 8.56.4 (530) that such *donatio mortis causa* should be made in the presence of five witnesses (*quinque testibus praesentibus*), whether in writing or in any other form (*vel in scriptis vel sine litteratum suppositione*), without any need for the transaction to be registered, and that the gift should have the same effects as a bequest. The similarity between a legacy and a *donatio mortis causa*<sup>85</sup> thereby was extended to the formalities:<sup>86</sup> witnesses were needed, as in a testament. However, while Justinian returned to the requirement of seven witnesses for a testament,<sup>87</sup> he let suffice five witnesses in the case of a *donatio mortis causa*. Consequently, it was not the same ritualized form that was used for testaments, but another,

<sup>80</sup> Rügner (note 79), § 99 no. 1; D. Rügner, *Die donatio mortis causa im klassischen römischen Recht* (Berlin 2011), 23.

<sup>81</sup> See e.g. D.39.6.2 (Ulp. 32 *Sab.*) and D.39.6.35.4 (Paul 6 *l. Iul. Pap.*) with Rügner (note 79), § 99 no. 2; du Plessis (note 2), 207; and Rügner (note 80), 26–27.

<sup>82</sup> See for instance Paul. *Sent.* 3.7.1; Rügner (note 79), § 99 no. 13; du Plessis (note 2), 207; for more details, see Rügner (note 80), 221–42.

<sup>83</sup> See e.g. J.2.7.1; Rügner (note 79), § 99 no. 4; du Plessis (note 2), 207; Rügner (note 80), 30–32.

<sup>84</sup> C.I. 8.56.4 (530); J.2.7.1; Nov. 87 (539). See Rügner (note 79), § 99 no. 5; Rügner (note 80), 32–34; K. H. Schinder, *Justinians Haltung zur Klassik: Versuch einer Darstellung an Hand seiner streitentscheidenden Konstitutionen* (Cologne 1966), 13–19; M. Amelotti, *La donatio mortis causa in diritto romano* (Milan 1953), 6 and 203–206.

<sup>85</sup> See also D.39.6.37 pr. (Ulp. 15 *l. Iul. Pap.*) (*donationes mortis causa factas legatis comparatas*).

<sup>86</sup> In this sense, see Rügner (note 80), 228.

<sup>87</sup> C.I. 6.23.26 pr. (528), 6.23.28.6 (530), 6.23.30 (531); J.2.10.3. See Rügner (note 2), 20 and 23.

albeit a similar one<sup>88</sup> – the form which was to be used, according to C.I. 6.36.8.3 (Theodos. 424), *in omni . . . ultima voluntate excepto testamento*, namely for codicils, i.e. dispositions *mortis causa* which did not include the appointment of an heir.<sup>89</sup>

This short excursus has shed some light on the fact that also apart from the law of testamentary formalities *strictu sensu*, there are examples in the Roman law of succession in which Roman law responded to social necessities, reacted to private or public crises, and exceptionally granted a deviation from the strict formalities set to stipulate one's last will. The reforms discussed in this paper therefore do not stand isolated, but are to be seen against the background of a broader development in Roman succession law.

## V. Conclusion

In times of crises, be they public or private, it was often hard for the Romans to maintain the necessary testamentary formalities and to perform the required rituals, while at the same time, obviously, in such times, the question of what happens after a person's death was of particular relevance. Therefore, Roman law responded to social necessities and developed, time and again, new exceptions that sought to keep the balance between maintaining traditional rituals as a stabilizing factor on the one scale and the need for manageable, effective legal acts in times of crises and disruptive events on the other scale. Thomas R fner fittingly styles this an "idiosyncratic mix of stable and dynamic features."<sup>90</sup>

Already in early Roman succession law, soldiers were exceptionally exempted from the ritualized formalities of the *testamentum calatis comitiis* on the eve of battle by the introduction of the *testamentum in procinctu*: the testator was exempted from waiting until the next gathering of the *comitia*, held only twice per year, but not from performing the rest of the ritual, the public presentation of the designated heir for the (tacit) consent of the

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<sup>88</sup> See Schinder (note 84), 18 ("F r die [*donatio mortis causa*] war eine neue Form geschaffen worden, die der Errichtung vor f nf Zeugen.").

<sup>89</sup> This fact is stressed by Kaser, et al. (note 7), 495, and by Amelotti (note 84), 6 n.21 and 206, with further references to the Pandectists views in id., 206 n.11. On codicils in Justinianic law, see R fner (note 2), 23–24.

<sup>90</sup> R fner (note 2), 25. On the "ambivalent nature of the law as both a force for stability and an agent of change," see additionally T. R fner, "Tipping the Scales of Justice: Roman Law as a Resource in Medieval Legal Discourse," in M. Endre , L. Clemens, and B. Rampp, eds., *Strategies, Dispositions and Resources of Social Resilience. A Dialogue between Medieval Studies and Sociology* (Wiesbaden 2020), 219–20.

assembled peers. Later, when testamentary formalities were alleviated, but when it was still necessary to make one's will in the presence of a certain number of witnesses – a procedure going back to the traditional Roman *mancipatio* ritual used in a “postformed” way for the *testamentum per aes et libram* – imperial legislation granted exceptions in cases of crisis. At least as finally shaped by Justinian in C.I. 6.21.17 (529), the concept of *testamentum militis* exempted soldiers on a military campaign from the requirement of using the ritualized testamentary formalities. Besides, Diocletian had already granted, in C.I. 6.23.8 (290), an exception from the requirement that the witnesses had to gather with the testator at the same time in times of an epidemic. Valentinian III conceded in Nov. Val. 21.2 (446) an exemption from the requirement to call witnesses in cases in which the testator was in a difficult personal situation (illness, alone on travel, isolation). In both cases, however, only parts of the ritualized testamentary formalities were exempted from, while as much of the normal ritual as reasonable, given the situation at hand, had to be performed.

As the above examples have shown, the Roman law of testamentary formalities constantly, in all the periods considered in this paper, evolved and was adapted in order to accommodate social needs and changing circumstances, especially those caused by disruptive events and crises. It is to that extent that Roman testamentary succession law looked for a compromise between ritualization and exception, thus managing crises in an effective way.

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