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# INDIVIDUAL WILL AND THE CIVIL LAW TRADITION

**RETHINKING LEX PRIVATA**

Edited by  
Tommaso dalla Massara



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This volume sets out to explore the relationship between individual will (*voluntas*) and the legal rule. What unfolds in the following pages is a wide-ranging itinerary, moving between past and present, most notably ancient Rome and the contemporary world.

The guiding question is as radical as it is enduring: in what way can *voluntas* (a psychological impulse internal to the individual) come to determine the legal rule? European private law tradition rests on the premise that legally binding acts – contract and will, to mention only two paradigmatic cases – derive their force from individual will. From the Roman sources arises, with exemplary force, the notion of *lex privata*: the idea that private will itself may generate binding legal norms.

Such a premise immediately leads to further questions. Above all, it compels reflection on the authenticity of that will: what if *voluntas* is compromised? The law of defects (*error, dolus, metus*) opens the problem of whether distorted or corrupted will can truly sustain the validity and effects of a legal rule.

The reflections gathered in this book approach the European civil law tradition as a broad and unified phenomenon, one in which law is inseparably bound to the historical and cultural contexts in which it takes shape.

**Tommaso dalla Massara** is Full Professor of Law at Roma Tre University. His research has long focused on the foundations and models of the European civil law tradition; he is author of numerous monographs and essays in Roman law and private law. He also serves as editor of academic book series with leading publishers and sits on the editorial boards of several distinguished international journals.



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Individual Will and the Civil Law Tradition  
Rethinking Lex Privata



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and the Civil Law Tradition  
Rethinking Lex Privata

Edited by

Tommaso dalla Massara

Coordinated by

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## Chapter 3

### **VOLUNTAS AS LEX.**

# **THE ANCIENT ROOTS OF A MODERN LEGAL IDEA**

**Sara Galeotti**

*ABSTRACT: This contribution aims to investigate the significance of the expression *lex contractus* (*lex privata*) concerning the phenomenon of the normativity of will. Specifically, this study will examine the complex role of ‘private will’ – as expressed in the construction of *id quod actum est* – in shaping contractual types and contributing to their development and enrichment.*

**KEYWORDS:** *Voluntas – Lex contractus – Agreement.*

**SUMMARY:** 1. *Voluntas*: A long ‘intellectual’ journey. – 2. The polysemy of the concept of will: From the Greek conception of *boulesis* to the Latin notion of *voluntas*. – 3. About *lex contractus*. – 4. Private autonomy and *Typenzwang* in Roman contract law: Two examples. – 5. Is the cyber-formalism the new *mancipatory-formalism*? – References.

## **1. *Voluntas*: A long ‘intellectual’ journey**

*Nil est tam in potestate voluntatis  
quam ipsa voluntas.*

August. *Retract.* 1.1.22

One of the most fruitful contributions of twentieth-century philosophical hermeneutics lies in its capacity to elucidate the intrinsic relationship between thought and language (Baghramian 1998). This perspective has served to consolidate, on the one hand, the notion of the fundamental ‘conceptuality’ of philosophy (Gadamer 1970, 137 f.); and, on the other hand, of the methodological centrality of *Begriffsgeschichte* in tracing the evolution of thought itself (Gadamer 1990, 401 ff.).<sup>1</sup> Indeed, attentiveness to linguistic

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<sup>1</sup> «Wir hatten in der Analyse des hermeneutischen Prozesses die Gewinnung des Auslegungshorizontes als eine Horizontverschmelzung erkannt. Das wird jetzt auch von der Seite der Sprachlichkeit der Auslegung aus bestätigt. Der Text soll durch die Auslegung zum Sprechen kommen. Kein Text und kein Buch spricht aber, wenn es nicht die Sprache spricht, die den anderen erreicht. So muß die Auslegung die rechte Sprache finden, wenn sie wirklich den Text zur Sprache bringen will. Es kann daher keine richtige Auslegung

phenomena and recognizing the semantic transformations of keys – such as the Latinisation of the Greek philosophical lexicon or the translation of Latin terminology into modern idioms – enables us to grasp the complexity of linguistic choices and cultural contexts which, over time, have generated distinct intellectual traditions (Camera 2025, 232).

Much like philosophy, law is not an abstract construction founded upon conceptual invariances; rather, it is the dynamic product of a work shaped by language in forms defined and oriented by the socio-economic evolution of a given civilization (*ex multis*, Mazzotta 1992, 104 f. and Raffa 2000, 113 ff.). Consequently, the understanding of a legal institution as well as its developments demands, first and foremost, the ‘historicisation’ of the terminology that describes it, together with a diachronic reflection on the concepts thereby evoked across different moments in time.

After all, from the perspective outlined by one of the most prominent intellectual figures of the Roman Republic – Cicero, particularly in *De re publica* and *De legibus* –, *ius* is conceived as *lógos*, the rational principle underpinning the normative order of the *res publica* (Schiafone, 2005, 108). As Ulpian would observe more than two centuries later, this order would be unsustainable without the jurists, *sacerdotes iuris* and *veri philosophi*, who serve as custodians of the profound and privileged nexus between the pursuit of justice and the realization of truth (Nörr 1973; Nörr 1972 [74]; Casavola 2003; Falcone 2004; Schiafone 2005, 371; Bretone 2010; Maganzani 2020).

As a full understanding of the long intellectual journey of the *Willenstheorie*, calls for an exploration of the cultural landscape that shaped its origins, the inquiry will begin by considering the theme from the perspective of the ancient world. Indeed, starting from a preliminary, and necessarily cursory, reflection on the term *voluntas* within the Roman cultural and legal context, this contribution seeks to investigate the conceptual and functional significance of the expression *lex contractus* (*lex privata*) concerning the phenomenon of the normativity of legal will. Specifically, the chapter will offer an overview of the complex role played by will/*voluntas* – as expressed in the formula *id quod actum est* (Vlahos 2012, 844)<sup>2</sup> – in shaping contractual types and in contributing to their development and conceptual refinement.

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>an sich< geben, gerade weil es in jeder um den Text selbst geht. In der Angewiesenheit auf immer neue Aneignung und Auslegung besteht das geschichtliche Leben der Überlieferung. Eine richtige Auslegung >an sich< wäre ein gedankenloses Ideal, das das Wesen der Überlieferung verkennte. Jede Auslegung hat sich in die hermeneutische Situation zu fügen, der sie zugehört...».

<sup>2</sup> See, e.g., Ulp. 31 *ad ed.* D. 17.2.52 pr.: *Cum duobus vicinis fundus coniunctus venalis esset, alter ex his petit ab altero, ut eum fundum emeret, ita ut ea pars, quae suo fundo iuncta esset, sibi cederetur: mox ipse eum fundum ignorante vicino emit: quaeritur, an aliquam*

## 2. The polysemy of the concept of will: From the Greek conception of *boulesis* to the Latin notion of *voluntas*

The historical evolution of the philosophical concept of ‘will’ or ‘willing’, from classical antiquity to the advent of Christianity, has garnered considerable scholarly attention and inspired thorough debates. These inquiries juxtapose diverse paradigms that aim to delineate this notion and underscore its centrality in elucidating the Human experience (Arendt 1971, 84; Dihle 1982, 144; Kahn 1988, 255-259; Miller and Inwood 2003; King 2010, XXXI; Brann 2014, 23-37; Maso 2021a; Paulson 2022, 17). Within this rich hermeneutic framework, certain salient theoretical junctures may be discerned to demarcate the speculative scope within which the concept of *voluntas* can be critically examined (Ranouil 1980; Vetö 2003; Wijffels 2022). Philosophically, the term is inextricably linked with the phenomena of action and deliberation, situated within the broader domains of ethics, moral discourse, and anthropological self-comprehension. Private will, in its legal meaning, is frequently conceptualized as an intrinsic faculty of the agentive subject, endowed with the capacity to engender acts rooted in deliberation, whether exercised voluntarily or involuntarily, and informed by the principle of free will (Pereboom 2014; Pereboom 2017a; Pereboom 2017b).

According to a well-established interpretation, the concept of will as a causal principle of action finds its development in modernity, shaped significantly by the influence of Latin culture and its reinterpretation in Medieval doctrine (Bassano 2022; Sinisi 2022). Although an initial reflection on willing emerged in the Greek world, it is crucial to note the absence of a precise term in the Greek linguistic context equivalent to what the Romans denote as *voluntas*.

Instead, the Greek philosophical paradigm oscillates between two poles, represented by the verbs θέλειν and βούλεσθαι, though this does not amount to a strict opposition: the former signifies «being ready or disposed

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*actionem cum eo vicinus habeat. Iulianus scripsit implicitam esse facti quaestionem: nam si hoc solum actum est, ut fundum Lucii Titii vicinus emeret et mecum communicaret, adversus me qui emi nullam actionem vicino competere: si vero id actum est, ut quasi commune negotium gereretur. Societatis iudicio tenebor, ut tibi deducta parte quam mandaveram reliquas partes praestem.* According to Ulpian, the mere fact that two or more individuals jointly perform an act or engage in a common enterprise does not, in itself, constitute a partnership. In addition to such collaborative action, there must also be a specific intention to establish a partnership relationship, expressed through the *affectio societatis*. This *affectio* is precisely what Julian seeks to identify in addressing the factual question at hand. He examines the parties’ intent to determine whether the arrangement in question represents a mere informal agreement between neighbors or a true partnership contract. Particularly illustrative in this context is the formula *si hoc solum actum est, ut – si vero id actum est, ut*, which underscores the pivotal role of intent.

toward something», while the latter refers to «aspiring to something deemed worthier of effort – a desire or plan (βουλή) directed toward a specific object» (*ex aliis*, Pohlenz 1947, 209 ff., 304 f.; Snell 1953, 182 f.; Voelke 1973, 5).<sup>3</sup>

While βούλεσθαι denotes the act of spontaneous willing, its etymological root invokes notions of reflection and deliberation. As a result, the actions it describes invariably stem from an intellectual process culminating in the effort to attain a goal deemed valid. In a philosophical framework that privileges the primacy of intellect (manifested as νοῦς or διάνοια), the will does not attain autonomy as a distinct force or an independent psychic faculty detached from the cognitive dimension, thereby hindering its conceptual independence (Vlahos 2012, 830 ff.; Paulson 2022, 18-24; Camera 2025, 234 f.).

A significant turning point in the redefinition of the theory of will lies in the assimilation of Greek thought within the framework of Latin culture. It can indeed be justly stated that the Latin concept of *voluntas* constitutes a foundational matrix for the subsequent conceptualisation of legal will as an autonomous human faculty, wherein deliberation is not exclusively dependent on rational knowledge (Maso 2021b, particularly 84).

First and foremost, language offers guidance: in Latin, *voluntas* is a polysemous term that encompasses the meanings expressed by the three Greek nouns βούλησις, ἐκών, and ὁρμή (Maso 2021b and Paulson 2022, 24). *Voluntas* thus signifies not only the manifestation of a subject's decision<sup>4</sup> but also a choice exercised in the absence of constraint, as well as an impulse that does not necessarily arise from an act of rationality. It is no coincidence that Varro, capturing this dynamic, attributes a dual origin to *volo/velle* – from *voluntas* and *volatus* – to emphasize the dynamic and immediate nature of the human spirit, capable of turning instantly to any chosen objective (Paulson 2022, 24).<sup>5</sup>

In Cicero, legal will is theorized as the motivational nucleus from which all movements of the human soul originate, encompassing both those rooted in rational deliberation and those stemming from irrational impulses (Maso 2021b, 73-84; Vlahos 2012, 832; Paulson 2022; Camera 2025, 234 f.). Seneca likewise delves into the interplay between *voluntas* and intellect within the framework of human action, challenging the Greek intellectualist tradition and attributing to the will a profound and structurally innovative significance. His celebrated *dictum, velle non discitur*,<sup>6</sup> encapsulates the notion

<sup>3</sup> See below, Galeotti, particularly 196 ff.

<sup>4</sup> See below, Galeotti, particularly 196 ff. See also Orlandi and Grondona, in this book.

<sup>5</sup> Varr. *ling. lat.* 6.6.47: *Volo a voluntate dictum et a volatu, quod animus ita est, ut puncto temporis pervolet quo volt.*

<sup>6</sup> Sen. *ep.* 81.13: *Desinant itaque infamare nos tam quam incredibilia iactantes et sciant*

that the will does not emerge from learning or knowledge but rather manifests as a primordial force emanating from the unfathomable depths of the human psyche (Maso 2021b, 85-94 and Camera 2025, 236 f.).

In Seneca, the term *voluntas* attains substantial significance, yet does not crystallise into a formal theoretical system. Rather, the term identifies an original disposition of the soul, a tendency (*impetus, intentio*) rooted in the will to live, from which action derives independently of any necessary connection to positive action. In this framework, action resulting from *voluntas* is not exclusively bound to goodness or reason but can also strive toward what is not good, as exemplified by the characters of Medea and Phaedra in Seneca's tragedies, where reason is dramatically at odds with will (Bourbon 2021; Maso 2021b, 85-94; Cassan 2022, 105-143; Camera 2025, 237).

It is worth noting, moreover, that it is precisely the theatrical stage that provides the earliest evidence of the term's multifaceted nuances: indeed, the first recorded instance of *voluntas* appears not within a juridical framework but in the work of the pioneering Latin tragedian, Livius Andronicus.

An enigmatic line from his tragedy *Tereus*, performed in the latter half of the 3<sup>rd</sup> century BC, reads: «Believe me, never with my own consent/Did she my sister press her cheek to his – *Credito/cum illo soror mea voluntate numquam limavit caput* (trans. Warmington 1936, fr. 25 f.)». Although the context remains partly obscure, the implicit relationship between the characters appears to articulate the nexus between *voluntas* and *sponsio* in a marital context:<sup>7</sup> an individual grants their consent – presumably expressed verbally – to an action carried out under their authority (*ex aliis*, Albanese 1992, 145-148; Astolfi 1992, 262 ff.; Astolfi 1994, 9 ff.; Bartocci 2002, 25 ff.). We are not yet dealing with an interpretation of will in a subjective sense; rather, the focus is on the hierarchical status of the two parties and the relationship between βούλεσθαι and θέλειν, between command and consent (Paulson 2022, 27).

Misinterpretations of will also constitute a fundamental structural element in the dramatic architecture of the two foremost playwrights of Roman comedy, Plautus and Terentius. The term *voluntas* and its derivatives appear eight times in the twenty-one extant comedies of Plautus and six times across Terentius' six surviving plays (Paulson 2022, 27). Notably, *Pseudolus* testifies a refined awareness of the 'transactional' conception of will, deeply rooted in the Roman legal tradition. In the first act, the astute eponymous slave finds himself subjected to a mock trial orchestrated by his master and a family friend, accused of

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*apud sapientem esse ipsa honesta, apud vulgum simulacra rerum honestarum et effigies. Nemo referre gratiam scit nisi sapiens. Stultus quoque, utcumque scit et quemadmodum potest, referat; scientia illi potius quam voluntas desit. Velle non discitur.*

<sup>7</sup> See, e.g., also Gell. 4.4.1-4.

having misappropriated a substantial sum of money. Having taken the money to assist his master's son in purchasing a slave girl, Pseudolus subverts the parody of a criminal trial into a simulation of contractual negotiation:

Would you not, of your own free will (*tua voluntate*), immediately grant me the money so that I may pay the procurer?

The friend intervenes, affirming the validity of the request (*ius bonum orat*):

Say: «I grant it». <sup>8</sup>

As in Andronicus's fragment, the character's will is not the object of inner scrutiny, but one of performative declaration. The role of *voluntas*, both on stage and within a legal framework still deeply marked by formalistic constraints, would thus appear to be that of an analytical and adjudicative instrument – operating in retrospective and dichotomous terms – rather than a constitutive force (Paulson 2022, 25).

A different image emerges when we turn our gaze to the political sphere. An inscription dating back to the late 2<sup>nd</sup> century BC in Roman Spain states:

*extarent eis red(d)idit dum populus [senatusque]  
Roomanus vellet deque ea re eos [qui aderunt---]  
eire iussit legatos Cren[--- f(i)lius]  
Arco Cantoni f(i)lius legates [---]*<sup>9</sup>

The phrase «public law is law insofar as it is what the Senate and the People of Rome have willed» underscores the self-activating and dynamic nature of the republican deliberative process, in which the very act of willing produces legal effects without the need for an abstract conceptualization of will (Paulson 2022, 25).

This transition from the original descriptive and retrospective function of *voluntas* in the private domain to a constitutive and self-activating function in the political realm reveals the stratification and complexity with which the concept was integrated into Roman legal-political culture.

In classical Roman law, the legal will of private individuals transcends mere institutional consideration, emerging as a fundamental aspect of the conceptualization of *ius* by the jurisprudential discourse of that era. Our analysis commences with the *responsum*, characterized by its typical tripartite structure: factual background, legal consequence, and *ratio decidendi*. Within this framework, *voluntas singulorum* is manifested either in the first or the third part.

<sup>8</sup> Plaut. *Pseud.* 534-538. See also Plaut. *Men.* 640-645; *Stich.* 170.

<sup>9</sup> AE 1984, 495 = AE 1986, 304 = AE 1987, 474 = AE 1991, 965.

Primarily, the will of individuals constitutes an element of the *factum*; however, it is frequently utilized as the foundation for the jurist's interpretative approach to the specific case at hand (Burdese 1993, 9-11 and Vlahos 2012, 839-846). In such instances, *voluntas* transitions from a factual component to the basis of the *ratio decidendi*, thereby playing a guiding role in the jurisconsult's determination of the legal consequences of the act under examination. Occasionally, this interpretive process extends beyond a mere application of legal norms to factual circumstances, acquiring an expansive dimension driven by the forceful nature of *voluntas singulorum*. This dynamic legitimizes significant interpretive interventions in favor of a more flexible legal framework.

The two occurrences of will – both as a factual and as a normative element – constitute the foundation of our analytical framework. Consequently, we will examine the concept of *voluntas singulorum* as interpreted by the more mature Roman legal science, which strongly emphasizes the intentional dimension underpinning the notion of will. Due to its conceptual alignment with other components of the legal system, *voluntas singulorum*, initially viewed as the origin of the act (*factum*), can also serve as a source of law (*ius*), thus forming the *ratio decidendi*. Through its dual nature, will encompasses both the *quaestio facti* and the *quaestio iuris*, a complexity that, in certain respects, is effectively encapsulated by the expressions *lex privata/lex contractus*.

### 3. About *lex contractus*

Roman legal thought of the Classical period identifies *voluntas* as a fundamental principle underpinning contractual agreements, thereby conceiving them not merely as 'transactional entities' but also as expressions of individual will deeply rooted in the philosophical tradition previously discussed (Vlahos 2012 and Giannozzi 2022). The distinguishing characteristic of *voluntas*, as recognized by law, resides in its binding nature, which engenders legal effects. What begins as a mere fact evolves into a commitment – one that obligates not only the individual but also other parties who may engage in the same legal transaction. This transformation is often governed by a specific *formula*: the will must be presented in a formal manner to yield its intended effects.<sup>10</sup> Nevertheless, preclassical and classical jurisprudence consistently emphasizes the intentional essence of any legal act executed voluntarily (Burdese 1993, 7-11 and

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<sup>10</sup> See, e.g., Gai 2.116: *Sed ante omnia requirendum est, an institutio heredis sollemni more facta sit; nam aliter facta institutione nihil proficit familiam testatoris ita uenire testesque ita adhibere et ita nuncupare testamentum, ut supra diximus. 117. Sollemnis autem institutio haec est: TITIVS HERES ESTO; sed et illa iam conprobata uidetur: TITIVM HEREDEM ESSE IVBEO; at illa non est conprobata: TITIVM HEREDEM ESSE VOLO; sed et illae a plerisque inprobatae sunt: TITIVM HEREDEM INSTITVTO, item: HEREDEM FACIO.*

Vlahos 2012, 830, 836 f.). Particularly in the legal discourse of the 2<sup>nd</sup> and 3<sup>rd</sup> centuries AD, the *voluntas singulorum* embodies the judgment of an individual aimed at fulfilling a specific objective and, being subject to the authority of the normative authority of the legal rule – which remove it from the realm of personal discretion –, it becomes a norm in itself.

It is not surprising, therefore, that legal studies on Roman terminology, conducted since the 19<sup>th</sup> century, have sought to identify private agreements with the expressions *lex contractus* and *lex privata* (Georgescu 1932).

Notwithstanding their alignment with Roman contractual models, ancient legal sources offer only scant textual evidence to substantiate this interpretation. At least regarding consensual contracts, the jurisprudential framework emphasizes the bilateral character of the interests underlying the agreement – interests that, in turn, shape its internal regulation. This projection of the *lex contractus* into a dual dimension is manifest in terms such as *lex venditionis*, *lex emptionis*, *lex locationis*, and *lex conductionis* (du Plessis 2006, 81).

In other words, what mattered was the perspective adopted by the jurist: if consulted by an *emptor*, he would frame his reasoning in terms of *lex emptionis*; conversely, if called upon to defend a seller's position, his *responsum* would refer to *lex venditionis*.

Why, therefore, should one refer to the substance of the agreement, to an individual contractual provision, or, more broadly, to the elements that constitute the foundation of an obligational relationship as *lex*?

To address this question, the etymology of the term, albeit controversial, offers little assistance (Watkins 2000, 47). Some scholars have linked it to *ligare* (to bind), emphasizing its binding nature, while others have associated it with the Greek λέγειν (to gather, to choose, but also to read). This latter interpretation could suggest both a reference to the written form that a *lex publica* might take and – most compellingly, given the theme of this study – the coming together of individual wills with a shared intention (Magdelain 1978, 12-22; Harrison 2010, 79-87).

A useful starting point, then, may be a well-known passage from Varro, which not only documents the adaptation of contractual formulas originally designed for cash sales to the new reality of consensual and obligatory sales (Talamanca 1991, 50), but also provides valuable insight into the terminological issue surrounding the use of the term *lex*:

*In emptionibus (ovium) iure utimur eo, quo lex praescrpsit; in ea enim alii plura, alii pauciora excipiunt... De reliquo antiqua fere formula utuntur: cum emptor dixit: «tanti sunt mihi emptae?» et ille respondit: «sunt» et expromisit nummos.<sup>11</sup>*

<sup>11</sup> Varr. *re. rust.* 2.2.5.

In purchasing we take advantage of the variation which the law allows, some making more and others fewer exceptions... With this exception, the ancient formula is generally employed: when the purchaser has said, «They are sold at such a price?» and the seller has replied, «Yes», and the money has passed (trans. Hooper 1934, 332-335).

The *lex*, drafted at an earlier stage, is explicitly defined here as the source of law (*iure utimur eo*), containing the prescriptions that bind the parties (*lex praescripsit*). Varro thus attributes to the word *lex* – more than any other term – the ability to express the idea of ‘that which is (legally) binding’, granting it its full meaning as the *ius* governing the contract. Moreover, as in the system described by Cato, the passage illustrates a two-step process: first, the formulation of clauses intended to regulate the relationship between the parties, and second, the subsequent conclusion of a contract that ought to conform to the regulatory shell (Magdelain 1978, 40; Carbone 2005; Carbone 2016-2017, 12, fn. 35; Carbone 2017, 69, fn. 211).

This framework has direct repercussions on the procedural level. Claims arising from *leges contractus*, which acquire legal force in stipulatory form and for which no issue of typical content emerges – since it is the *conceptio verborum* that grants them relevance, while the *voluntas contrahentium* remains latent in the background (Magdelain 1978, 43; Talamanca 1991, 50 f.; Burdese 1993, 4 f.) –, were originally protected through *satisfactiones* or *ex stipulatu* (Carbone 2017, 89 ff.). However, the *sponsio/stipulatio* could be used for achieving various objectives. In its different forms, it became a multifunctional instrument that roughly fulfilled the role of the modern principle of freedom of contract and the abstract notion of legal acts. It is extremely characteristic that precisely through the example of verbal contracts developed from the *sponsio*, especially those like *stipulatio*, the theory of the validity of declarations of will emerged in Roman law (Wołodkiewicz 1978, 295 ff.). Similarly, the advent of *iudicia bonae fidei* led jurisprudence to relate these archaic constitutive schemes and the content of obligations to the general principle of *bona fides*, progressively shaping the substantive scope of the *oportere ex fide bona*.

In the praetorian jurisdictional practice, formality thus began to be replaced by causal typicity (with a gradual rigidification of the *finis contractus*, which also defined the *finis actionis*, given that the Roman system of actions was itself typified) as the criterion for distinguishing, within contractual relations, what was legally binding from what was not. In other words, increasing value was attributed to *conventio* beyond the binding force previously conferred on agreements solely by the *verba stipulationis* (Talamanca 1991, 51).

During the classical period, the individual will enter into the picture as a central driving force behind the interpretative techniques developed by *iurisprudentia*, which not only shaped legal practice but also contributed to the

emancipation of Roman law from its formalistic constraints (Magdelain 1978, 44 and Burdese 1993, 10 f.).

In this regard, it is worth recalling a famous *dictum* by Ulpian, who wrote at a moment of full maturation of this process: *contractus accipiunt legem ex conventionione* (Cardilli 470, fn. 1 and 471 and du Plessis 2006, 82 f.). The central concern in this statement pertains to the interpretation of the term *conventio*. The Severan jurist utilizes this term predominantly to signify ‘agreement’ or, more accurately, to denote the «of the convergence of the internal assent of several individuals». <sup>12</sup> His statement should therefore be understood as: «contracts derive their *lex* from the object of *consensus*» – that is, from the *quid* on which there is a mutual *consentire* among those engaging in a contractual transaction (Falcone 2019). In other terms, the agreement established between the parties regarding the essential elements of the ongoing economic transaction engenders a form of ‘law’ that is binding.

The recognition that every contract is fundamentally anchored in a *conventio* constitutes one aspect of legal analysis; however, it is a distinct endeavour to infer, through the principle of reciprocal implication, that every *conventio* possessing a lawful cause engenders an *obligatio* and thus forms a contract. As previously noted, the Roman legal system is distinguished by a strong typicality. This principle implies that individuals are constrained by the catalogue of legal provisions provided by the system, with no opportunity to deviate from these established parameters. Nevertheless, this assertion represents only a partial truth. The growing emphasis placed on the substantive content of the *conventio*, in contrast to mere formalities and predefined contractual frameworks, occurs even within established legal structures. This phenomenon is particularly evident in procedural evaluations of the concrete and specific content of agreements (Burdese 1993, 8 f.).

Specially within the framework of contracts governed by *iudicia bonae fidei*, private autonomy is recognized as having the capacity to modify the typical effects of specific legal transactions – for instance, by expanding or restricting the scope of the parties’ liability, thereby altering the structure of obligations that would ordinarily arise from a given contract. <sup>13</sup> This principle is explicitly emphasized by Ulpian himself, who observes that the *pacta*, reached at the time of concluding a contract protected by an *iudicium bonae fidei*, constitute an integral part of the agreement (Cardilli 2008, 51 ff.). <sup>14</sup> Consequently, the judge

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<sup>12</sup> D. 2.14.1.3.

<sup>13</sup> See, *infra*, § 4.

<sup>14</sup> Ulp. 4 *ad ed.* D. 2.14.7.5: *Quin immo interdum format ipsam actionem, ut in bonae fidei iudiciis: solemus enim dicere pacta conventa inesse bonae fidei iudiciis. sed hoc sic accipiendum est, ut si quidem ex continentis pacta subsequuta sunt, etiam ex parte actoris insint: si ex intervallo, non inerunt, nec valebunt, si agat, ne ex pacto actio nascatur.*

must take them into account as if they were inherent elements of the contractual structure itself. Furthermore, it should be noted that, through established practice, certain provisions tend to become standardized to such an extent that, even in the absence of an explicit agreement between the parties, the judge may presume their inclusion – unless proven otherwise.

These observations are crucial for weighing the *Typenzwang* of the Roman civil law system, particularly in terms of its practical impact on the contractual freedom of the parties and the normative power of their will.

#### 4. Private autonomy and *Typenzwang* in Roman contract law: Two examples

The process of refining contract types – a result of the absorption and legal formalization of certain agreements between parties – discussed above is well-documented, for example, by Papinian's distinction between *adminicula emptionis* and *substantia emptionis*, which arises from a structural reflection on contractual typology:

Pap. 10 *quaest.* D. 18.1.72 pr.: *Pacta conventa, quae postea facta detrahunt aliquid emptioni, contineri contractui videntur: quae vero adiciunt, credimus non inesse. quod locum habet in his, quae adminicula sunt emptionis, veluti ne cautio duplae praestetur aut ut cum fideiussore cautio duplae praestetur. sed quo casu agente emptore non valet pactum, idem vires habebit iure exceptionis agente venditore. an idem dici possit aucto postea vel diminuto pretio, non immerito quaesitum est, quoniam emptionis substantia constitit ex pretio.*

Special agreements made subsequent to a sale count as part of if they abate some of its terms, but not if they add a new term. This applies to all provisions subsidiary to the contract; for example, a covenant dispensing with the penalty of the double for eviction, or one requiring it and a surety as well. If the pact does not form a good ground of action at the instance of the vendee, it will receive effect as an equitable defence in favour of the vendor. It has with good reason been questioned whether this holds good when the price is subsequently increased or diminished, because the price goes to the essence of the contract (trans. Mackintosh 1892, 121-123).

There are certain aspects of the content of a sale that the jurist regarded as indispensable for the contract to be legally recognizable, and others – considered accessory – that were gradually incorporated into the original framework of the causal type. For these latter elements, it becomes necessary to assess whether a contractual derogation, autonomously established at a time

subsequent to the *conventio* constituting the *oportere ex fide bona*, may nonetheless be considered part of the *lex contractus*. Papinian distinguishes, in fact, between *pacta quae detrahunt aliquid emptioni* and *pacta quae vero adiciunt*. This distinction is entirely internal to the so-called *pacta ex intervallo*: the former are considered *contineri contractui*, whereas for the latter, Papinian leans toward a negative solution (Falcone 2019, 202).

In terms of the remedial effects associated with the *actio empti*, this means that the former can be directly invoked within an *iudicium bonae fidei*, while the latter are only enforceable *ope/iure exceptionis* in response to a potential action brought by the seller (Talamanca 2003, 89 f.). The distinction would, in any case, be confined to aspects of the contract's content that qualify as *adminicula emptionis*. Conversely, its extension to clauses affecting areas of the contract deemed non-derogable – namely, those that, according to Papinian's terminology, reflect its *substantia* – would be questionable. This applies, for instance, to subsequent stipulations aimed at increasing or decreasing the price originally stipulated by the parties at the time of the sale's conclusion. Ultimately, we are faced with a dual-track structure of the content of *emptio venditio*, which, according to Papinian, responds differently to contractual modifications introduced after its conclusion (Cardilli 2008, 44 and fn. 111).

However, it would be a mistake to ascribe absolute value to this *distinctio*, as Papinian formulates his *responsum* within a circumscribed legal setting – namely, a *pactio* made after the *lex contractus* that purports to alter its content. Accordingly, this distinction cannot be uncritically extended to the broader dialectic between *pacta conventa* and contracts adjudicated through *iudicia bonae fidei*. On the contrary, it is precisely the impossibility of subsuming such subsequent agreements under the category of *lex contractus*, given their temporal autonomy from the foundational convention that gives rise to the *oportere ex fide bona*, that necessitates an evaluation of their capacity to legally modify an already existing legal framework. This autonomy, in principle, should preclude any juridical relevance of *pacta ex intervallo* in terms of enforceability. Yet, it is precisely on this point that Papinian offers his most original contribution, identifying a category of agreements which, despite their subsequent formation, may nonetheless be incorporated into the contract, thereby effecting a substantive modification of its content.

In his analysis of *pacta ex intervallo*, the Severian jurist distinguishes between pacts that modify the accessory content of an already concluded contract – some of which are considered automatically incorporated into the contract – and those that introduce entirely new external elements. In the former case, subsequent pacts may transcend their temporal disconnection and effectively alter the contract, as they fall within the framework of the original convention. In the latter case, however, if the new elements do not

align with the content already established in the contract, these pacts cannot be automatically integrated and are not enforceable through legal action. In essence, the capacity of *pacta ex intervallo* to alter a contract, hinges on their compatibility with the original content agreed upon by the parties.

The Papinian's distinction not only reflects a precise conceptualization of the limits within which contractual modifications can operate, reaffirming the central role of the *lex contractus*, but above all illustrates the complex work undertaken by Roman juridical science in filtering and defining the rules to be included in the contractual type and transmitted through it (Cardilli 2008, 73).

An additional example of how the regulatory will (*voluntas*) of the contracting parties can influence the material determination of *oportere ex fide bona* comes from an excerpt from Ulpian's writings, which merits close and scholarly scrutiny:

Ulp. 32 *ad ed.* D. 19.2.15.6: *Item cum quidam nave amissa vecturam, quam pro mutua acceperat, repeteretur, rescriptum est ab Antonino Augusto non immerito procuratorem Caesaris ab eo vecturam repetere, cum munere vehendi functus non sit: quod in omnibus personis similiter observandum est.*

Likewise, when someone was asked, having lost the ship, to return the freight he accepted as loan, it was replied in a rescript by Antoninus Augustus that it is not without cause for the emperor's procurator to ask him the restitution of the freight, because he did not fulfil the duty to convey: a rule that should hold for all persons alike (trans. Fiori 2022, 195).

The core narrative of the passage, whose paligenetic attribution has sparked scholarly debate (Mayer-Maly 1956, 146; Longo 1965, 295; Fiori 2018, 554 f., fn. 165), offers a vivid snapshot of the bustling reality of maritime trade. It recounts the case of a *navicularius* who, having undertaken to transport certain goods by sea on behalf of the *procurator Caesaris*<sup>15</sup> and having received a sum of money upon boarding, fails to fulfil the promised

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<sup>15</sup> See, e.g., the inscription dedicated to *Sex. Iulius Possessor* by the *schapharii Hispanenses*: CIL II.1180 = ILS 1403 = AE 1965, 237 = AE 1971, 171 = AE 1991, 993 = CILA II.23: *Sex(to) Iulio Sex(ti) filio) Quir(ina) Possessori / praefecto) cob(ortis) III Gallor(um) praeposito nume/ri Syror(um) sagittarior(um) item alae primae Hispanorum curatori civitatis Romulensium Malvensium tribuno mil[(iti) leg(ionis)] XII Fulminat[ae] / curatori coloniae Arcensium adlecto / in decurias ab Optimis Maximisque / Imp(eratoribus) Antonino et Vero Augg(ustis) adiu/tori Ulp(ian) Saturnini praef(ecti) Annon(ae) / ad oleum Afrum et Hispanum recen/sendum item solamina transfe/renda item vecturas navicula/riis exsolvendis procuratori Augg(ustorum) ad / ripam Baetis Scapharii Hispanen/ses ob innocentiam iustitiam/que eius singularem.*

service due to the loss of the ship. The lessor (Fiori 2018, 548; Galeotti 2020, 111 e fn. 201; Galeotti 2023, 847. *Contra* Jakab 2000, 259 ff.; Crescenzi 2011, 75 ff.) subsequently demands the restitution of the *pecunia numerata*, encountering resistance from the carrier. The latter, likely, cites the evident facts in his defense: the failure to perform was not attributable to his fault but rather to an uncontrollable event – possibly a shipwreck.

To defend the imperial *procurator's* position, the *princeps* intervenes through a rescript, affirming that the freight received as payment for an unfulfilled (and now unfulfillable) service cannot be retained by the carrier.

The source is notable not only for the parties involved (Cimma 1981, 3 ff., 36 ff.; Sirks 1991, 30 ff.; De Salvo 1992, 210 ff.; Höbenreich 1997, 83 ff.; Galeotti 2023, 846 f.) – though its conclusion suggests a broad application of the principle it articulates – but above all in the agreements established between them regarding the methods of calculation and payment of the *vectura*. Indeed, the specific configuration of the interests agreed upon by the parties (*lex contractus*) shapes the framework for the allocation of contractual risk.

Despite the limited attention that doctrine – though with some notable exceptions (Jakab 2000; Thür 2010; Zwalve 2013; Fiori 2018, 546 ff.) – has devoted to the specification that the *vectura* was received as if it were a loan (*pro mutua*), the phrase must have held some technical significance, or the Severan jurist would not have alluded to it.<sup>16</sup> The clause, deemed by many as superfluous to the point of not warranting translation (Galeotti 2023, 849, fn. 52), could find a satisfactory explanation within the *Basilica*, specifically in Cyril's Greek paraphrase of the excerpt.<sup>17</sup>

The Latin expression *promutua* is rendered by the Byzantine jurists as προχρεία, a term that, in Hellenistic practice, Greco-Egyptian papyri identify as indicating the advance payment of a specific sum of money in anticipation of a future labor performance requested from the recipient (Jördens 1990, 271 ff.; Fiori 2018, 550; Fiori 2022, 195). The presentation of the document attesting to the fictitious loan – on which no interest would accrue – was intended to provide the creditor with assurance regarding the possibility of recovering the advance in the event of the debtor's non-performance. Conversely, the debtor would receive the same document as a receipt, confirming their fulfilment of the obligation for the agreed-upon service. Far from redundant, Ulpian's observation highlights a critical aspect of the contractual arrangement: the sum paid by the principal at the time of loading, retained by the carrier «as if it were

<sup>16</sup> The mere use of the verb *repetere* would have sufficed to indicate the prepayment of the freight charge.

<sup>17</sup> Bas. 53.1.59 (SCHELTEMA VII A, 2439-2440); Sch. ad Bas. 20.1.15 (Sch. 5 SCHELTEMA III B, 1182).

a loan», would only acquire the status of compensation for the transport upon the successful delivery of the goods at their destination port (Thür 1994; Thür 2010; Fiori 2018, 551; Fiori 2022, 195; Galeotti 2023, 849). The failure of the shipment would have consequently precluded the deduction of the *pecunia numerata* from the *naulum*. This, in turn, would have imposed upon the *nauta* an obligation of restitution, giving rise to a *dare oportere* concerning a *certum*.

A *lex contractus* establishing such parameters for the calculation and payment of freight would have prevented the *navicularius* from defending himself by claiming that he had been bound to an *obligation de moyens*:

Lab. 1 *pith. a Paulo epit.* D. 14.2.10 pr.: ... *Paulus: immo quaeritur, quid actum est, utrum ut pro his qui impositi an pro his qui deportati essent, merces daretur: quod si hoc apparere non poterit, satis erit pro nauta, si probaverit impositum esse mancipium.*

... *Paul*: But this depends on the agreement, whether freight was payable for the slaves who were loaded or for those who were carried to destination. If it is not clear what the agreement was, it will be enough for the captain to prove that a slave was put on board (trans. Fiori 2022, 188).

In light of the subject of this study, the Paulus' note on the *pithanón* of Labeo is of particular interest, as it suggests the existence of a juridical presumption in favour of the carrier: if it were impossible to prove the actual content of the agreement, Paulus states, it would be appropriate to assume that the contracting parties had agreed on the freight *pro his qui impositi* – that is, that they had arranged not for transportation, but rather for the rental of the vessel or some of its spaces.

If the sailor's obligation is typically understood as an *obligation de moyens* rather than *de résultat*, then the usefulness of the practice of fictitious lending described in D. 19.2.15.6 becomes evident. This practice, by excluding the carrier's upfront gain at embarkation – since the *pecunia numerata* was accepted as a loan (*mutuum*) rather than as *naulum* – indirectly qualifies the nautical lease between the *navicularius* and the *procurator Caesaris* as a transportation contract (thus, an *obligation de moyens*), placing on the former the contractual risk of non-delivery at the destination (*i.e.*, non-performance).

Starting from the formula – *C. Aquilius iudex esto. Quod Aulus Agerius Numerio Negidio opus faciendum locavit, qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret absolvitor* – it becomes clear how the *actio locati* could be employed, in the case contemplated in D. 19.2.15.6, *ad pecuniam (promutuum) repetendam*: the failure to fulfil the contractual purpose (*cum munere vehendi functus non sit*), which

justified the performance rendered – namely, the advance payment of freight – would have resulted in the carrier being condemned to *quidquid ob eam rem dare oportet ex fide bona, i.e.*, to pay a sum of money equivalent to what had been received (Galeotti 2025, 102).

If this reconstruction is correct, Caracalla’s rescript would thus document the conventional extension of the sailor’s *praestare* obligation to encompass risks intrinsically linked to the *id quod actum est* – that is, the structuring of interests formalized through the conclusion of the contract.

## 5. Is the cyber-formalism the new mancipatory-formalism?

This brief analysis of *voluntas singulorum* within the context of Roman contractual law may be synthesized along several intersecting trajectories: from philosophy to jurisprudence, from actions to their legal effects, from social practices to their normative implications, from the formal structure of the *responsum* to the broader domain of *scientia iuris*, and, ultimately, from the rigid formalism of archaic law to the interpretive flexibility of classical law. Among these, the final trajectory – encompassing and illuminating all others – offers a tangible representation of the historical development of Roman legal thought. Within this evolving framework, the notion of legal will (*voluntas*) emerges as a central, indeed decisive, element.

Positioned within a conceptual framework informed by philosophy, Roman legal science engages with legal practice by tracing it back to its foundational source: the individual *voluntas*. The legal act is understood not merely as an external behaviour but as the expression of an internal intention – an instrument oriented toward the realization of a consciously chosen binding effect. Admittedly, divergences among jurists do exist,<sup>18</sup> reflecting the inherently pluralistic nature of jurisprudential discourse. However, a comparative analysis of various *responsa* and interpretive methodologies reveals a consistent intellectual pattern: interpretation *ex voluntate* persistently aims to uncover the substantive meaning that lies beneath formal appearances.

Particularly, the textual analysis presented reveals a constant element: the extreme plasticity of the *lex contractus*, within which the form of the contractual type and the will of the parties are synthesized. The Roman contract, therefore, does not constitute a static entity, but rather a ‘structure’ with variable geometry, the boundaries of which must be continuously redefined through a process of selection and conceptual refinement of the legal rules to be integrated into the model. It is a complex mechanism of juridical sedimentation, that has made the contractual type a value in itself. A significant

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<sup>18</sup> Compare D. 2.14.7.5 to D. 18.1.72 pr.

example of this process is the distinction between *pacta in continenti* and *pacta ex intervallo*, which plays a decisive role in the juridification of the agreements that enrich the typical content of the contract. Equally important is the reflection on the criteria for reconstructing the *id quod actum est*, aimed at defining the regime of *periculum* in carriage-by-sea contracts.

It is evident that Roman legal culture significantly diverged from contemporary conceptions of the interaction between private autonomy and contractual typology. On the contrary, it emphasized the central role of the dynamic process through which the regulatory will (*voluntas*) was typified, thereby shaping the ‘anatomy’ of the contract. This framework, as understood by jurisprudential doctrine, represented a privileged legal structure within which private autonomy could operate – a structure not solely defined by specific agreements but also derived from concrete patterns of interests that gradually achieved typification as judicial and interpretative practices crystallized within the broader legal paradigm.

In this sense, the typicity discussed should not be viewed as a limitation, but rather as an acknowledgment of a development: a lesson worth remembering before declaring the contract, like God, *dead* (Gilmore 1974, 3).<sup>19</sup>

In today’s world, increasingly shaped by the digitalization of legal, educational, and social practices, we are witnessing the re-emergence of rigid normative frameworks disguised as technical neutrality. Automated decision-making, algorithmic platforms, and procedural informatics seem to offer a new form of legal rationality: cyber-formalism. But is this truly something new? I believe – if anything – we must look beyond the mere appearance of things.

Unlike Gilmore, in fact, I would argue that contract theory can be ‘re-signified’ precisely by drawing inspiration from the Roman example. The reflections developed thus far demonstrate – at least to me – that even a system dominated by formalism and contractual typicity allows for the enhancement of legal will: on a substantive level, through *stipulationes* and *pacta*; on a procedural level, through *iudicia bonae fidei* or *exceptiones*.

If we imagine transposing that system into today’s reality of smart legal contracts, the contracting party’s fingertips become the bronze and the *libra* of Cato: simply put, a cyber-formality has replaced a mancipatory-formality. Thus, with a memory that looks toward the future, we must reclaim the most fertile aspect of the Roman lesson: rather than yielding to the binary opposition between ‘form’ and ‘will’, we should embrace the tension, the dynamic

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<sup>19</sup> «We are told that Contract, like God, is dead. And so it is. Indeed the point is hardly worth arguing anymore. The leaders of the Contract is Dead movement go on to say that Contract, being dead, is no longer a fit or worthwhile subject of study. Law students should be dispensed from the accomplishment of antiquarian exercises in and about the theory of consideration».

balance, and the dialectic between these two poles, continuously integrating the former with the sedimentations of the latter.

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