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Sommario

DISACCORDI

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Dichotomy of the Roman Financial World (J. Andreau) and Some Recent Trends of Roman Studies on Economy and Law

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Abstract (Italiano)

Per valutare i meriti e i limiti dei nuovi studi sull'economia e il diritto romano, ispirati a alcune recenti teorie economiche, è efficace rivedere la tesi principale di Jean Andreau, secondo cui c'erano due mondi finanziari all'inizio dell'era del Principato: quello dell'aristocrazia terriera imperiale con i suoi dipendenti (WI) e quello dei banchieri professionisti attivi nelle vicinanze funzionali delle città municipali (WII). L'approccio dei costi di transazione dei nuovi studi è adatto a dimostrare la razionalità economica relativa delle organizzazioni interne come unità di WI, composte da dipendenza personale, anche se non è sufficiente per tenere in considerazione fattori come il possesso e le garanzie reali. D'altro canto, il livello del diritto contrattuale classico è al di fuori della portata di questo approccio. Inoltre, i nuovi studi mancano di una seria critica delle fonti e, di conseguenza, non sono in grado di analizzare le tensioni e i conflitti tra WI e WII, e a maggior ragione il dinamismo storico della loro genesi.

Parole chiave: Economia della Roma antica, teoria economica, diritto ed economia

Abstract (English)

In order to measure merits and limits of the new studies in Roman economy and law, inspired by some recent economic theories, it is efficacious to revisit the main thesis of Jean Andreau, that there were two worlds of finance in the early Principate era, that of the landholding imperial aristocracy with its dependents (WI) and that of the professional bankers active in the functional neighborhood of municipal cities (WII). The transaction costs approach of the new studies is apt for demonstrating relative economic rationality of internal organizations as units of WI, composed of personal dependency, though it is not enough to count such factors as possession and (real) pledge. On the other hand, the layer of the classical contract law is out of its range. Moreover, the new studies lack serious source criticism, and in consequence they are not able to analyze tensions and conflicts of WI and WII, and a fortiori the historical dynamism of their genesis.

Keywords: Economy of ancient Rome, economic theory, law and economics

1. Introduction

As everyone knows, we easily encounter in recent years various applications of some contemporary economic theories in the fields of Roman economic history and Roman Law studies. These challenges are often stimulating, and so we should not neglect them. It is, however, also true that these new studies are not completely convincing. This review article proposes one issue around which we should ponder on problems brought to us by the new studies.

Only that, from the side of the Romanists (Roman Law studies), we have had, certainly not many but, acute criticisms on the new orientations[1]. And I am not sure how much influential the new studies are among the Romanists. Is there any more need to review the new studies?

Yet if we look at the other side, at the situations of studies on Roman economy, we can confirm immediately that the new trends have established a solid hegemony. And nonetheless their unanimous picture of the Roman economy seems to me too happy, too optimistic, and too vague. Their source analysis seems to be not so rigorous. Theory is too predominant, compared to source analysis. I suspect that something still remains to be scrutinized.

Such a review might eventually affect Roman Law studies too. Law is indispensable component for the new theories so that the so-called «Law and Economics» is a consistent wing among these theories. NIE starts from the axiom that every institution is rational because one creates it in order to reduce transaction costs. The institutions constitute framework for transactions. So law vis-à-vis market is the most typical institution. However, this image of «law» is never compatible with Roman «Law». Though Roman Law too has much to do with market, it is not one of the systems of rules historical societies have respectively, eventually in order to regulate market, but is a particular substance that has been base of the entire tradition of civil society, which is the very foundations of our liberty. Roman law and «law» of the economists are of different species. So, two different understandings of «law» collide with each other.

There is one more strong motive for our challenge. The background theories of this new trend of the Roman studies are representative in our actual world. They are omnipresent in all the fields of studies on economy and society. It is not far from right if we think that this trend has roughly something to do with the directions of the actual global economy and its alleged success. The global economy has some negative aspects. One of them is organizational swelling so destructive and often violent. And the new theories too insist on organizational aspects. In parallel the civil society and its traditional foundations are now in crisis. Although the main reason is its own frailty, it is no less certain that menaces by such a global economy

[1] The most important is Mantovani 2018. His criticism is discret and sometimes too sophisticated, but his observations are often severe in substance.

too are really present. *Vice versa*, if the civil society overcomes its immanent weakness[2], it might perhaps contribute, not only to reinforce its own foundations but also, to correct the directions of the global economy through counter attack. If Roman Law has been one of the pillars of the civil society and our liberty, because its historical understandings innovated have been crucial for our implementations of necessary intellectual frameworks of the civil society, there is evidently a cause in commencing such a reflection. If the new studies bring fresh stimuli, it's because the background theory accompanied by the global economy makes us be aware of the weakness of the civil society viz. Roman Law understandings. If these stimuli themselves are in confusion, analysis of them and their confusions can help us, not only to re-construct the civil society but also, to point out some wrong compositions within the global economy.

It is too obvious that this last ambition is still premature. Here we take only a first step to criticize the new studies on Roman economy without losing Roman Law in our sight. Moreover, this article is only a starting point before a full-scale confrontation with the new studies. I'd like only to put a thesis of Jean Andreau in front of the studies of new orientation. This is the cornerstone not only for understanding Roman economy but also for measuring validity of the new approach. And we have to see also how his thesis has been constructed. Andreau's method, especially that of source criticism, should be examined in a historical context of studies. This by-pass will be efficient to elucidate some defects of the new studies in source criticism.

This article is a kind of review over the studies, and does not contain analysis of sources[3]. And the review itself is not exhaustive. The works by new approach are just now increasing day by day, and it is impossible to get an integral picture. Notwithstanding this, we need to try an interim survey, because we have a global situation urging it, as I have just now suggested.

2. The World of Jucundus, and a financially orientated landholding aristocracy

i) Jucundus

Andreau constructed through many contributions the thesis that the Roman financial world was divided into two spheres. One (WI) is composed of the members belonging to more or less elevated classes, aristocrats or notables, and of their finances among them. The other (WII) is a well-defined space of activities where the professional bankers assumed the

[2] One of the weaknesses is that Roman Law studies had offered in the Nineteenth Century the fundamental substratum of conceptual apparatus for industrial economy, and so also for the actual organizational capitalism (such concepts as representation, agency, moral person etc.), above all thanks to Savigny.

[3] In addition, considering the nature of this journal, my ambition consists in mediating the Romanists and non, and the jurists and non, the economists and non, the historians (of Rome) and non. So I apologize in anticipation for saying sometimes things too elementary for each field.

role of principal actors. These two spheres are relatively independent and scarcely intersect each other. I'll enter upon some details of the very formation of the thesis, in particular of his source criticism. For, though the studies of Andreau are regarded as essential by every scholar, these are not always accurately interpreted with sufficient attention to his delicate criteria.

WII emerged for the first time with *M. Jucundus* (1974)[4]. This was epoch-making, not because of the materials it discussed (one archeological data, a presumable register of a banker which had been excavated many years ago at Pompei), but because it studied these with a fresh method. Andreau paid his whole attention to source criticism, and his method of source criticism was drastically new. The antiquarian sources had been used mostly to prove automatically the facts concerning the respective institutions (positivism), and this automatism had been enlarged unduly to a speculation of generic order, often about some mysterious entity as spirit, ethnicity, culture etc. The source criticism had not been major scope in itself, or had been effectuated only for a precaution to measure what could not be said from the source, what the limits or the bias were. But this book of 387 pages is dedicated in a sense entirely to the source criticism of one document. It seems rather as if all the data were summoned up around these specific documents under pretext of source criticism. In any way it is undeniable that we are paradoxically induced to see a whole world from a sharply edged point of view, even if from a corner of one little city under the Principate. Source criticism brought a decisively clearer image of the social structure, as I'll show soon.

As Andreau acknowledges explicitly[5], we must take into consideration a certain impact from Ettore Lepore, especially his epoch-making article «Orientamenti---» of 1950[6]. This article is very influential all over the archaeology of Southern Italy, and opened a way, bringing a revolution for relationship between archaeology and historical argumentation, for methodical induction from the archaeological data to the historical facts. That meant also to overcome concretely the limits of the antiquarian thoughts which had been elucidated by A. Momigliano[7]. Lepore proposed to put each archaeological data in an integral historical context, reconstructing the specific social structure, for example the position occupied by Pompei in relation to the Roman central power and aristocracy, the territory[8] surrounding the city Pompei, etc. At the same time Lepore launched acute doubts on several not well-defined categories, such

[4] Andreau 1974.

[5] For example, Andreau 1974, p.121f.; p. 132; p. 139; p. 148; esp. p. 163ff., cf. Andreau 1997b.

[6] Lepore 1950, but also cf. Lepore 1955.

[7] But Momigliano's «Ancient history and the antiquarian» appeared in the same year (1950), even if the conference at the Warburg Institute was in January, 1949. In Momigliano this theme is said to emerge rather suddenly after a certain *caesura* caused by his exile, though I think that a careful reading might discover some symptoms in his early articles on the Roman archaic history.

[8] This is a special term in the Greek and Roman historical studies, of which Lepore was one of the representative proposers, and Andreau too presupposed the connotation. The classical city is composed of the city center and the surrounding territory and this demarcation is vital and rich of meanings. This dualism is central code of the society.

as ethnicity (Oscan or Greek etc.), or on automatic attribution to them of some social functions, in the onomastics, using such terms as «industry», or on recognition of «democracy» in the presence of a certain ethnic group in *graffiti* in election campaign. It is remarkable that his criticism hits precisely upon a short cut induction of M. Rostovtzeff from archaeology to economy or similar argumentations. All this is very important particularly for our interpretation of Andreau's works. Lepore required us to consider many factors composing a concrete social reality, as a new way of source criticism.

Now Andreau 1974 started with saying that the documents cover two specific operations of this presumable banker. First, contract of tax collection and lending of public domain, of the city of Pompei. Second, private auction. The registers concerned payments or consequent settlements of account, principally for proving the solution of debt for the purchasers, in the presence of witnesses to be particularly underlined. Andreau is very prudent, cautioning that these two spheres of activities might not be exclusive[9]. About the personal operations of Jucundus himself too, he says that there might be preceding acts of deposit as establishment of fund[10], but there is no clear proof for it[11]. In any case, at least in these two genres we are witnessing both deposit[12] and lending[13], for it is certain that a short-term credit is conceded to the purchaser, and a certain account is immediately given to the vendor (equivalent to act of deposit). In one case only[14], of the auction, an additional credit was given, through registering of an expected (bigger than the actual purchase price) amount of money for the vendor.

Then Andreau proceeded to a prosopography upon this document, more exactly upon the clients and the witnesses. The prosopography is an antiquarian-sociological tool which had been so often used since the early Twentieth Century especially in order to know about the *clientela* or the party politics, therefore the sociological studies. Andreau, however, re-orientated this tool for a slightly different scope. He tried to detect a coincidence of the group of Jucundian clients and their witnesses with the municipal office holders and the candidates, and then with the names appearing on the surface of amphora transporting wine and oil. He got a positive result as for the former and a negative one as for the latter. Therefore we know that Jucundus mediated finance of the municipal leading class including their freedmen, and the covered affairs were both public (public contracts) and private, although his financial function did not reach directly[15] the productive sector (the wine production) nor the wholesalers

[9] Andreau 1974, p. 117.
[10] Andreau 1974, p. 95.
[11] Andreau 1974, p. 307: «les grandes inconnues sont les activités de dépôt et de crédit exercées par Jucundus».
[12] As I say later, I guess that it did not exist a deposit of commodity money («savings» in this sense), and so there was no deposit without cause, no payment other than transfer of bank money.
[13] But there is no proof that a lending in cash by banks is effectuated.
[14] Andreau 1974, p. 99.
[15] Andreau 1974 suggests in p. 289ff. that the textile industry left a vague shadow on the register of Jucundus, though he never financed this industry. We can presume that the same person could both occasionally use, or be witness in, the auction and could be active in the industry with another finance.

(if the inscribed names on the amphora are theirs)[16]. We should not forget that the municipal notables were at the same time an economic and specifically landholding class. And the production including not only the agriculture but also the manufacture was mainly based upon landholding. So we get the picture that two (at least financial in the Jucundian sense) contexts were splitting the same municipal landholding class, one economic-political and the other productive-commercial, and that in consequence the ruling class of the municipality shows us, in their mediated engagement with management of landholding, a different morphology from that of those who, being active in the productive and landholding sectors, used another financial channel through which they were connected directly (transcending the municipal milieu) with the exterior world (eventually the imperial aristocracy). We can say that Andreau used the prosopography in order to reconstruct not different social groups but diversified total contexts. We recognize here a certain critical and revising attitude vis-à vis a naïve sociological method.

Now let us reflect a little upon these results by tracing Andreau's motives. It is evident that one of his targeted problems had been whether the finance of this presumed banker is industrial or not. If we can affirm it, the modernist approach wins. But he denied it. Should we say he supported the primitivists? By the way, there had been another problem in front of Andreau, that is, whether the finance of Jucundus had some role among the imperial aristocracy or not. His answer was once more no. It was this aristocracy and its landholding that was, whether ancient or primitive, productive. So Lepore already had criticized both the modernists and the primitivists maintaining that some financiers at Ercolano were involved in the affairs of the imperial aristocracy, presupposing duly that the aristocracy owned the commercialized farms. He shuffled up the modernist-primitivist play. Nonetheless he remained still sticking to some primitivist residue because he (rightly) contrasted these men of Ercolano to Jucundus and (a little hastily) interpreted this one as usury, that is, some actor of consumer's loan. Andreau came to correct this[17], and discovered a very positive role of Jucundus, thus cancelling at last really the modernist-primitivist antithesis[18] that had been fruitful but had had some evident defects. This banker detached himself clearly from the imperial milieux placing well his technical and professional functions in the inner circle of municipal notables[19]. Then he avoided direct intervention into the productive affairs, and assumed the task to finance as main platform for the wholesale of products, often for and from abroad, however only through

[16] For example, the analysis of Andreau 1974, p. 268 is typical of his reasoning. First, the participants of the auction could be active in the wine production but these affairs had not any direct liaison with auction. They used auction as members of *ordo*. Second, certain shopkeepers are present, but their business in the occasions of auction has nothing to do with their commerce. Third, the merchants are trading multiple commodities and other things. So they are not even wholesalers of some materials for producers. These activities are compatible to be municipal notables.

[17] Andreau 1974, p. 121f.

[18] On the controversy between the primitivists and the modernists, Andreau 2010, Chap. 1 is the best synthesis.

[19] Andreau 1974, p. 304: «tout montre quel écart sépare le monde municipal de l'oligarchie impériale». As for Tab. 45 where appears P. Alfenus Varus, which is exceptional to show some intrusion of an element subordinate to the imperial power, cf. p. 219.

filters of financial asset[20] of the municipal notables. The municipal leading class including the rich freedmen, often ranked as *Augustales*[21] etc., could control such commercial activities as well as the suburban farms, financed exclusively through patrimonial operations along some municipal channels, one of which was the register of Jucundus, although they were placed more and more under pressure from the side of those who were linked directly to the imperial aristocracy. In any way, a direct loan for activities of the municipal elites is not known on our register and, that, if any, might be effectuated through other circuits, similar and contiguous to those used for the circles of the imperial aristocracy.

So, the finance of Jucundus was neither inside nor outside landholding elites, and neither productive nor not productive. These terms are valid. We need, however, to be more precise. The Jucundian finance was related both to the aristocracy and to the production, indirectly and discriminatingly. A systematic mediation intervened and this system enclosed an integral world. Thus Andreau in this book discovered a third pole, if we can call the modern industrial finance and the premodern «embedded» loans as two primary poles. To be comparatist, we can say that this third pole is different from the canonical medieval commercial finance, because Jucundus is neither outsider nor dependent vis-à-vis the landholding aristocracy.

In sum, this discovery is a decisive step to attain the conceptualization of our dichotomy. This is not mosaic of primitive and modern. What made this discovery possible was Andreau's deliberative synoptical examination of a historically well-specified individual part of the society. This was fruit of a concentration on one archaeological document and of a comprehensive source criticism on it.

ii) The opposite side

After this first *opus magnum*, Andreau explored «the rest of the world», and as late as «Financiers de l'aristocratie»[22] of 1978 he showed us an image of this second half of the world (WI). Typical were various financial transactions in the Ciceronian circle, of which the documentation is apparently easy thanks to its quantity, what is exceptional in the Roman history. Andreau classifies financial operators into two types. The first is at once landholder and money lender, resource being his own as well as other's. The second manipulates only other's money and so they are professionals, associated often with the colleagues in a college. Then Andreau sets the question: to which of them does the Ciceronian aristocracy entrust its money? And he concludes that it chooses exclusively the former. He recognizes in the same aristocracy existence of a relatively differentiated layer occupying itself principally of finance

[20] The final solution was completed on the platform, viz. by registered money as financial asset. All this depends upon institutional recognition by the municipal milieux.

[21] Andreau 1974, p. 205: «je considère les Augustales, dans leur ensemble, comme un des groupes de l'oligarchie municipale».

[22] Andreau 1978.

(the first type). These financiers were included in the aristocracy, therefore the aristocracy is financially self-sufficient within itself, not needing any vehicle of Jucundian type. Here we see a prevailingly financial landholding aristocracy and their financial autarchy. We know many examples of the aristocracy of commercial base in the Greek (especially archaic) world. In our case, however, a commercialized agriculture needs financial investment, and so the estates are able to be objects of money speculation. The landowners themselves are able to be as well purchasers and vendors of various commodities for speculation. They can be straightforwardly money-lenders. And professional bankers such as Jucundus have surprisingly no part in this world. Such a financially addicted aristocracy had no need of bank, or was so careful in avoiding it!

In «Brèves remarques» of 1982[23], Andreau slightly modifies this picture. He denies differentiation inside the aristocracy. Instead he sets a third category, «affaristes», busyness men, who are not landowners but manage his own assets in the urban milieux lending both his own money and that of a third through borrowing (but neither fusing money, nor collecting it from anonymous many). This category of men does not belong to the aristocracy, but morphologically is the same as the financial aristocracy in the lending-borrowing context. Naturally these men accept money of the Ciceronian aristocracy as in the cases at Puteoli. The line of demarcation shifts now more subtly to a middle point between these «affaristes» and the professional bankers.

iii) Dichotomy

It is logical that Andreau came to question the dichotomy itself. Andreau was consolidating in the years 80's his view of the dichotomy of Roman financial world. And immediately he moved on to reflect upon its significance. «Modernité économique»[24] of 1985 is very important, for he tried to interpret this dichotomy.

Finley had argued for a subaltern status of the commercial and financial sector and persons, which meant a certain premodernity. D'Arms had given the opposite picture of a full development of commerce and finance. Andreau criticized both, differentiating the matter. He proposed a great diversity of the financial agents, and put it in front of the background of his dichotomy, though in this article an overall diversity prevails so that the dichotomy submerges a little beneath it. He argues that the professional finance sector is neither negligible (Finley) nor prevailing (D'Arms).

Instead, Andreau, in the following pages, criticized rather D'Arms than Finley, and emphasized that the financial agents and their activities were socially ranked as lower. Agency was often dependency. The financial agents did not assume the responsibility and the risk

[23] Andreau 1982.
[24] Andreau 1985.

which were entirely imputed to the principals who were often aristocrats of higher rank. These were naturally also direct investors though often using puppet agents. On the contrary it was difficult for the agents to accumulate capital and technique. A scarce social estimation motivated them to social ascension (abandoning professionality), what made difficult also the generational accumulation. All these elements, not least this mentality linked to this low social estimation, result in a premodernity of the Roman economy.

We can't deny that Andreau sometimes does not insist on the specific dichotomy on behalf of more generic diversity, and he simply represents WI as a diverse world. But we must remind ourselves that, although even WI does not allow a sheer primitivist treatment because of its highly financial nature, we have to recognize a quite special historical value to the professional bankers. Lower rank of financial agents can be said mainly about those of WI. However, when we treat WII, we have a more complex historical reality. Although it was never the case that here the agents were socially more respected, an eventual lower rank did not mean subordination. Jucundus stood independent vis-à-vis his clients, municipal elites, if not equal to them. He was respected as reliable among (eventually peer) municipal elites (who were eventually freedmen), a center built-in in the mechanism of their social coagulation, while the «affaristes» stood *par définition* in margin of the aristocratic circle though they could contempt even the municipal elites.

Agency and dependency are meaningful principally for WI. In fact «Roman financial systems»[25] of 1994 came to emphasize the network through which the financial money circulated. This network was valid mainly for the financial links departing from the (not municipal) aristocratic sources whose basis was landholding. In this article the professionals had an only scarce presence.

iv) Tensions between the two worlds

During this period Andreau was completing his picture of WII of the professional finance. He published the second *opus magnum*, *La vie financière*[26], in 1987. This book contains a huge range of subjects, so it is not easy to discuss it. Here I pick up only a few points pertinent to my argument. Striking is the polarity between *argentarius*, banker of proper sense, and *coactor*, collector of claims giving a certain credit for creditor. Another is that between the former and *nummularius*, operator of commodity money. Andreau's criterium for bank is the double function of deposit and lending. And both *coactores* and *nummularii* came to acquire this function later, and so it is easy to fall into a confusion in treating both as bankers, found even in the sources themselves where in fact the title *coactores argentarii* is known alike in the funeral inscriptions etc. Andreau lucidly discerned that this was a consequence of the historical change;

[25] Andreau 1995.
[26] Andreau 1987.

argentarii began to work in collecting debts by means of their registers as well. So, although Andreau is not too explicit[27], we can presume that *coactores* and *nummularii* originally inhabited in WI, and even *argentarii* were obliged to be adapted to WI. One of the repercussions was that even *coactores* and *nummularii*, thanks to reciprocal assimilation, acquired the double function, and became ironically apparent bankers.

The double function itself, including later cases of the converted *coactores* and *nummularii*, is diverse in Ancient Rome compared with the modern one[28]. Andreau's contribution here steps in a double turn. Though he affirmed existence in Rome of the double function excluding a naïve primitivist vision, nevertheless he did not miss to notice a different morphology of the Roman double function, eventually criticizing the modernist view. In reference to the ancient and modern juristic controversies, he pointed out a certain hostility against remuneration with interest in Rome, being inspired by M. Humbert[29]. Another difference is that in Rome there was no automatic compensation, and the account was only register of subsequent acts, not dissolving themselves immediately. And the difference is not limited to morphology. In Rome the double function covered the transactions of only a certain limited circle in the society. Andreau's principal efforts were made to know about the exact range of this covering. In any way the auction was central to this range of banking. It was attached to a certain corner of the social articulations.

The so called Murecine Tablets were offering a central issue for the controversy about Roman bank. In 1999 we have had Camodeca's critical edition. These documents of the Sulpicii seemed to have some similarity with those of Jucundus. The majority thought that the Sulpicii too were bankers. Andreau distinguished them from Jucundus. For him they were financial intermediaries other than bankers. The documents concerned at most the scenes of collecting debt resulting from transferring loans and in sum lending and borrowing[30]. Real pledge[31] is

[27] Andreau 1987 does not say explicitly that these polarities correspond to the dichotomy. There is a simple fact that his criterium is successful in distinguishing all these categories, in tracing such a change that *nummularii* began to satisfy the double function. This did not mean that *nummularii* became inhabitants of WII, but only that WII was absorbed into WI. So eventually the dichotomy functions here very well.

[28] I think that the original Roman bank was not occupied of deposit with interest in cash, simply because I don't encounter the case. Cash deposit without cause seems not to be found. The double function here was, as we saw, to accept deposit only by registering a concrete bank money corresponding to a specific transaction and to give a short-term credit for adversary till the payment. It is so far what we know from Jucundus (and Plautus). This is very different even from the Greek bank, not least from the modern one, a part of which derived from saving and lending. The late stage of the Roman bank shows us a figure more aggressive to effectuate even veritable loan. Even so, this is not yet modern bank (denial of Bürge 1984 is right here).

[29] Andreau 1987, p. 538. The reference is to the Romanist controversy about the so-called *depositum irregulare*. The oral conversations with M. Humbert had been important for Andreau in his *M. Jucundus* too.

[30] We have a succinct form of his interpretation in Andreau 2001, p. 137ff.

[31] To say simply «pledge» would be perhaps sufficient as legal language in English, because, differently from «collateral» and «security» which are neutral, this term presupposes transferring of a thing. However, possession is ambiguous, and there is no thought against real security whatever might be. So I adopt «real pledge» for translating «gage réel» with emphasis upon the peculiarity that its interest is «réel» (knowing that «réel» is not sufficiently translated into «real»). I'm not sure if this wording is passable or not.

overwhelmingly present[32], and imperial aristocracy lies behind. Andreau was a little isolated among the scholars. We can say rather that he only watched the historical realities. The texts are incomplete and we don't have integral figures of the documents. The difference between Jucundus and the Sulpicii may be less definitive than the dichotomy itself. There is undoubtedly a syncretism in either document, especially in technical aspect. Despite such a situation, Andreau did not fail to distinguish these two thanks to his own thesis of the dichotomy as pertinent social contexts.

In the end, I choose as a clearest expression of the attained fundamental framework of Andreau a few lines in the preface to his collected papers of 1997, *Patrimoines, échanges et prêts*[33]. «J'ai toujours tenu à séparer les banquiers de métier des financiers de l'élite (financiers de l'aristocratie). Cette distinction, qui pour moi s'impose comme une évidence, aux yeux de certains, le signe que je suis un sectateur de Finley, et que je méconnais la fluidité de la circulation monétaire et financière. Ils pensent qu'elle conduit à réduire l'importance de la banque proprement dite. ---Sans cette dichotomie, il est impossible de rendre compte de la vie financière romaine dans ses aspects les plus concrets»[34].

3. A shortest review over a current of recent studies on Roman economy (/law) and its background

i) The first phase

Now, as a matter of fact, there exists a current of studies on Roman economy and law standing under intense influences from a certain theory of Micro-Economics, or New Institutional Economics. Let us remind ourselves at minimum of what the new studies argue. The review will be as rapid as possible because here we need to extract only one salient point.

We must start from a book, very precocious as a contribution in this current, but cited continuously, that is, Di Porto 1984. Di Porto in this book aimed to challenge limits of the contract *societas*, which had been considered as maximum scheme of asset accumulation in Roman economy. Despite all the efforts of artificial interpretation, its figure, at least

[32] Andreau's observation: «les garanties sont le plus souvent réelles» (Andreau 2001, p. 144) is decisive and is charged with multiple significations. This is not only an important indicator distinguishing WI and WII but also a cardinal issue which is potential deadrock for the theory of asymmetrical information, or transaction costs, as I'll argue, while for some Romanists this is normal vestige of diffusion of the formal law (for example, Pellecchi 2018, p. 447 cites Andreau for supporting his thesis neglecting that Andreau is here negative distinguishing the Sulpicii from Jucundus).

[33] Andreau 1997, p. XIX.

[34] Andreau 2001, p. 16ff., argued that «---les banquiers de métier ne pouvaient influer sur la vie politique ni de la même façon ni dans le même sens que les financier de l'élite---», «Mais cette division en deux groupes, hommes d'affaires d'un cotê, banquiers de métier de l'autre, est insuffisante»! He says that this dualism is a common phenomenon in the pre-industrial societies. So, according to him, we must investigate on the comparative differences, in particular with the focus at «statut de travail». But I was a little perplexed when I read it because I had understood the dichotomy («ces clivages») not as simply common phenomenon of all the historical preindustrial societies where there are «l'aristocratie, l'élite sociale et politique, dont les membres, en general, possèdent d'abord un patrimoine foncier» and «les hommes des métiers, urbains, les artisans, commerçants et banquiers».

depicted purely and classically by Arangio-Ruiz[35], denied any permanent entity of asset to be imposed even to a third, that is, «busyness organization» or «firm». *Societas* is reduced to a bundle of ephemeral contracts between two persons. Instead, the basic device of asset accumulation was a type of slave or freedman who, with a relative independency, worked as manager of some part of the asset belonging to patron[36]. In Roman Law there were such institutions as *actio institoria*, *actio exercitoria*, *actio de peculio* etc. These were instruments with which one regulated three persons relationship. This field had been battleground of debates over the principle of no representation and the deviations from it[37]. Di Porto, however, put aside these debates, and instead, perhaps thinking that this literature was not sufficient because of neglecting the aspect of «busyness organization», resorted to a fragment of Roman Jurisprudence, D.14,3,13,2[38]. He placed as a core of his «busyness organization» the model that two principals shared a slave who managed an asset automatically in fusion, composed of the respective parts both of which were possessed however through this very single slave. Di Porto played jigsaw puzzle to attach other various fragments to the rich picture of D.14,3,13,2. And he exhibits a magnificent vertical structure of «busyness organization»[39], constructed thanks to such an operation as making slave manager have his own slave managers (*servi vicari*).

However, we feel somewhat uncertain about these manipulations of text fragments[40]. These don't rule out interpretations which don't presuppose the hypothesis «*per servos communes*». We wonder how much important this business model of sharing a slave was in the Roman economic realities, even if relatively independent slave agents themselves were considerably common. Then, although his sophisticated analysis on limited liability or solidarity is attractive enough, and surely useful, we don't forget that shared ownership had been ancient institution, or rather, old home of *societas*. We suspect that the «*per servos communes*» scheme might have appeared in a no less anachronistic than advanced context. Despite these doubts, it is evident that Di Porto had independently reached two major discoveries of the new trend. First, he found some rationality in the Roman economy and relative legal institutions *au de là* of two opposite positions of primitivist and modernist. For, primitive slavery stands for modern accumulation of assets. Second, this relative rationality consists in the internal organization of an economic actor. This brought again a surprise because essential elements

[35] Arangio-Ruiz 1984, p. 8. Arangio-Ruiz 1950 was not standard work in a sense (for the German textbooks). Though I can't here retrace the history of the Romanist concept of *societas* since the Nineteenth Century, it had been contaminated by a poweful wind of communitarian collectivity theory, of which had been representative F. Wieacker (cf. Wieacker 1936). And this trend could get support in the fragments of imperial jurists. These fragments could evoke a certain archaic phase of this institution. For Di Porto Arangio-Ruiz was necessary to get the target, even if in Italy perhaps this old Neapolitan professor was standard. I think that the choice of Di Porto was opportune in order to clarify the issue.

[36] Di Porto 1984, p. 31ff.

[37] This has become one of the favorite issues for the new studies. This is *in se per se* a great symptom.

[38] Di Porto 1984, p. 63.

[39] Ivi, p. 298.

[40] There is criticism on this point. For a synthesis, cf. Cerami, Petrucci 2010, p. 72.

in this «organization» were slaves and freedmen who had been considered as the very factors blocking economic developments of the Roman society.

A second step is represented by two contributions in the 90's, of Aubert and Kehoe. Both re-evaluated some positive roles of agent. Aubert[41] analyzed very well, through the archaeological data such as pottery signatures for example, the enterprise structure of the manufactures orientated to market. He convincingly proved that vertical division of labor gave rationality to such a firm. One of its merits was ramification of the enterprise through agents[42]. But his argumentation has also something odd. Though he commenced with business agents and business managers[43] and soon found juristic field of *institor* etc.[44], he was unconsciously submerged in the depth of landholding problem through *vilicus*[45]. Certainly *vilicus* was essential in the management of agricultural farms, but its dependency derived from landholding power, not directly economic rationality. Aubert's studies were not irrelevant because the manufactures were unfolded around the agricultural farms, or at least on the territory. However, we must admit that the vertical articulation followed not only the business rationality but also the logic of landholding.

Kehoe[46] investigated on attitudes of the imperial aristocracy («upper-class») in their managements of assets. He found in the juristic sources on tutorship a tendency to safeguard the pupil's asset by inducing tutor's investment to landholding, what meant being steady rather than seeking after profit. The same tendency is attested in the trust-like relationship invented by legacy (*alimenta*, *fideicommissum* etc.), where landholding was preferred to the municipal administration as entrusted entity. Landholding itself was managed through agency, that is, tenancy. For steady profit to be secured, tenants by themselves had to be tied directly to market, taking risk and profit. Despite the jurists' inclination to allocate risk in favor of landlords, tenants had bargaining power enough, whence derived a conservatism of landlord sticking to maintaining mutual relationship even by means of *remissio mercedis*. Thus Kehoe encountered agency or organization problems, observing investment attitudes of Roman aristocracy inclined to landholding.

His analysis was very interesting in many points. In particular we are convinced that a vertical articulation appeared from a new historical situation that landholding was highly financial asset. Steady revenue in money depends on agent's taking risk and profit. On the other hand Kehoe was misleading because preference of landholding and respect of tenant were different modes to be steady, even if these two were integrated by one mentality to prefer long-term

[41] Aubert 1994. As we all know, both on farm or *villa* and on *vilicus* there is an accumulated literature. While the studies had discussed on landholding itself, Aubert turned the direction of interest to management and organization (cf. p. 133).
[42] Fülle 1997 is more precise, recognizing the nucleated structure in the manufacture, which is situated in a sub-urban context. *Officinator* presides over a financially and internally independent unit though subordinate to patron landholder. We see the morphological feature of WI very well. A dualistic structure, seen in *peculium*, *institor*, *libertus*, and even *colonus* etc. too, persists, allowing neither collectivity of small tenants nor mass slave labor.
[43] Aubert 1994, p. 1.
[44] Ivi, p. 40ff.
[45] Ivi, p. 117ff.
[46] Kehoe 1997.

stability. In fact, the former was connected with another problem. In this context, tutor was converting financial base from urban one to landholding[47]. The alternative was not whether financial or landholding, but whether urban financial base or landholding one. The true meaning of the scenes witnessed by Kehoe was that, more precisely, urban asset became directly captive of landholding, instead of being driven by municipal vehicles or channels, what meant hereditary management of complex asset including landholding, manufacturing, commerce (wholesale and retail) and public contract etc. This asset physiology notoriously lost hegemony already since the first Century BC, and financial support for pupil depended more and more on one landholding. Its principal cause was the well-known decline of the municipal cities[48].

ii) Maturing and generalizing

Then an article of W.V. Harris[49] is very important and even exciting. He radically criticized the view to think of only coinage when discussing money supply in Roman economy. He adduced multiple examples in which payment was fulfilled by loan transferring. He argued, this also should be comprised in the category of money. The mainstream of economics as well as jurisprudence had included some forms of lending as those originating money, but not all. But the so-called endogenous theory of money maintained that money[50] had its basis simply upon debt in general. Though the controversy was concerning whether money should be restricted to the so-called high-powered one or one could issue money over the limit given by the last one, Harris, following the new trend, applied the new conception to the Roman contrast between coin and loan transferring. However, while credits in our times, even if seeming to be simple loans, have collateral in the system of deposit at the central bank by the hands of private banks, Roman loan had not such a collateral. Instead, in general, loan was covered by personal dependency peculiar to the imperial aristocracy (and, we'll emphasize, each by real pledge). While the new monetary theory has defect in its incapacity to distinguish some crucial difference of nature among credits, Harris for Roman economy, *a fortiori*, should have taken in account a delicate line of distinction. It is his merit to have demolished a bullion-centrism, opening the way indirectly to think of another direction of bank (for example that of Jucundus). But it might generate as well another confusion if we would have unified in money all the forms of «loans» indiscriminatingly. It is true that the archaeology does not produce

[47] Kehoe's preferred forms of finance, *tutela* and *fideicommissum*, have their homeland in the Second Century BC as *dos*, *dos numerata*. In those years WII, or urban financial asset, was exploring the way to enlarge its dominion into the territory, as we see in Plautus. In Kehoe's cases we see a reversal.

[48] The morphology of the municipal finance itself was transformed from *honores* to *munera*. We have too many studies.

[49] Harris 2006.

[50] One of the main advocates is L.R. Wray (cf. Wray 1990; 2015). Modern Monetary Theory has as intimate ally the debt monism of a current of anthropological monetary theory representated by Graeber. Though Harris resorts to the concept of credit money, this has been not so simple with various conflictual theories of Neapolitan School, Bagehot, Hawtrey, etc.

hoard in the Vesuvian cities[51]. But some payments of Cicero and that of Aebutius in Cic. *Caec*. were different because the latter was through *argentarii*[52], while the Ciceronian aristocracy did not use any bank[53]. So Roman jurists did not acknowledge loan transferring as payment[54]. Loan transferring itself was not so viable, because it needed acceptation by the third debtor[55]. Even if transferring is realized, we are not sure if the third debtor will really pay. Roman jurists did not admit even compensation[56]. Loan transferring is not commeasurable. Some exceptions opposable to the former creditor will be so to the successor too. Money should have power enforcing extinction of debt once for all with absolute transparency. And there existed one type of operations on the register similar to loan transferring but valid as payment. This is the very operation of Jucundus[57]. In contrast, loan transferring involves very often personal dependency[58]. Harris can be said to try to grant the status of money to the credit peculiar to the vertical integration[59] and its network in the imperial aristocracy. In this point his attempt was close to the new wave of Micro-Economics as well as the new monetary theory.

And an article of B.W. Frier and D.P. Kehoe in 2007[60] marked the turning point. This was a manifesto of the new orientation[61] arguing as follows. Transaction costs are produced out of asymmetrical information and adverse selection. Institution, organization, firm, are to

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[51] Harris 2006, p. 3.

[52] *Ibidem.*

[53] According to Andreau, as we saw above.

[54] Harris, p. 6 argued that Roman Law protected creditors sufficiently and consequently loan was equivalent to money. He was careful considering that the mainstream cherishes solvability or immediate liberatory effect. But even if the jurists acknowledge the effect of fulfillment to *datio in solutum*, we can't say that the real object of this operation deserves as money. Think of the scene in Molière, *L'avare*. Theoretically payment with loan transferring is a kind of *datio in solutum*. Even here we must see a profound dilemma for the Roman jurists. This tension had been seen already in Cic. *Pro Roscio Comoedo*. This is a famous *litis contestatio* case stemmed up from a *datio in solutum*.

[55] We must remind ourselves that tranferring of loan was in Roman Law «causal», that is, depended upon a third factor such as approvement of the third debtor. Although Roman Law did not impose a vast range of «cause» such as in French Law, the German jurists were forced to seach for non «causal» concept of loan transferring needed by modenization of business, either in Roman «Landrecht» (the Greek part of the Roman Empire) or in «German Law». The typical scene was *delegatio*. B transfers loan to A. The purpose could be collecting debt from the third debtor C. But also it could be B's *datio in solutum* with this loan transferring for A, B's own creditor. Such an operation accompanied *novatio*, and sometimes comprehensive arrangement with collective consent (*transactio*), called technically *acceptilatio*. As for reuse of formal act (*stipulatio*) to cancel all the precedent sequence of events, cf. Vincenti 2003, p. 368. In any way in such a process the third debtor had occasion to affirm his interests.

[56] It was possible only in the court. Cf. Vincenti 2003, p. 374.

[57] Harris's huge reliance upon the case of the Sulpicii as bankers was fatal. He was not aware of the dichotomy of Andreau, though he cited him very frequently. The distinctive line between money and debt is decisive, and it runs in Roman economy at the middle point between Jucundus and the Sulpicii.

[58] A possible meaning of loan transferring from B to A is a short cut (in a typical *delegatio*), that is, a credit reducing, because it leaves now, given that A was formerly B's creditor and B was C's creditor, only A's credit versus C subsisting. The chain ABC is often vertical and implicates dependency.

[59] We should not forget that investment, and so loan-giving too, means *ipso facto* agency. In this case agency is direct in the sense that it does not imply any mediation by a Jucundus-like platform agent.

[60] Frier, Kehoe 2007. Bang 2009 is book review of the entire collected work (Scheidel, Moris, Saller 2007) containing Frier, Kehoe 2007, very useful for understanding about influences arriving from New Institutional Economics.

[61] Another was Kehoe 2007, Chap. 1. Kehoe attempted to apply the new theories to the landlord/tenant relationship in the imperial ages.

mitigate it. As an example of such an institution there was the market regulation of *aedilis*. In Roman economy, however, the networks of long-term personal relationship were as well essential, and when these were insufficient, besides various forms of agency, firm assumed the role of lowering transaction cost. For example *actiones adiectivae qualitatis* was a remarkable institution to promote organization, and above all there was *familia* structure, that is, business organization by slaves, or the use of social dependents as agents. Such a «vertical organization» brings even accumulation of human capital.

The volume[62] dedicated to R. Bogaert, published in 2008, shows some very interesting scenes, where financial intermediaries are treated as sharply distinguished from the professional bankers[63] and the terms of New Institutional Economics are applied distinctively to the former[64]. This category, key figure of WI, acquired now a solid rationality thanks to the new theories. Slightly earlier, Temin[65] had used the category «financial intermediation» absorbing both the bank of Bogaert/Andreau and the simple loan agent, relying explicitly on the new theory. This must have had some impact on Harris's work, though it did not aim at such a clear-cut conceptualization as that of Harris. Jucundus/Sulpicii problem was crucial again and Temin could not distinguish them[66]. And as late as 2013, not only in finance but also in the whole field of Roman economy the new trend swallowed up non-vertical relationships too. Terpstra 2013 was important in its overt stance. It was symptomatic that he passed through deliberately the controversy over the Sulpicii, whether bankers or not[67]. His analysis on the Murecine Tablets is not imprecise. He found a great legalism in these documents[68]. Despite scarce enforcement, he says, there was «path dependence» due to «sunk cost» historically accumulated, valid both for the natives and the foreigners. Notwithstanding (here Terpstra's argumentation is a little obscure), the long-distance trade involving the foreigners suffered from scarcity of information and personal confidence, and so some measure was necessary for making it possible. According to Terpstra, that was «group reputation». The collectivity of each foreign city, whose presence at Puteoli was institutionalized, had power of sanction against moral hazard. This intermediate ring was secret of the stabilized long-distance trade. Terpstra distinguished himself[69] from some preceding scholars relying on the personal de-

[62] Verboven, Vandorpe, Chankowski 2008.
[63] Verboven 2008.
[64] Terpstra 2008.
[65] Temin 2004. Temin 2001 had been not yet explicitly new institutionalist, still sticking to Polanyi or general mechanism of reciprocity in order to recognize for Roman economy a market in its loose definition.
[66] Temin 2004, p. 722f. Rathbone, Temin 2008 too adopted the monistic picture of financial intermediation, but this was due to their objective to compare Rome and England in a large scale. In fact, their conclusion that Rome did not succeed in Industrial Revolution despite a well-developed financial intermediation and England did succeed in it notwithstanding that financial system was less developed is very interesting.
[67] Terpstra 2013, p. 16.
[68] Terpstra follows Wolf 2001. Wolf had generally recognized coincidence of the conceptual world of the Tablets and that of the jurists.
[69] Terpstra 2013, p. 28.

pendence theory[70]. He recognized an individualism among the people in the Tablets. And he emphasized «group reputation». So Terpstra stands at last nearby to WII. These scenes seem to me, however, those where WII was eroded by the infiltration of WI. The alleged legalism might be result of return to a formalism fundamental to the latter. The reputation of WII was very different from «group reputation», because it evaluated one by one person in his conformity to transparency, that connotates to be never submerged in a particular group. An international context can break group mechanism. On the contrary, in the cases cited by Terpstra, we see segregation and corporatism by ethnic groups.

Kehoe, Ratzan, Yiftach 2015b was a second manifesto, and it told us on a program to explain even some relationships other than organization and agency by the concept of institution for lower transaction costs. In the same volume Kehoe symptomatically argued across the two chapters of contract and agency that «the authoritative legal institutions» or «the Roman state» was successful in reducing transaction costs, relying both more or less on «broader social institutions»[71]. In parallel there was emerging a highly diluted concept of market in the studies in the volume Kehoe, Ratzan, Yiftach 2015a. They endeavored to have something like the greatest common divisor between market and vertical organization, or to seek after a certain economic rationality in the mezzanine level between ideal market and primitive system. As such, Roman economy was now preferred, because it was neither modern nor primitive, almost modern, but not modern[72].

Nevertheless, Kehoe, Ratzan, Yiftach 2015a produced only scanty works on Roman economy among many contributions in the other fields of ancient history. And this tendency continued. Ptolemaic Egypt, or its Roman successor, became preferred genre. We see some conquering efforts even towards the classical genres of Roman Law[73] too, although these are so far futile. Fleck, Hanssen, Kehoe 2020 is a third manifesto which tries to absorb even Classical Roman Law of property and landholding in the same scheme. And Kehoe 2020, though being an extreme case, illustrates very well what the problem is. We must recognize that Kehoe is still well aware of the dichotomy, in this case that of mandate and slave agency. He concentrates here his discourse on the former. He argues that *mandatum* as consensual contract was for large scale commerce of the upper class, and the reciprocity among them brought mutual trust which could reduce transaction costs compensating asymmetry of in-

[70] For example, Verboven 2002.

[71] Kehoe 2015. But these two chapters were proof that Kehoe was compelled to recognize the dichotomy. He was also careful on the difference admitting that in agency social institutions (personal dependency, above all freedmen) were more important.

[72] Lo Cascio 2020 is a culminating point.

[73] In the meantime among the Romanists of main stream was spreading a hesitating feeling, found for example in the volume Lo Cascio, Mantovani 2018. The volumes Dari-Mattiacci, Kehoe 2020 don't cancel this impression. Willems 2017 was not able to gather much support from the Romanist literature. Admittedly the line established by Di Porto coagulated a cluster of Romanists advocating «diritto commerciale romano» of which the synthetical picture is given by Cerami, Petrucci 2010. However, this movement has not accepted the new theories, although it reduces one main sector of Roman Law to organizational regulations of enterprise.

formation. His basis of argumentation is gratuity. Admittedly «gratuity as friendship» is an ancient and still now diffused opinion. However, *mandatum* was used in daily business, as well as *die mittelbare Stellvertretung* nowadays. Even if its origins are to be explored in some archaic solidarity, we are not able to explain the classical *mandatum* as such. Residues of such a spirit found in juristic sources don't change the things[74]. Then, although Kehoe calculates distributions of transaction costs, none of his sources concerns the authentic *mandatum*. The liability of *culpa* was originally very alien for *mandatum*. Admittedly «*mandatum*» was used for collection of debt too and produced various forms of surety. But such is not at all the classical *mandatum*. Here prevailed suspicion and fear. On the contrary the classical *mandatum* can swim only in the water of absolute confidence.

Finally in this current of studies has emerged a situation as if all were justifiable only if being recognized as effort or institution to reduce transaction cost. That institution reduces transaction costs is perhaps an absolute truism, but at the same time colossally trivial[75].

iii) Background – a glance

Let us glance at the background theories too.

The origins of these theories, even apart from the game theory[76], have an old date, viz. the year 1937, when R. Coase published an article[77], neglected, however, during the following years. The second important date is the year 1960, when R. Coase with his «Coase Theorem» marked the period[78]. In the 60's we saw already a flourishing of Law & Economics literature. As is well known, in the former article, Coase had compared two alternatives, transaction in the market and solution in one's own internal organization (to buy it at the market and to make fabricate by engaged staffs). The market is too risky, and his staff is credible enough, then he had better choose the second alternative. Coase calculated respective costs, not using the word «transaction costs», but impressively saying of «costs of using market». We can not but detect a certain aversion from, or at least suspicion versus, market in the text of Coase, what is not to be seen in the classical economics. This latent organizational preference seems to have nothing to do with his second thesis. Here he maintained that the social cost is the same, indifferently from how allocation is defined, only if it is done definitely enough. People can reach the best choice between the alternatives above said too, and so this choice shall be best for his productive

[74] Plaut. *Mercator*, and *Bacchides* offer the idea that *mandatarius* can not take *fructus* of the entrusted thing. It only passes through him. Therefore he can not receive *merces* when he delivers *res mandata et fructus*. He only claims compensation of *impensa*.

[75] So, the insistence upon vertical organization found in Dari-Mattiacci 2013, Hansmann, Kraakman, Squire 2020 and Abasino, Dari-Mattiacci 2020 etc. is far more sound than such an excessive generalization.

[76] We can confirm that information had been key term already here, and one had accepted as starting condition such a Cyclopic situation of no dialogue and *a fortiori* no dialectic, as of dueling two intelligence organizations.

[77] Coase 1937.

[78] Coase 1960.

organization as well. The best choice is otherwise in harmony with the aggregated maximum welfare. The well-defined allocation makes possible calculation of market transaction costs so that one can sort out what to be procured in market and what to be realized in his inner productive organization. We notice soon that Coase needs judicial decision for allocation and this decision or law is for him nothing other than authoritative attribution of positive and negative resources to the two parties[79]. He thought that this would reduce (make zero) transaction costs in market. A kind of rude arbitration between two interests, even if not a ordinary civil procedure, would work very well for his market. This system would resemble rough process of interest group pluralism of democracy, which was at its height in this period of US politics. We can easily guess that the organizational orientation was congruent to market only under this presupposition. Coase 1937 and Coase 1960 could be bridged only through this tight rope. We should memorize that market (or democracy) was configurated thus as if it were arena of Cyclopic collisions and transactions, each Cyclops having his own organization. In fact, here language becomes «information», viz. scarce and secret, closed and suspicious, without dialogue and debate. So Coase had predicted considerably the whole bias of the following trend.

Admittedly we should modify this picture with precious indications of Klaes. He says that the *caesura* between 1937 and 1960 is «the folk history». He rediscovered a current in the neoclassical monetary economics in the 50'[80]. He considered this current quite accurately as recognizing more and more «frictions» of market circulation to be explained in the inner part of equilibrium theory itself. This diligent reading of the literature suggests that there had been still in the years 60' two directions. One was exploring precondition of market and external factors for it. The other was seeking after balance between market and non-market, though unconsciously transforming market into Cyclopic arena, law into compromising rule of it. It is worth confirming that inner organizational problems were not yet principal for both.

A true impact of Coase in the field of organizational economy, that matters for us because it led to NIE, came then with O. Williamson. Coase could this time furnish a paradigm which would exercise a revolutionary impact upon an entire direction of economics. In the later 60's Williamson adopted the term «organization costs», similar to «transaction costs», with which one can reach the appropriate size of business organization[81]. We see that the second alternative of Coase appeared now accompanying a similar term to that of the first. Williamson commenced now to question the cost of the organizational alternative itself. He is similarly

[79] We all know that Law & Economics then came to explaining or justifying the property rights themselves as institution. But they are sometimes incredibly ignorant of both Civil Law and Common Law, *a fortiori* Equity. All these are not systems of authoritative allocation. The core is protection of possession. The structure of civil procedure is indifferent on the problem whose thing that is, but prioritizes possession. So the plaintiff has scarce possibility to win, being blocked by the defender's possession (to get this position at the pre-trial phase is crucial). The procedure is very partial. This principle prevails even over contract law and intellectual property, although modes of legal protection, which the economists don't distinguish in the name of property rights, are various. Cf. Koba 2022.

[80] Flaes 2000a; 2000b.

[81] Williamson 1967. In Williamson 1975 we see a complete formulation.

in a sense anti-market so that he is known for his criticism against anti-trust[82]. «Organization costs» is the term with which he proved rationality of a certain vertical integration in particular in merger policy[83].

As Klaes corrected the story, some mainstream economists as Hicks and Arrow had been problematizing the neo-classical setting of market with such terms as «incomplete market» or «failure of market», «asymmetry of information» and «adverse selection». Now a straightforward pursue for the alternative vertical business organization took over these terms. Still, in the 70's we saw two currents standing ambiguously side by side. Some continued to think of reconstructing market. For them «agency theory»[84] had scope of improving asymmetry of information, and so its target was reparation of market.

Then NIE came. In the 80's Williamson began to use an institutionalist language[85], but his discourses were still of the same nature as in the 70's. He tried only a comprehensive explanation of the whole economy with the organizational logic. But there were some who attempted to explain the very raison d'être of each institution with the organizational terms accumulated in the meantime. For them the economy itself was historical formation of economic institutions. And in the 90's NIE consolidated its position in the social science with Douglass North[86]. Law had been decisive for the new orientation of economics since the very beginning. In this new phase, one began to discuss on historical formation of law as institution. One of its orientations even designed a new concept of contract[87]. Nonetheless we must take note of the fact that this new phase did not bring us any new term. And such a point of view as asymmetry of information was maintained integrally even when it now treated vast field comprising politics. NIE shifted the axis of its arguments to a market in an enormously broader sense, discounting criteria of market. It did not like anti-market intervention, but nor pro-market one. It harshly insisted on the endogenous character of institutions. NIE had, or had potentiality to have, merit to discover a relative economic rationality outside the neo-classical market. Certainly with these tools we now perhaps can at last analyze various historical societies. There are many historical institutions reducing transaction costs though these had nothing to do with the neo-classical market. We must admit it.

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[82] In Williamson 1975 we see it placed in a system as linkage of multiple dimensions of vertical organizations.

[83] Williamson 1971.

[84] The principal-agent model is so important. One of the initial points of this theory is normally attributed to Jensen, Meckling 1976. We have a vast literature. «Firm» is ever present there. Agent is in substance manager of enterprise. We, the Romanists, are by nature curious whether the principal-agent contract *mandatum* or *locatio condutio* is. Remuneration recommends the second hypothesis. If so, we need to discuss much about labor market of managers.

[85] Williamson 1985.

[86] North 1990 is an absolute landmark.

[87] «Incomplete contract» of Hart 1995 has been one of the most interesting wings of the new theories for jurists, and as is well known it influenced on the recent civil law reform in France. For us, the Romanists, however, the cases hypothecised are all those of *locatio conductio*. This contract, born in WII for urban free labor, became then the bridgehead towards the future WI. So conflicts between two worlds were condensed around this contract. «Incomplete contract» as well as «relational contract» is heir of this delicate field without knowing it and so with considerable confusions.

However, if this attitude means abandoning any criterium to judge the quality of an alleged market, damage is considerable. Even if we are at last able to compare many historical societies thanks to this new term «transaction costs», we are not yet legitimized to justify all these however it might be. We can't idealize it for the sole reason that it might reduce transaction costs. Every economic reality suffers serious diseases, and the most advanced market too is now fallen in an *impasse* or even into an abyss. Although «transaction costs» is one point of view valid, we should see economy by many other criteria too. They perhaps would say that these other criteria could be reduced to «transaction costs». Even if so, I don't understand what a sense such a reduction has. Historical realities are complex, multi-dimensional, ever-changing. And we must face these realities full of miseries. We must have the most refined method of source criticism compatible with that complexity. These doubts are completely parallel to those to the studies of Roman economy and law in this current.

4. The limits of the new studies, and some fields to be investigated further

i) An optimistic monism

If we put the new studies in front of the dichotomy elucidated by Andreau, we are soon induced to some observations.

First of all, these studies don't like to look at the differences or the sharp contrasts between the two worlds[88]. And their understandings have strong inclination towards WI. They share clear tendency to assimilate WII to WI. Their preference of WI is rooted in the very origins of their methods and key terms. Accidentally or with some reasons, WI is fit to their view, the focus of which is «firm» or its «internal organization», «agency». The assimilating catalyst-term is «transaction costs». But we can't forget that this term was set up originally so as to be maximized in market and minimized in «firm».

The background theories themselves have enlarged their targets. Arriving at the NIE stage, they became more and more inclusive, and incorporated up even such institutional elements as the contracts typical in the market that they call «neo-classical», or as even the State and the political system. This great monism is characteristically optimistic, in contrast to its roots in R. Coase who was seriously pessimistic for market. The Roman studies has translated this optimism into an economic *pax Romana*. They discovered a new modernism as revisionism over traditional primitivism. However, no one could deny that this optimism compromises rigor of observation.

[88] Verboven 2021b, or «behavioral economics», «complexity economics», stresses upon complexity, but this complexity is no more than mosaic composed of various types of personal tie. Their picture is so monotonous.

ii) Landholding basis of WI, and its financialization

In the Roman studies the new trend is not only too monistic but also it can't understand enough each of WI and WII.

The new wave has conspicuous merit to have furnished discourse adequate for WI, to have detected a certain economic rationality in its organization. Di Porto lighted up an almost idiosyncratic corner of Roman economy. Aubert and Kehoe started steadily from a typical agency on the landholding. Their discovery corresponded to some organizational rationality insisted so powerfully by the theoreticians in US. In fact, WI was composed of agencies, and some organizational principle prevailed there as a matter of fact.

However, this organization was *au fond* based upon personal dependency[89]. Admittedly this personal dependency was regulated by the business terms because landholding was financialized. The dependency has become agency wearing financial logic. We should not forget, however, that the ultimate binding force, necessary for sustaining credit given from patron investing onto his dependent, is due to landholding system. Landholding means to occupy a piece of territory. To do it one needs a corpus of persons, at least physical presence of himself. One engages normally other persons, whence personal dependency stems up. If the agency of WI has its resource in personal dependency, the most typical of which is slavery, this signifies that this business organization has its roots in landholding, as Aubert and Kehoe so keenly noticed, and in legally protected binding force of landholder[90]. And landholding in WI was backed up by the imperial authority or the network of imperial aristocracy, which was no other than personal dependency. However, occupying physically a piece of territory through a band of men had inevitably problems harmful to transparency which is essential to finance or credit. Because power and authority are inimical to any open confidence. Here is clearly a double edge. Binding force is both guarantee and obstacle at the same time. The new studies lack preparations for treating these complicated problems.

To tell the truth, landholding force had been in Roman Law refined and elaborated so as to be adapted to transparency and open confidence. First of all, the Romans, otherwise than other people, had experienced a great liberation from a generic and vague personal dependency. More specifically, they acquired, after the Republican Revolution, as the second step historically distinguished from this, the principle of possession by their Decemvirate revolution[91]. Landholding was liberated not only from nebulous network of personal dependency,

[89] The creditor/debtor relationship could be sometimes included in one complexity. So multiple credits of one creditor could be bundled by one inclusive agent executing collection. Camodeca 1992, 199ff. had already reconstructed very well TPSulp 60. We are certainly looking at *nomina arcaria*. But his criticism on Andreau in nt. 27, p. 214 is not so convincing. His convincing argument cited from Gai. Inst. III, 131 and Arangio-Ruiz (yes, certainly this is *nomina arcaria*!) proves, instead, that the Sulpicii were not bankers. Gaius says that this is not *contractus litteris* (*perscriptio*, payment itself) but *re* (crude loan). Here the same form of book (*codex accepti et expensi*) was used for registering debts of A to B by C (Sulpicii).

[90] Roman Law had denoted this with the words «*manus*», «*mancipium*» etc.

[91] As I argued in Koba 2022.

but also from the allocating political authority. This second liberation brought about autonomous guarantee of landholding, hence civil procedure and civil law. Possession was the key concept. It definitively sweeps out intervention by a superior, especially by those who claim «it's mine», or even by the allocating political authority. This gives transparency. Imagine a potential creditor. He must decide whether he gives credit or not. If he sees shadow of a third person intervening vis-à-vis this potential debtor, he must probably renounce this financing. Transparency is essential for credit. Possession cleans up all the shadows. There is more. Internal personal dependency too may create obscurity. Possession meant inner transparency as well[92]. And at the same time possessor's inner power is not absolute, differently from the vulgarly conceived idea of property, because, vis-à-vis an inferior who is in a good condition (inner transparency), a possessor without inner transparency can lose possession, the inferior replacing. Because ex-possessor is blamed now for intervening, causing obscurity. Thus this same principle had in Roman Law another liberating power through *causa liberalis* and *vindex libertatis*[93]. This was a safeguard for liberty as well as *provocatio*. Even the landholders in the imperial aristocracy could not have financialized their farms without this basis, at least without any function of excluding exterior arbitrary interventions.

However, it is also true that they wanted to derogate this principle partially, in the age of Late Republic and Early Principate. They hope that the principle of inner transparency be mitigated in half way. They don't abandon it, because their inner autonomy is still fundamental, and above all because the very half liberty of the inferior part becomes now useful for creating vertical business organization (segmentation). I don't know to what extent the historical setting that Roman freedmen were not free, or were only demi-free (because freedmen continued to be obliged to bring benefit for ex-patron), contributed to construct a new structure[94]. But it is certain that the same structure set up a mezzanine position, into which slave and ingenuous citizen with freedman were inserted indiscriminatingly[95]. For this new structure, various conceptual resources were now recycled[96]. Even far from landholding, in the most sophisticated commerce, agency becomes indispensable[97]. A new historical condition assimilated it to the mezzanine position in landholding. So we see a new phase of *institor*

[92] *Lex agraria* was for the purpose of realizing this inner transparency in possession. Cf. Koba 1999.

[93] Still cf. Nicolau 1933.

[94] However, these obligations were perhaps obscure so that the new studies are not able to calculate cost and benefit in this relationship. The enormous vogue of freedmen in the early Principate is still to be explained.

[95] Dari-Mattiacci 2013 offered us a fresh point of view for understanding manumission. He maintained that asymmetry of information was determinant for the choice of patrons whether they had better emancipate the concerned slave or not. But our focus should be fixed on a deliberately ambiguous position.

[96] Stolfi 2009, though being sketch of plan, offers precious perspective on this point. Stolfi points out that in Greece the commercial jurisdiction was indifferent to the status (whether free or slave). In Rome on the contrary the stubborn subordination was recycled for creating a halfway concept of freedom/subordination, useful to a new form of commerce or enterprise. Stolfi suggests even the stratification and the stratigraphy in the texts of the Jurisprudence which have layers corresponding to two stages, primitive and recycling, in a general ambivalence.

[97] In the texts of Plautus, we find an incredible wide range of agency, completely different from *vilicus*-type. In *Casina* a fierce conflict between two agents, urban and territorial, is pictured.

and *actio institoria*[98]. The new structure hid equivocation. Vis-à-vis the third creditors of the dependents, the patron claims sometimes his possession but in other occasions possession of the dependents. The third creditors shall accuse of such a double dealing. The jurists shall conciliate these and the patron with additional exceptions in their menu of *formulae*.

A structure characterized by the mezzanine position had been thus a potentiality for business organization. We saw that the inner structure of landholding itself was determined by the effects of this structure (we should acknowledge contributions of Aubert and Kehoe again). Landholding nucleus was pierced through internal monetary artery thanks to intermediation of agents. And the patron was a new type of proprietor, *dominus.* They were not simple possessors of land, but rather at the same time already investors and financial controllers on the units of land enterprise with adjacent manufactures. Agents as well were detached more or less from direct occupational affairs. They were often specialized as financiers. This new type of land ownership called *dominium* had double structure, overtly manifest for example in the causal thought about transfer of ownership[99]. *Peculium* too was device for creating such a double structure, making explicit vertical articulation (defining responsible organizational unit) so as to stabilize expectation of third creditors[100].

Despite such a relative rationality innate in financialization of landholding, it is plain that WI lived ambiguity and distrust ultimately coming forth from landholding basis of credit, and more directly from that mezzanine structure. Recourse to real pledge is one of the eloquent signs of it. We saw that WI financially controlled even commerce through their intermediaries, often freedmen. Even here it did not think of using bank, preferring real pledge.

And the new studies, thinking that society is organized only for reducing «transaction costs», say that real pledge is rational because it reduces information gap for creditor through anticipated or possible direct seizure of the thing or the affairs by his own hands. The famous creditor's informational disadvantage is thus dissolved. One easily lends money, and the quantity of credit will increase. So, taking collateral is recommended by the new studies. It seems to bring welfare or at least economic benefit. Thus we find in the Roman

[98] We must recognize this new rationality, not to be reduced to the original dependency. A series of Chiusi's works (Chiusi 1993; 2001; 2007; 2018) are useful for reminding ourselves of the original layer, for not being excessively optimistic of this new economic climate, but this does not exclude relative rationality of a certain morphology.

[99] In order to acquire the ownership one must procure both transfer of possession and some cause, for example a valid contract of purchase. The second is the cause of the first. Cf. Gallo 1955. This is too well known as the iron rule of Civil Law tradition. The economists hardly dare to explain it.

[100] We should not look over that the possessive power as ultimate guarantee for proprietor compelled the jurists to excogitate complicated conceptual operations. Dependents acquire possession automatically for patron, but in the case of *peculium* acquisition takes two steps, potential but still independent acquisition by slave and definitive one in the insolvency of *peculium*. In this latter scene third creditors obviously try to limit acquisition by proprietor. Some jurists thought that if there was *causa peculiaris*, an extraordinary commitment of patron was necessary for immediate acquisition. Though Nicosia 1960 had denied value of fragments favorable for this limitation, Pesaresi 2008, p. 65ff. has great merit to rediscover a new significance of such a particular regulation, inspired by Di Porto. Pesaresi was able to shed light on the concept of *possessio naturalis*. Even if landholding power says ultimate word, law of possession protected even *peculium*, in order to maintain relative rationality.

studies too someone re-estimating the well-known multiple developments of security interest in the first centuries AD[101].

This argumentation makes us all extremely skeptical. Monitoring itself is contiguous to intervention hindering debtor's qualified voluntary performance. It can sacrifice it in exchange of secured low-level performance. It can cause moral hazard of debtor. Collateral might maximize efficiency of monitoring, but if its ultimate scope is seizure of debtor's asset in cases of insolvency, the alleged maximized monitoring is no other than the one over cadaver. Creditor's interest in this case is scrap value or raw material. So, even though collateral reduces transaction costs, performance of economy will be damaged in its quality. *Vice versa*, collateral is corollary to prevailing low quality or scarce confidence. Heavy institutionalizing of collateral promotes this vicious circle (general atmosphere of moral hazard). If we interpret the definitive scope of economy as something qualifying, not indifferent to securing freedom, all such terms, «transaction costs», «asymmetry of information», «monitoring», not necessarily but, can be at odds with this great requisite.

Only the type of collateral presupposing conversion in money sum can conserve going concern value. But in order to block creditor's impetus to seize debtor's asset, we need collective procedure of bankruptcy. In this institution «*Par condicio*» is indispensable, and this principle contradicts logically collateral though compromise is often tried. Since *lex Poetelia*, the Romans, who had appropriated the principle of possession even in its social textile[102], had prohibited any seizure of the asset of the debtor by a single creditor[103]. «*Par condicio*» among the creditors and open procedure of conversion in money of the whole asset of the debtor have been one of the Western core values (an application of the principle of possession). The procedure of bankruptcy in the next historical phase (*bonorum possessio*) is monumental for us even now[104].

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[101] Pellecchi 2018 is an exellent work applying to the Roman security interest the new theories. Its (perhaps paradoxical) merit consists in demonstrating that the Roman jurists were not ignorant of some tendentious development of security interest coupled with (naked) loan (*mutuum*), but cautious as well of possible deviations. Pellecchi sees well too that it was rather the practice that pushed foward various forms of collateral. The practice may have tried to reduce asymmetry of information as Pellecchi says, but the jurists must have insisted on another economic rationality, as I argue here.

[102] Abolition of *nexum* was intermediate step of version up of the principle of possession.

[103] *Pignus* has been object of fierce controversy. I think, as well as the relative, I hope, *communis opinio* (at least the old French Romanists), that «*Besitzpfand*» or *a fortiori* «*Faustpfand*» had been obsolete very early, because these contradicted the principle of possession that was established by the Twelve Tables (cf. Koba 2022). As result of a further evolution attained by *lex Poetelia* collateral itself seemed to disappear, except inside of the Catonian farm, and at least in the *bona fides* milieux (monumental anti-collateral spirit in *Captivi*). Instead, since the last Republican years, we see various forms of collateral, «*Besitzpfand*» and «*Faustpfand*». I think that this is due to the emergence of WI or the erosion of WII. *Peculium* itself was no other than one type of inclusive real pledge for proprietor on half-independent asset of his slave or freedman. Nevertheless the jurists did not abandon the battle against this tendency (they were contrary at least to «*Faustpfand*» as their opinions about *lex commissoria* show) though they were more and more losing.

[104] Despite the great tradition of prohibition of *lex commissoria*, we see more and more even in the Continental Europe the irregular type of collateral, that is, disguised in purchase. Pellecchi 2018 did not neglect this movement. I'm afraid that this is one the scenes where the global economy has become so wild. At least this (with consequent loss of transparency) is one of the reasons for the decline of the Japanese economy. My personal experience is that, when I advocate the «*par condicio*» principle in my teachings, students often counterattack me citing these European tendencies, and I shout in my mind, to you the Europeans, «you traitors!».

iii) Understanding WII

The new studies don't have adequate tools to understand the fundamental mechanism of WII. The logic constituting the world of Jucundus can be illustrated well by the following principles of the classical Roman contracts. Its key element was *mandatum*[105].

Between A and B, a *mandatum* is agreed for B to sell something produced by A. B concludes contract of purchase with C, unknown to A, according to the previous contract of *mandatum*. B assumes in his own name[106] the entire responsibility in front of C. The purchase between B and C is independent. B delivers the received money onto A, even before A delivers the merchandise that B may deliver onto C in anticipation. These plans exist only between A and B and between B and C[107]. B's service is not paid (gratuity)[108]. If he is paid, he is dependent, purchase is for A and C, and B is not completely free (optimal choice viz. best performance in market is not secured because he may conform to A's caprice, A is patron).

We may add that *societas*[109] was a bundle of multiple directions of *mandatum*. S1, as if he were *mandatarius* of S2, transacts with the third in his name. S2, as if he were *mandatarius* of S1, transacts with the third in his name. S1 and S2 have an inner pact to give to each transaction this meaning implicit (but transparent) for the third. S1 and S2 could repeat such transactions fabricating register of accounts, but they could also limit it to one operation. In the transitional stage can be accumulated on the register an asset which is continuously floating in the air and just for this reason seems to be independent[110]. But this asset could never achieve landing, viz. acquire real possession[111], although *bona* sometimes

[105] The following is an idealized synthesis of Arangio-Ruiz 1949, though it does not vary so much from the picture for example of Kehoe 2020 on which I commented above. To be idealized means a limit. But here it is useful because we need to be liberated from the prejudice that *mandatum* is inferior to the modern agency. Its limit consists elsewhere. To tell the truth, we don't have any direct source for recontructing the classical figure. That of Arangio-Ruiz is product of sophisticated puzzlework.

[106] No representation rule. Cf. Popesco-Ramneceano 1927.

[107] Consent is essential, but its content should be defined rigorously by dialectical words, because the two parties should share a plan. This plan is virtual, and so this contract excludes real effects (Miceli 2008 points out rightly that, differently from *procurator*, *mandatarius* could not get possession).

[108] On gratuity, even Arangio-Ruiz is not convincing.

[109] On *societas* too, I follow Arangio-Ruiz 1950. There had been a strong wind to seek after the origins in the archaic family (Meissel 2004 is an effort of partial recovery through typology). We can't deny that *hereditas* was its homeland, but *societas* was then re-modelled completely in the good faith phase of law. Yet, already in Cic. *Pro Roscio Comoedo*, its further transformation had started since sometime ago, *societas* of asymmetrical partners being converted into an agency for farm enterprise. In later stages a syncretism with communion (its archaic origins) was attested frequently, and on the ground of this phase (whence some *corpus* seems to remain) some of us claimed rehabilitation of it as business organization (Fleckner 2010; Cerami, Petrucci 2010, p. 68ff. too is ambiguous adhering to Burdese's cohabitation). Di Porto's favorite type, «*per servos communes*», too, as we saw, is a contamination of agency and communion.

[110] Even on the register of *mandatarius* remains an asset. *Societas* reinforces subsistence of it through reciprocal binding of the partners. This is resilient against creditors of one partner, because it belongs to another partner, relatively, though this barrier is not absolute but only in terms of possession. So this asset is far more transparent than *peculium*.

[111] For this reason asset is transparent, but naturally for some of us this is the very limit of Roman partnership. The modern corporation allegedly overcame this limit maintaining transparency with such devices as equity, shareholders, governance organization etc. However, as everyone knows, its success is only half.

could indicate this type of asset. The Roman jurists pay enormous attention to avoid the transformation of this into a real asset or an organization, in particular to deter it from unbalance, or asymmetry, between *socii* through which *societas* could be converted into agency or dependency[112].

Emptio venditio too had a form adequate to this thought[113] (the contract is said to be «consensual»), that is, in its nature dependent upon absolute confidence already while neither price nor delivery are realized. Purchaser could sell it for a third even before it is delivered to him. Whence we encounter marvelous *custodia* liability, or *periculum emptori*s principle, or exclusion of *culpa* liability[114]. As if the vendor were *mandatarius*.

We saw thus that in theses contracts credit is given, not by loan, but by actual performance anticipated of the one convinced blindly that his partner will do the qualitative best quite voluntarily[115]. This structure is the same as the bank of Jucundus[116]. The sign has the same value as the achievement, because expectation is perfect. So account on register functions as money.

We must recognize that such a confidence means mortal jump. If loan[117] intervenes in spite of this structure, we can not escape from intrigues, obscurities, complications accompanying, and these are immanent in personal dependency. On the contrary this structure dissipates all these immediately by virtue of a shortcut (action precedes money). Complication of ternary relationship characteristic of personal dependency is too excluded, for, the entire chain

[112] Recently Johnston 2018 did not forget to refer to the English partnership opening possibility to evaluate the positive side of the classical *societas.* I regret that he then endeavored to defend the later Roman jurists conceding in front of compromising realities. This does not demonstrate their economic rationality. We have endless scenes of their defeats, even though they were honorable losers. The jurists faced the situation that *societas* was more and more worn out becoming at most communion of landholding in the inheritance.

[113] Here too I follow Arangio-Ruiz 1954. But naturally this figure had been very traditional on the Continent (a glance at Domat and Pothier would be sufficient).

[114] Cf. Arangio-Ruiz 1927, which is in substance a discourse on *emptio venditio*.

[115] All the members behave spontaneously. There was a conviction that not spontaneous action had no value. So the regulation was such that no enforcement was required. Remedy was flexible, and even if troubles happened, rapid solution with money besides some possible restitutions satisfied the parties. Strict liabilty was ruled out. The golden rule of *condemnatio pecuniaria* seems to have roots in the principle of possession (not permitting acquisition of possession), but was nice to the spirit of *bona fides* too. The economists don't understand that enforcement, by physical force in particular, is vulgar legalism.

[116] Andreau 2020, p. 106 cites an oral comment of Dari Mattiacci that some features of WII bank, considered normally as historical limits, might be explained as efforts reducing transaction costs. Though I don't know whether so or not, even if we adopt their language, we must say that it is important to pay high transaction costs in order to get high performance. We must aim at higher equilibrium of cost/benefit. The new theories incline to low cost low performance because of market price conformism.

[117] «Financier» of WI mixed naked loan into commercial one. Cf. Andreau 1983, p. 99ff. He returns to this topos in Andreau 2015, p. 90ff. where he confirms the presence of commercial loan besides consumer one under Sulpicii's hand. The mixture of these two types of loan had been a fact by which Andreau could distinguish the Sulpicii from Jucundus. Professional bankers don't operate nor long-term credit, in Andreau 2020, p. 199, he writes: «---short-term commercial loan were made by several categories of people, and particularly by professional bankers and wholesale merchants, who lent money at the same time as they sold goods. As for long-term credit, which was certainly less frequent, it was mainly practiced by financiers belonging to the elite and by big businessmen». This is valid as synthesis of mandate type trust structure.

of credit is articulated into units of dual relationship. So this structure is resilient vis-à-vis systemic risk, because failure is not contagious.

Admittedly this credit structure is found historically often in merchant milieux. However, Roman Law was successful in a rigorous conceptualization, because it covered once an entire society, even if seriously limited by the external world. It was hegemonial, certainly not auxiliary to an aristocratic dominion, controlling adjacent landholding too. There was a particularly favorable historical condition. That is, an infrastructure composed of two layered floors supported this trust structure. Solidarity of Greek polis and liberation from it. Absolute horizontal bondage and liberal attitude not to insist upon fulfillment. In sum, the constellation of the municipal cities, so impressively present in the study of the register of Jucundus by Andreau. This infrastructure with these two layers filtered insidious credits. The background of Greek cities and the Roman international space were an ideal mixture.

iv) Genesis of tension between the two worlds

The new trend, not discerning the difference between the two worlds, *a fortiori*, has no equipment necessary for exploring possible tensions and conflicts of the two worlds. This is more serious, because we are historians and this was the true problem of one historical reality. It is also very relevant that the new studies don't accomplish any progress in source criticism. We should remind ourselves that Andreau's discovery of the dichotomy was fruit of it.

Such an incapacity of the new trend is related to its too simple comprehension of the social structure lying beneath the institutions.

For example, what should we see behind auction? This figure appears in both of the two worlds. But for one thing, auction on the register of Jucundus preferred to treat the inheritance and the bankruptcy. Inheritance is a complexity composed of various assets[118]. This complex unit was transferrable intactly if only a political system functioned. The procedure of bankruptcy (*bonorum possessio* is synonym of *hereditatis possessio*) had the same political function as an absolute requisite. Differently from transferring one commodity, inclusive attribution of a whole complex asset is complicated task. Convincing evaluation and fair distribution are indispensable, and only highly qualified sense of politics shared by peer members makes it possible. The basis is a fair conversion of patrimony into money which on the other side makes possible conservation of going concern value (avoiding scrapping). Auction connotates pub-

[118] In contrast to enterprise, patrimony is composed of multiple and various sources of profits. In particular, cf. Andreau 2005, p. 57ff. We encounter this argument for a first time in Andreau 2001, p. 54ff. «Patrimony» is not «jamais un capital». His criteria consists in «monétarisation», «la commercialisation et la circulation des patrimoines», and «crédit pas exclusivement pour la production». Then he develops this theme, besides in: Andreau 2005, also in: Andreau 2006, p. 157ff. Only that Andreau refers here rather to *dominium*. This new type of property, however, was hybrid though certainly it shared some attributes of patrimony.

licity in which is wiped off every obscure transaction. Payments too should be accomplished on one open register. So we find here a professional bank.

For another thing, the financiers of WI too used auction as the Sulpicii. But they did not offer the exclusive platform of payment for auction. They remained only purchasers or vendors utilizing auction. The occasion could be often that of converting real pledge into money[119]. Admittedly this too meant a recourse to market, but it was another market, parasite in WII. We are watching already a slippery battle of the two worlds. This battle is visible only with the peculiar glasses for background structure.

In the documents of Jucundus, witnesses[120] are fundamental. They are peer municipal citizens, sign of which is career as municipal magistrate. Naturally witnesses function for every personal tie, in particular for every formal binding act[121]. In fact, we see them in the Murecine Tablets as well. But these are present with real pledge. We must doubt what attributions of witnesses essential are for each context[122].

In the vicinities of Puteoli or Pompeii and Herculaneum there must have been a tug of war. Behind the Sulpicii there was a landholding aristocracy which, however, invested in the commerce. On the contrary at Pompeii we see an alternative mode of financial intermediation where landholding was absent. And at Herculaneum the municipal proprietors of land relied on the first mode of finance[123]. We can presume that owner of a suburban farm had choice

[119] Wolf thought that in TPSulp 81 Castricius was banker as well as Sulpicius (Wolf 2001, p. 125). Sulpicius sold the thing pledged by Servilius and Castricius promised to pay to Sulpicius on behalf of a third purchaser. In TPSulp 22-24 a certain Sulpicius as hereditary creditor prosecutes a certain Castricius, successor, through the procedure of *bonorum possessio*. In a repetitive relationship Sulpicius is simple creditor of Castricius, simple debtor. So here is no bank-client effect. Sulpicius had not got immediate satisfaction with registering or promise of Castricius. However, they could enjoy such an institution as *bonorum possessio*, that needed commitment of municipal organization including auction, publicity and deliberation. Among the documents in which Camodeca 1999 found auction, only TPSulp 82 offers an example of being paid from a Sulpicius, and in the others he was vendor, what categorically excludes that he might have been banker intermediating auction. And as Andreau acutely launches a doubt (Andreau 2001, p. 147), the phrase reconstructed of TPSulp 82 indicating auction is never certain. Wolf 2001 too admitted that only in this last case Sulpicius stands on the paying side (p. 124). Registering was effectuated through formal act of oath, but TPSulp 82 reads «*accepisse*». This may be a simple purchase of loan for collection by Sulpicius. We know that, in the cases where pledged things are sold in auction, loan in cash «*pecunia praesens*» was not rare (TPSulp 91-92).

[120] Witnesses function for any personal tie, but in the Murecine Tablets we encounter them less than in the register of Jucundus, and above all here witness represents a different circumstance. Terpstra 2019, p. 135ff. should have observed about different morphology rather than common presence of witnesses. The presence of *Augustales*, which is attested in the register of Jucundus too (Andreau 1974, p. 172ff.), if any, does not mean immediately influence of the imperial elite, because their *collegium* could compensate for decline of municipality organizing the emerging freedmen.

[121] As for *stipulatio* or *sponsio* it is extremely difficult to interpret it when we find it in the sources. We encounter it very often in the register of Jucundus as well as in the Murecine Tablets. One thing is that *stipulatio* brings irreversible effect of payment without cash and it is necessary such a formal act in order to make the registered sum function as if money, what is essential for bank (think of *receptum* too, cf. Bürge 1984, p. 527ff.). We find it both in Plautus and in Cic. *Caec*. Another is that *stipulatio* is useful as collateral in order to make sure fulfillment. Oath is essential for surety. Petrucci 2008 traced well this second usage where we'll see even some exceptions in the later juristic fragments (exception means that absolute effect is loosened up so that even vendor paid by bank can be forced to sue directly perfidious purchaser). I think that *stipulatio* in the Murecine Tablets is the second type because the context is that of non bank financial agency.

[122] Elaborated stratigraphy on historical layers of Juristic texts is desirable. On the difficulties brought by these sources, cf. Mantovani 2018, p. 786ff. The new studies are not always careful or learned in using them.

[123] Camodeca 2003, p. 71.

between two ways, whether to rely on the first mode of borrowing and to stand eventually under protection of some imperial aristocrats, in sum to be organized in vertical network, or to live in orbiter of some municipal and intermunicipal notables financing his factory only with mutual short-time funding. Here too WI and WII were in an incessant mutual interference. The dichotomy was conflictual and in a full tension[124]. The two worlds were hardly merged in one another, though WII disappeared at the end. Money as well stood between the two rival social contexts. Everyone had to choose to which of them he gave credit.

Whence was born this conflictual dichotomy? This is the most vital question. There is one more reason of it. Even if WII is worth being re-evaluated for punctual criticism versus WI or dominant point of view for understanding economy/law, historical failures of WII too are evident. We can presume that it lacked foundations at the level of social structure. These defects would be revealed only in the historical dynamism of its decline. Thus, only in order to illustrate such a problem, I in the following try to sketch the historical emergences of WII and WI in their conflicts. There is no need to say that the picture will be taken from standard historical studies and you will find no originality, though I'm afraid that in some nuances I may exceed simple restatement.

If the affinity between WII and the most classical phase of the Roman classical contract law is so strong, it is plain that WII, or at least its core, was born simultaneously with this last cluster of contract figures[125]. However, it is said that we can't know precisely how this contract law attained judicial protection[126]. On one side we know that since the second half of the third century BC the Roman judicial organization was open to the peculiar «foreigners»[127] who were in substance the notables of the allied cities diffused in the Mediterranean basin. In this space an international commerce had been developed. The hypothesis that WII was born here is probable. The incontestable municipal background of WII corroborates it. But on the other side it is said that still in the middle of the second century the Roman jurisdiction had not regular modes of acceptation for such affairs among the «foreigners»[128]. We know of a new regular jurisdiction of Q. Mucius Scaevola in Asia in the first years of the first century BC. His menu reveals that the classical contract law had been already so consolidated as the *propraetor* went further to enlarge the protection to other types of transaction[129]. But a full

[124] As the new studies too show well, *locatio conductio* was perhaps the largest battle ground of the two worlds. This contract can be understood as instrument for assimilating organizational and labor problems even on land to those of the trust structure of WII. Success was limited to commercial and urban labor perhaps in addition of some business spaces. «*Locatio conductio*» in other contexts was derivative or degenerated, even though it represented various efforts of the jurists to regulate rationally landholding relationships. There is a vast literature, and I recommend Fiori 1999 and Stolfi 2017a.

[125] Among the scholars there is a vague consensus that since the middle of the third century BC began a new era of the Roman Law. A synthesis is found in Schiavone 2012, p. 136ff., where the focus is put on the transformation of juristic activities.

[126] Marotta 2003, p. 405.

[127] A starting point is Serrao 1954.

[128] Marotta 2003, p. 404. A skepticism of Marotta is precious.

[129] Cic. *De officiis*, III, 70.

legal protection, if any, was probably realized only as early as the final decades of the second century BC. Meanwhile the foreign jurisdiction loosened formalism so as to be able to authorize autonomous arbitrations flexibly, but it did not necessarily reach stable procedural formula. In fact, while this post-formalistic way of judicial protection was often connotated by the concept «good faith» (*bona fides*), this concept or its procedural wordings, detected in later layers of legal texts, had high affinity with arbitration[130].

However, the trust structure of WII is extremely autonomous. We can presume that, earlier than the legal protection by some Roman official jurisdiction[131], the substance had been established[132]. This substance must have been already a *sui generis* mixture of Greek and Roman elements. Even if the foreign jurisdiction after the first Punic War was probably still extension of the one which had been among early *civitates sine suffragio*, from Caere to Capua[133], we may be satisfied temporarily with the hypothesis on the birth of the substance[134], of as late as the first half of the Second Century. The texts of Plautus[135] would be the most suitable candidate sources to verify this hypothesis. Traditionally one has thought that there is not yet any figure of the classical contracts in Plautus. But these texts are of highly literary nature, and are adaptations from the Greek counterparts. We should be capable to scrutinize complicated source value. The scenes are full of various agencies, too problematic and conflictual. The sources were fertile for the author to reflect on the new social values, which could constitute the principles of a new trust structure. The sources had to be Greek because the very Greek elements as main resources were to be transformed, in mixture with Roman inheritance, into the new values. When we read the texts of Plautus, one is always trapped into illusion as if one were looking

[130] Marotta 2003, p. 400ff. Carcaterra 1964 had denied this connection with arbitration. But Cic. *Pro Roscio Amerino* strongly supports Marotta (the subject is *mandatum*). Arbitration or straightforwardly political decision, necessitated in international context, makes possible flexible and creative remedy, which is apt to the trust structure of *bona fides*. Later problems were how and to what extent one could absorb these flexible solutions into the axis structure of civil procedure. Stolfi 2004 is a marvelous work surveying this delicate problematic. According to this study, the Roman jurists did not save efforts to stick to the original spirits until considerably later ages. The phrase was not a simple «general clause». For us, the jurists made efforts to construct the trust structure of good faith among the new class of *domini* untill the last moment, even though they were forced to approach infinitely near the sphere of *scientia* and *aequitas*.

[131] Marotta 2003 is skeptical on the triade *ius gentium*-*ius honorarium* (*praetor*)-*bona fides* as we saw, but Fiori goes further. He maintains that *bona fides* was born in the heart of the new *ius civile* (Fiori 2011, p. 359).

[132] In Fiori 2016, p. 586 we find the succinct but efficacious formulation of this substance: «---a fictitious and conventional *fides*, based on the behavioural paradigm of the respectable, "good" people (*boni*)---"Good faith" was not an ethical principle opposed to the law, but a standard of economic rationality in the formation and performance of contract---taking into consideration all the implied terms of the contract as arisen in the international market---» . I need only to add that this «international» is extention of «municipal» or (formerly) «social» (of *socii*), and «the behavioural paradigm of the respectable, «good» people (*boni*)» arised from the municipal milieux («*boni*» were less specifically indicating also good men in territory, while men of *bona fides*, or simply *fides* in Plautus, were specifically urban, even if they possessed their bases in the territory).

[133] Cf. Humbert 1978.

[134] In so far as the word *bona fides* covers this substance, our starting points are Lombardi 1961 and Freyburger 1986.

[135] I can not discuss here but Terentius already signaled of a crisis of the new trust structure with his partial return to the Greek original plot (rape and healing by authorization, that is, marriage and citizenship).

at the classical contracts anticipated, but is soon disillusioned[136]. We are probably looking at a work to design mental infrastructure of a new society. These works had highly literary nature. We must have some method for using these texts as our sources[137]. In sum source criticism of the texts of Plautus is decisive for studies of the social background of the new trust structure.

Similarly, as for the birth of WI, all depends upon source criticism of the Ciceronian texts. The «Ciceronian aristocracy»[138] was tainted with loans for landholding, typical to WI. It was surely worth to be the prototype of WI. The formation of this financial aristocracy is a complicated problem. One certainty is that there was an apparent restoration of the traditional aristocracy after the regime of Sulla and under Pompey[139]. And its resurgence was due to temporal success of organized protection of the traditional municipal elites, once declined after the Sullan persecution, but transformed now into a new class of financialized landholding. Investment, or conversion, of urban asset into a now elaborately constructed farm[140] is a main theme of the early Ciceronian orations[141]. Heated financial market appearing in the «Ciceronian aristocracy» was one of its consequences.

However, Cicero had a good insight into fragility of this ephemeral world. In fact, credit increase, brought about by these investments, relied on managers controlling directly the very base of asset. These managers[142], who had been Sullan partisans, could be now, transformed, one of the principal resources of the Caesarians[143]. For them, and perhaps according to some economic rationality, bloated jungle of aristocratic finance was superfluous. It seemed convincing Caesar's attempt to reduce swelled credit,[144] compelling short-cut of loan transferring

[136] As is well known, Costa was partially dazzled, and Dareste was disillusioned with his great attention to the Greek institutions. Since, we have had, not many but, a considerable number of studies, but we never encounter those based upon the advanced literary text theory or the theory on theater and comedy. One recent attempt to use Plautus for legal studies was Randazzo 2005, p. 38ff. He saw in the pragmatics of the verb «*mandare*» the archaic phase of *fides*. Even if so, that is literary picture on which the author's criticism hits, and in fact the pictures are distorted so that the author can suggest for example negative effects of principals' interventions. Thus the author tries to make take off independent relationship between principal and agent (often father and son) so as to create a new trust structure.

[137] The most advanced level is representated still by Andreau 1968. His basis of argumentation was the gap between Greek and Roman banks.

[138] Andreau as well as many others refers to the financial situations of the Ciceronian aristocracy very often. We can get its good picture in Iohannatou 2006.

[139] Cf. Lepore 1990a, p. 743ff.

[140] Harris 2007, p. 525. This structure corresponds to the new legal framework *dominium*, explained above. As for the conceptual conversion in a pre-stage (in *lex Sempronia*) on the subject *possessio*, cf. Koba 1999.

[141] At least we can enumerate *Pro Quinctio*, *Pro Roscio Comoedo*, *Pro Caecina*.

[142] Aebutius in *Pro Caecina* is emblematic. Naevius in *Pro Quinctio* too is a manager disguised into a *socius*, and then usurping the entire real asset. We can be sympathizing enough with the jurists in their disquiet vis-à-vis an asymmetrical partnership. We suppose also that it should not be fixed upon a real base.

[143] As for season of the rise of Caesar, cf. Lepore 1990b. Diversity in the power base of the Caesarians was to be traced through analysis of the Catilinarian uprising, *rogatio Servilia* and the Ciceronian *De lege agraria*. Then these elements were convergent to the class of solid landholding minimally financialized, neither more simple managers nor yet aristocratic investors.

[144] As for the bubble and consequent credit crunch, cf. Verboven 2003. «although property prices collapsed, nothing indicates that the prices of other vital products followed the same downward trend» (p. 55). This crisis was not due to monetary cause but to downfall of real property credit which had been too swelled.

and transforming it into simple landholding as asset[145]. Confiscation too furnished materials for austere landholding. Only Caesar's power was able to realize these policies, and *vice versa* this success legitimized the new power. His favorite power base was ex-manager of farm, then climbing to be owner, firmly holding landed enterprise in his hands. Only that this ascension meant to repeat bubble of the «Ciceronian aristocracy».

On the other hand Cicero seemed to share only one half of this reform. He had critical eyes vis-à-vis uselessly entangled credit chains. But his program targeted at creation of another new class, re-organized into municipal cities, but at the same time seizing firmly the economic base as possessor, not being reduced to financial creditor though controlling a highly financialized unit. His dream was that this new class offered democratic basis of the central political system. On the Ciceronian texts spun out of his meditations is thus mirrored a strong distorting force inflicted upon some essence of the trust structure connotating WII. Because the main resource of his new class was the ex-municipal elites, and his intention consisted in accommodating them into a reshaped municipal platform. And, according to him, they were destined to form an imperial political organization. Thus his texts were woven as an arena of complicated conflicts between WII and WI in supremacy of the latter but also with resistance of WII. So a stratigraphy of source value of the Ciceronian texts[146] is for us indispensable. We must trace the Ciceronian thought very carefully watching respective political situations. We have fortunately an excellent study[147].

Augustus reestablished a certain equilibrium, although the superiority of the manager class was unquestionable. The municipal apparatus was indispensable. The problem that the new patrons too were destined to form a new Ciceronian aristocracy, and so to fall into similar

[145] I don't find many pertinent studies beside Giuffrè 1972 which discusses on *datio in solutum* from a juristic point of view. We desire a serious work. My temporary understanding is that chronicle financial instability of WI was going to compel the imperial authority to oscillate between promotion of aristocratic finance and austerity reducing credit to core landholding. *Datio in solutum* in combination with *delegatio*, the forcible one in particular, was an extreme measure for the latter.

[146] We have now at last Fiori 2011 scrutinizing the key texts of Cicero, *De officiis*. This work has an exceptional philological quality. According to his general view, Fiori extracts *bona fides* as an immanent concept in the very nature of law. For Cicero this meant neither opportunistic balancing nor ethical intervention from outside. As for Fiori's thesis, Stolfi 2017b pointed out that the substance or «nature» was not indefinite but consent-central, and so *bona fides* was sticked to spontaneity and will. In fact, only exquisite performance mattered. So external restriction was disturbing. Hence derived liberation from formalism, that made possible some creative remedy. It resembled political settlement, perhaps having mirrored some blend of Greek elements. Naturally as an analysis of the Ciceronian texts Fiori's study is still valid, because *bona fides* was already transformed, apparently under the influences of the Greek philosophy but really through the Ciceronian attempts to harmonize good faith and absolute discretion of *domini*. Cicero's mission impossible was to drive them into the cage of new (or authentic in the sense of not any more «social») municipality. This problem continued to be present among the jurists during the whole period of the Principate (so Stolfi is right extracting a fidelity to the original spirits among the jurists). It means too that contradiction between WII and WI remained unresolved. I regret only that Fiori did not refer to Lepore, because this historian had offered a convincing stratified picture of «*boni*» for Cicero.

[147] Lepore 1954 is still solitary in analyzing convincingly the Ciceronian texts, placing them in the historical situation of «Italian» cities and recognizing his theoretical originality. Lepore 1990c is also useful, but the picture is simplified because the Ciceronian efforts to re-organize into enlarged basis of the Roman democracy municipal elites equipped with (by nature contradictory) new type of landholding are this time implicit.

collapse of credit[148] became chronicle. WI was two-headed, Ciceronian aristocracy of swelled credit and purging pressure by the side of managers proclaiming austere credit but soon being absorbed into the former. This vicious cycle was WI.

This is the hypothesis which the best studies suggest. We have to verify it. In sum, we have the task to revisit the whole Roman Revolution, since the Gracchan Reforms, but above all since the Social War. To investigate on the birth of the conflictual relationship of WI and WII is identical to re-exploring such a too classical theme. I'm very sorry that we reached so commonplace a conclusion.

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[148] So WI saw a chronicle ascension of manager from «affaristes» to patron who was in chronicle decline. It was never that managers as such formed a dominant class. Andreau returns to «affaristes» in: Andreau 2001, p. 101ff. They are neither «l'élite foncière» nor belong to «le monde des métier», but are «socialement très mobiles».

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