

Title	Thoughts, words, and promises: Fides and the legal significance of the inner sphere
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Publication date	2025-09-02
Original Citation	Deibel, T. (2025) 'Thoughts, words, and promises: Fides and the legal significance of the inner sphere', Pólemos, 19(2), pp. 411-433. https://doi.org/10.1515/pol-2025-2023
Type of publication	Article (peer-reviewed);journal-article
Link to publisher's version	10.1515/pol-2025-2023
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Download date	2026-09-17 20:34:22
Item downloaded from	https://hdl.handle.net/10468/18164

Thoughts, Words, and Promises: *Fides* and the Legal Significance of the Inner Sphere

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The final published version is available in *Pólemos Journal of Law, Literature and Culture*.

Deibel, Talya. “Thoughts, Words, and Promises: *Fides* and the Legal Significance of the Inner Sphere”, *Pólemos* 2025; 19(2): 411–433.

This paper traces how the Roman notion of *fides* evolved into the concept of good faith, which is central to contract law theory. It explores how *fides* was initially understood in Roman society as a divine presence within the inner sphere of individuals, symbolizing honesty and loyalty in social relationships. To illustrate how *fides* transitioned into the legal domain through natural law and procedural law, the paper examines three key developments over the *longue durée* of European private law: the emergence of the *bonus vir* (good and reasonable man) standard, the evolution of consensual contracts, and the doctrine of *aequitas naturalis* (natural equity). The legal evolution of good faith from a moral-religious phenomenon to a legal principle highlights how loyalty to promises and honesty, which belong to the inner sphere, and their relationship to their outward manifestations were addressed in law. It also demonstrates how the values tied to *fides* became integral to European legal traditions thereby shaping modern contract law.

Key words: contract law, *fides*, good faith, inner self, natural equity

Introduction

In the Latin language, *Fides* symbolized loyalty to promises in Roman society and, so understood, belonged to the inner sphere of persons. It was characterized as *tacitum in pectore numen* – an inner and unmanifested divine presence believed to reside within human bodies.¹ On the one hand, this Roman concept represented the inner realm.² On the other hand, from the archaic period onwards it was understood in the context of interpersonal relationships and operated in the social realm. For instance, *fides* was transmitted in the legal sphere as ‘*bona fides*’ (good faith) which signified loyalty to promises, keeping one’s words, honesty, and honouring legitimate expectations in contracts.³

Virtues like honesty and loyalty, which belonged to the ordinary morality of the era, were associated with the inner spheres of humans. However, *bona fides* in law was not limited to what medieval scholars later called the *forum internum*. Rather, it was understood as the outer manifestation of the phenomena that belonged to the inner sphere and, as such, assumed a social, relational, and economic character. Roman *Fides* was thus perceived as an intimate, albeit social, concept.

¹ Gérard Freyburger, *Fides. Étude Sémantique et Religieuse Depuis les Origines jusqu’à l’Époque Augustéenne* (Paris: Les Belles Lettres, Collection d’Études Anciennes, 1986), 228; Pierre Boyancé, “Les Romains, Peuple de la Fides,” *Bulletin de l’Association Guillaume Budé, Lettres d’Humanité*, 23 (1964): 419-435, 423.

² For the conceptualization of the inner realm in European legal tradition and its relationship to the protection of the inner sphere of persons, see Talya Deibel, “The Civil Law and the Inner Self: Roman Iniuria and the Transformation of the Private Sphere,” *Journal of Civil Law Studies*, 16.1 (2024): 54-95.

³ Emanuele Severino, *La buona fede. Sui Fondamenti della morale* (Milano: Bur Saggi, 2008), 21.

Drawing on religious ideas as well as ancient and medieval texts, this paper offers a retrospective look at Roman *fides*; the concept indeed provides an illustration of the legal significance of the individual's inner sphere which later influenced medieval and modern understandings of the *forum internum*. The evolution of *fides* to *bona fides* highlights the philosophical and cultural origins of modern contract law. As part of this, Roman *fides* demonstrates how the civil law tradition dealt with the inner self in contractual relationships. It plays a pivotal role in translating personal and unmanifested human virtues into tangible legal obligations. It also portrays how changing notions of conventional morality in different periods in European legal history led to different attitudes towards the significance of the inner sphere of persons.

Within this context, this paper first revisits the roots of *bona fides* in Roman religion and Roman philosophy, which were strongly influenced by Greek thought. Second, it traces how *fides* has moved from the extra-legal realm to the quasi-secular legal sphere through natural law and Roman procedural law. To illustrate the relevance of the inner sphere, it examines three applications of good faith in law: the *bonus vir* (good man) standard, the origins of contractual will and consensuality of contracts, and *aequitas naturalis* (natural equity) from the classical period to Medieval law.

Contractual duties which derive from *bona fides* (good faith) are still central to modern civil codes and codes of obligations, as well as several regulatory instruments in EU law. *Fides* as the basis of promises – and specifically *bona fides* as a widely accepted principle of civil law – presents us with a source of common techniques to deal with legal problems. Its cultural and legal evolution demonstrates how it is part of a pattern of legal behaviour and shared values, originating in Rome, expanding to Europe and, later, through colonialism, globalism, and legal transplants to large parts of the world. This exploration showcases how an ancient value, which belongs to the 'inner spheres' of humans assumed a social and political role in shaping European legal culture and turned into a general principle of law.

***Fides* in Roman Society**

Though the content of *bona fides* is often discussed in legal texts, if we are to understand its origins in Roman culture, we must pay close attention to religion, philosophy, and literature. *Fides*-as-the-Divine-power was attributed great importance in Roman mythology. For instance, it was believed to be born of *Iuppiter*, the chief God of the sky, and protected by other deities.⁴ In parallel to the Platonic idea that the souls of humans were reflections of God, *Fides* was believed to be the reflection of humans' inner realms.⁵

At the same time, *fides* assumed a social dimension. It signified the inner supreme power that was vested in human beings, and that people carry within themselves. In this context, *fides* was seen in relation to *pietas* (piety) which represented religious and familial duties, and provided moral superiority of the Romans over other persons or other states.⁶ In Rome, the punishment of breaking a promise reinforced by an oath was sacrifice to the Gods. This was one of the earliest indications of how loyalty, as an inner value began to be considered as a source of legal "obligation."

The social dimension of *fides* was clearly encapsulated in *bona fides* (good faith) which was first established in everyday language to refer to honour and consciousness. Later, *bona fides*

⁴ Harold Mattingly, "The Roman Virtues," *The Harvard Theological Review*, 30.2 (1937): 103-117, 106; Eric Orlin, *Temples, Religion and Politics in the Roman Republic* (Boston: Brill, 2002), 62.

⁵ Boyancé, "Fides," 435.

⁶ Max Kaser, Rolf Knütel, and Sebastian Lohsse, *Römisches Privatrecht* (München: CH Beck, 21. Auflage, 2017), 72; Wolfgang Kunkel, "Fides als Schöpferisches Element im Römischen Schuldrecht," in *Festschrift Paul Koschaker*, Band II (Weimar: Böhlau, 1939): 1-15.

was incorporated in legal practice in Rome through special procedural mechanisms that allowed ethical and social values to be considered as part of legal justifications.⁷

Fides-as-loyalty-to-promises was seen as a guiding force in wars, interstate relations, and private relationships within Rome. It was believed that *fides* was the divine force which protected Romans in wars, as well providing moral legitimacy to their actions.⁸ Sharing the same etymological root as *foedus* which signified alliances, bonds, and pacts both between city states and individuals, *fides* was initially associated with establishing peaceful relationships. For instance, *fides publica* highlighted its role as agent of peace and truce.⁹ It was also one of the recurrent themes of Roman military actions and the use of force.¹⁰ Often used as the antonym of *crudelitas* (cruelty) and *perfidia* (treachery), it was also understood as an indicator of justice and moderation.¹¹

In particular, the *ius gentium*, i.e. the law of nations applicable to foreigners under Roman rule, played a significant role in how *fides* acquired its legal meaning in the private law sphere. In terms of its scope of application, Roman law referred to both *ius civile* (civil law) and *ius gentium* (law of nations). While *ius civile* represented the law applied to Roman citizens, *ius gentium* referred to the law applied to foreigners who lived under Roman rule, but did not have Roman citizenship. It was especially the momentum in trade relations with foreigners that led to the development of *ius gentium*, as a set of quasi-cosmopolitan rules of private law character, which were less formalistic and more flexible. The *ius gentium* was incorporated in the *ius civile* in 212 AD with an edict issued by Emperor Caracalla (*Constitutio Antoniana*), which granted citizenship to all foreigners in the Empire. Through the *ius gentium* and Roman procedural law, *bona fides* began to signify the virtues of loyalty, truthfulness, honesty, and commitment to promises in contractual relations.¹²

It is important to acknowledge that the tradition of making and keeping promises between nations and individuals is not unique to Roman culture. In the Mediterranean legal tradition, this can often be traced back to Achaeans and Hittites from Anatolia, and later carried over to Egyptian, Greek, Carthaginian, and Roman models.¹³ In Greek mythology *diké* and *themis* referred to two goddesses, the mother and daughter. While *themis* symbolized the overarching ideal of justice and divine order, *diké* represented the personification of fairness and common morality. In Homer's works (750-700 BCE), they are both emphasized as goddesses of justice who serve the demands of society, the values they represented being the features that distinguish humans from other beings.¹⁴

For instance, in *Erga kai Hēmerai* (Works and Days), the Greek poet Hesiod (750-650 BCE) frequently touched upon the concept of *diké* and examined its moral and legal significance together with its behavioural dimensions. In this poem, which is seen as one of the muses of economic thought, Hesiod used *diké* to refer to truthfulness, being fair, and avoiding dishonesty in daily life.¹⁵

⁷ Kunkel, "Fides," 7.

⁸ Polybius, *The Histories*, trans. William Roger Paton (Cambridge: Loeb Classical Library Edition, I, 1922), 21 ff; Alfred Bradford, *War: Antiquity and Its Legacy* (New York: IB Tauris, 2014), 39; Boyancé, "Fides," 421-433; Raymond Monier, *Manuel Élémentaire de Droit Romain*, Tome I (Paris: Domat 1947), 41.

⁹ Filippo Gallo, "Bona Fides e Ius Gentium," *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea*. Atti del Convegno Internazionale di Studi in Onore di Alberto Burdese, eds. Alberto Burdese and Luigi Garofalo (Padua: CEDAM, 2003): 115-153, 131; Boyancé, "Fides," 428.

¹⁰ Gabriele Brusa, "Diverging Traditions on Marcellus' Sicilian Campaign (214-211 BC): Livy, Cicero, Plutarch, and Appian on Marcellus' Fides and Humanity" *Histos* 17(2023): 239-270, 260.

¹¹ Brusa, "Diverging Traditions," 243, 247.

¹² See *Ins.4.6.30*; Pietro Bonfante, "Essenza della Buona Fede," *Scritti giuridici vari*, III, *Obbligazioni, comunione e possesso* (Torino: UTET, 1926), 745; Paolo Garbarino, "Brevi Osservazioni in Tema di Azioni di Buona Fede in Diritto Giustiniano," *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea*. Atti del Convegno Internazionale di Studi in Onore di Alberto Burdese, eds. Alberto Burdese and Luigi Garofalo (Padua: CEDAM, 2003): 191-202, 202.

¹³ Alan Sommerstein and Andrew James Bayliss, *Oath and State in Ancient Greece* (Berlin: De Gruyter, 2012), 150.

¹⁴ Matthew Dickie, "Diké as a Moral Term in Homer and Hesiod," *Classical Philology*, 73.2 (1978): 91-101.

¹⁵ Dickie, "Diké," 92; Michael Gagarin, "Diké in the Works and Days," *Classical Philology*, 88.2 (1973): 81-94.

Presocratic philosophers treated *diké* as a cosmic force.¹⁶ For instance, Heraclitus (553-475 BCE) took *diké* as a deity that protects fairness and honesty against lies and perjury. In this context, *diké* represented a universal natural order where agents were held accountable for their actions.¹⁷ Loyalty and truthfulness, as aspects of *diké*, were associated with logos, which represented the highest of virtues that enables people to think in the *right way*, say the *right things*, and act *rightly*.¹⁸ Earlier Greek literature and philosophy was essential in conceptualizing good faith as they often clearly depicted how inner moral concepts were to be transmitted into social life.

In Rome, one of the first usages of *bona fides* in daily settings was Cato's *De Agricultura*, where it was used to signify honesty and expediency in commercial transactions.¹⁹ This already illustrated how *fides* as a concept of the inner realm was understood in the context of business relations, transactions, and partnerships. The strict formalism of archaic Roman law contributed to the development of a specific understanding of fairness based on value judgements. The *veteres* law practice in the pre-classical era was especially significant in how *bona fides* acquired a legal meaning.²⁰ *Veteres* (ancient ones) referred to the first jurists of Rome with both religious and secular character who shaped the future legislative and judicial activities of the classical jurists.²² These early jurists were influenced by early period Stoic philosophy, moral value judgements, Roman traditions, and the socio-political and socio-economic dynamics of Rome.²³

In the pre-classical period, *fides* required a person to be *benignum* (good), *humanum* (humane), and *pium* (respectful). *Fides* was considered as *tacitum in pectore numen*, a tacit and unmanifested divine presence that dwells in persons.²⁴ This interpretation of *fides* was similar to Plato's conception of the soul's inherent divinity, and as such, one of the first traces of an idea of an inner self in European legal tradition.²⁵ *Bona fides* reflected the virtues that derived from the Platonic idea of innerness. It was seen as the product of mind. For instance, Plato commented on applying tests of commercial morality to intrinsic virtues. For him, "be this" was the highest expression of the moral law from where "do this" followed.²⁶ Similarly, duties imposed by *bona fides* derived from an innate sense of justice. A person of good faith was seen as a person who behaves (as he should) as a just person, and as such who does not betray or fail to honour his obligations. Behaviour which contradicted good faith not only signified the infringement of a moral and legal principle but was also perceived as a sign of injustice in society.²⁷

It is often discussed whether Greek philosophy directly influenced Roman law or whether the effect was not large enough to change its original structure.²⁸ However *bona fides* can easily be associated with the Aristotelian conception of the societal duties not to deceive and to be

¹⁶ Michael Gagarin, "Diké in Archaic Greek Thought," *Classical Philology*, 69.3 (1974): 186-197.

¹⁷ Gagarin, "Greek Thought," 193.

¹⁸ Severino, *Buona Fede*, 70.

¹⁹ Cato. *De Agricultura*. 14.3. Available at https://penelope.uchicago.edu/Thayer/L/Roman/Texts/Cato/De_Agricultura/A*.html. (last visited: 17.02.2025)

²⁰ Michel Villey, *Le Droit Romain* (Paris: Puf, 2012), 50.

²¹ Monier, *Droit Romain*, 48.

²² Hans Julius Wolff, *An Historical Introduction to Roman Law* (Oklahoma: University of Oklahoma Press, 1951), 101 ff.

²³ Franz Wieacker, "Offene Wertungen," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 94 (1977): 1-42, 3.

²⁴ Freyburger, *Fides*, 228; Boyancé, "Fides," 423.

²⁵ Peter Petkoff, "Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights," *Religion and Human Rights*, 7.3 (2012): 183-214; Talya Deibel, "Roman Iniuria," 54. For the legal evolution of the concept of the inner self see the law and the inner self project, led by Dr. Patrick O'Callaghan. <https://www.lawinnerself.org/> (last visited: 17.02.2025)

²⁶ Bernard Williams, "Plato's Construction of Intrinsic Goodness," in *Perspectives on Greek Philosophy*, ed. R.W. Sharples (London: Routledge, 2003): 1-18.

²⁷ Plato. *Res Publica*. IV-442e. Available at <https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0168%3Abook%3D4%3Asection%3D442e> (last visited: 17.02.2025).

²⁸ Fritz Schulz, *Classical Roman Law* (Oxford: Clarendon Press, 1951).

truthful. Aristotle traced the origin of the obligations imposed on the parties of social (and legal) relations in the concept of trust.²⁹ The virtue of keeping promises was essential to establish commutative and distributive justice. A person who did not keep his word was a liar, whose thoughts (belonging to the inner realm) and words (as their outer manifestation) do not match.³⁰ Trust was also ancillary to Aristotle's conception of *epieikeia*, often used to refer to equity, moderation, and fairness. *Epieikeia* was primarily a philosophical concept. However, its function in legal philosophy was significant as it referred to fairness, in particular when legislation is inherently subject to certain limitations and inevitably contains uncertainties and a moving beyond the strict application of the law is necessary.³¹

In this context Aristotle's *epieikeia* referred to a form of justice applied case-by-case basis, which can simultaneously override and complement the ideal of justice ordered by abstract laws.³² In Roman law, this conception was reflected in several places. For instance, Celsus conceptualized law as a system of what is equitable and good (*Ius est ars aequi et boni*). Similarly, Cicero highlighted the famous phrase "*summum ius summa iniuria*" to refer to how strict application of laws can lead to unfair outcomes, and how equity, as case-based justice, is essential to reach a fair and just legal decision.³³ One way to incorporate the idea of fairness incorporated into procedural law and concrete cases was through *bona fides*.

Just like Aristotle, Roman Stoics also focused on the development of inner morality. However the universal relevance of *epieikeia* was not seen as central as other virtues such as wisdom (this is because the wise person was already, by nature, fair).³⁴ Yet, Stoic philosophy was influential in how *bona fides* was stripped of its religious character and then secularized from the middle of the Republican era. The evolution of *bona fides*, moving from the inner realm towards the social sphere such as law, was based on the Stoic understanding of morality, manifested and tested through duties and obligations imposed by law. In this frame, *bona fides* was the expression of equity.³⁵ Every rule derived from *bona fides* had to constantly be tested against itself as the standard, in order to ensure that law was not excessively rigid and therefore, unfair.³⁶

***Fides* and Trust as the Basis of Contracts**

Fides was seen as the basis of many obligations in Roman society. For example, a person had the obligation to protect and preserve those who were subject to him. This was evident in contractual relationships which created *iuris vincula* (legal chains). The word *obligation*, deriving from *-ligere* (to tie) was already an indication of how persons bind themselves with the promises they make. In the classical period, ethics and law replaced the strength of Gods in assuring the sanctity of loyalty and trustworthiness as human values which belong to the inner sphere.

²⁹ Helmut Coing, "Zum Einfluß der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 69.1 (1952): 24-59, 26; Christoph Horn, "Epieikeia: the Competence of the Perfectly Just Person in Aristotle," in *The Virtuous Life in Greek Ethics*, ed. B. Reis (Cambridge: Cambridge University Press, 2006): 142-166.

³⁰ Aristotle, *Ethica Nicomachea*, trans. David Ross, 1137b1-2: 8-11, 1137b11-13. Available at <http://classics.mit.edu/Aristotle/nicomachaen.html>. (last visited: 17.02.2025).

³¹ Dimitrios Kremalis, "Good Faith in Greek Employment Law," *Comparative Labour Law and Policy Journal* 32.3 (2011): 630-662, 632.

³² Max Hamburger, *Morals and Law: The Growth of Aristotle's Legal Theory* (New York: Biblo and Tannen, 1965), 93, Coing, "Aristoteles," 44.

³³ Cicero, *De Officiis*, 1, 10, 33. Available at <https://www.thelatinlibrary.com/cicero/off1.shtml/> (last visited: 17.02.2025).

³⁴ John Rist, *Stoic Philosophy* (London: Cambridge University Press, 1969), 253 ff; Ian Gray Kidd, "Moral Actions Under Rules of Stoic Ethics," in *The Stoics*, ed. John Rist (California: University of California Press, 1978): 247-259.

³⁵ Martin Schermaier, "Bona Fides in Roman Contract Law," in *Good Faith in European Contract Law*, ed. Reinhard Zimmermann and Simon Whittaker (Cambridge: Cambridge University Press, 2000): 63-93, 69.

³⁶ Cicero, *De Officiis*, 3, 67.

Roman jurisprudence – especially from Cicero to Diocletian – was developed as a way of scientific elaboration of the legal institutions and systematization of law based on daily life and equity.³⁷ This method primarily distinguished the psychological inner elements from the external conditions in the concrete cases. Especially the will (*mens animus*) and *bona fides* were examples of this methodology which pragmatically bridged the inner and the social and shaped the development of the European private law tradition.³⁸

Values refer to ideal, extra-sensory, and normative objects which serve as foundations for moral standards and principles and as such, guide our behaviour.³⁹ They exist in inter-personal relations, and therefore cannot be understood without the subject, that is, the human being. These values are irrevocably tied to the inner self, yet need to be concretized in manifested human behaviour. For instance, truth is related to the inner sphere of human subjects whereas honesty represents a value related to the environment, such as the community and interpersonal relationships externalized through words.

This relationship between the inner and outer spheres was effectively symbolized by *fides* and how Romans understood good faith in private legal relations. One example was how the law has dealt with thoughts and intentions in relation to their external expressions such as promises. Before modern contract law doctrines, theories, and jurisprudence, Roman *fides* encapsulated the relevance of trust as basis of contractual relationships. In the classical period, *bona fides* functioned as a procedural mechanism to protect trust in contracts. It signified an earlier example of how legal principles contribute to the creation of a subjective state of being assured that the other party in a contractual relationship will not commit a worthless action.⁴⁰

Roman *bona fides* was associated with moral standards. First, it referred to a moral value itself in how it encompassed truthfulness and loyalty to promises. Second, it functioned as an external determinator of the boundary between good morality and bad morality and thereby ensured the achievement of moral goals.⁴¹ This made *bona fides* a tool that enabled moral values to penetrate civil law.⁴² Even though this interpretation of *bona fides* is shaped by modernity and Roman law, in general terms, was not necessarily fair or ethical, it is valuable from a methodological standpoint. Above all, good faith functioned as an extra-legal phenomenon which was introduced to civil law primarily to facilitate transactions through the ordinary morality of the era. In other words, it assumed a primitive economic function which was later extended to modern economies. The way it was able to fit in the liberal paradigm of modernity is one of the reasons why it survived in European contract law and commercial law for centuries.

In Roman philosophy and law, Cicero's writings are exemplary in how they bring the practical and jurisprudential elements together. In his work *On Duties*, Cicero referred to *bona fides* as the foundation of justice, as a prerequisite of all legal relations.⁴³ Cicero traced the essence of keeping promises in contracts to *fides* and *veritas* (truth).⁴⁴ Cicero's *bona fides* was associated with the "market", where more flexible rules were required to free Roman law from *ius strictum*. A behavioural examination of the parties' inner states, whether they "act" as loyal, honest, trustworthy, and well-intended was legally relevant for better commerce.⁴⁵ This

³⁷ Salvatore Riccobono and Edward Nathan, "Outlines of the Evolution of Roman Law," *University of Pennsylvania Law Review* 74.1 (1925): 1-19, 2.

³⁸ Riccobono and Nathan, "Roman Law," 3.

³⁹ Ionna Kuçuradi, *Human Rights: Concepts and Problems* (Münster: LIT Verlag, 2013), 101-102.

⁴⁰ Kuçuradi, *Human Rights*, 165, 205.

⁴¹ Severino, *Buona Fede*, 65.

⁴² Martijn Hesselink, "The Concept of Good Faith," in *Towards a European Civil Code*, ed. Arthur S. Hartkamp et al (Boston: Kluwer Law International, 2004): 471-498, 473, 492.

⁴³ Cicero, *De Officiis*, 1, 23.

⁴⁴ Schermaier, "Bona Fides," 78, 89; Wolfgang Waldstein, "Entscheidungsgrundlagen der Römischen Juristen," in *Aufstieg und Niedergang der römischen Welt*, II, ed. Hildegard Temporini (Berlin: Walter de Gruyter, 1976): 3-100, 73.

⁴⁵ Richard Bauman, *Lawyers in Roman Transitional Politics: A Study of the Roman Jurists in Their Political Setting in the Late Republic and Triumvirate* (München: CH Beck, 1985), 9.

understanding to a stoic interpretation of *bona fides* that prioritized actions, performance, and honouring trust through creating harmony between words and actions. This social aspect of *bona fides* illustrated how the source of contractual obligations was not only the inner self of the parties, including thoughts, motives, desires, but also the community's shared sense of fairness.⁴⁶ Accordingly, promises were seen as "sacred" as if they were made before Gods. This was not because they were assured by religious sanctity, but because they stemmed from the obligations of justice and loyalty. Similarly, in his Letters to Atticus, Cicero emphasized *bona fides* as the basis of all agreements.⁴⁷

Many different interpretations and usages of *fides* and *bona fides* can be found in Cicero's texts. These include its significance in international law, contract law, Roman religion, or as a social value. Two functions of *bona fides* were primarily highlighted in the context of contractual relationships: imposing a passive duty of keeping one's word and the active duty of protecting the trust of the other party in respect of words, acts, and actions. In this sense, *bona fides* operated as a legal tool which protected the phenomena which belonged to the inner sphere of the contracting parties such as thoughts, belief, and trust.

The contemporary role of good faith and trust in contract law is strongly tied to how *bona fides* was seen in Rome. It not only contained the traditional idea of keeping promises but also opened up forward-looking ways to protect the reliance of the parties on each other's words and conduct.⁴⁸ As opposed to the nineteenth century formalism, Roman procedural law allowed for the protection of expectations in contractual settings. In this context, Roman good faith not only protected honesty and loyalty, but also generated an environment of trust and contributed to the social ecology of law.⁴⁹

The Kantian idea of a promise refers to enlarging the scope of one's (inner) self-legislating will.⁵⁰ This establishes a relationship with the material realm, as the promise allows one to morally bind oneself to perform an action in a way that the object of future performance can be counted among the present possessions of the party who promises.⁵¹ Roman *fides*, which protected the sanctity of promises along with functionality in transactions, was essential in forming the civilian approach to promises as a private law regime which later extended into modernity.⁵² In this context, *bona fides* demonstrated how promises and reliance have been intertwined historically and how *fides*, as the loyalty to promises, provided the ground that justified the legal protection of reliance.⁵³

A. *Vir Bonus and Bene Agere in Rome*

Even though *bona fides* did not have one legal meaning or clearly defined boundaries, it was often associated with common morality.⁵⁴ For instance, it was seen as part of *boni mores* (good behaviour), and as part of accepted customary practices. *Bona fides* primarily imposed a behavioural standard in Rome, initially based on natural law, and later transmitted into civil law. As argued earlier, good faith was context-dependent. The ethics and social dynamics of the era determined the scope of the behavioural standard and duties derived from *bona fides*. The effects of stoic philosophy and political discourse, religion, the desire to avoid social

⁴⁶ Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981); Patrick Selim Atiyah, "Contract as Promise: A Theory of Contractual Obligation by Charles Fried," *Harvard Law Review* 95.2 (1981): 509-528.

⁴⁷ Cicero, *De Officiis*, 3,104; Ricardo Cardilli, *Bona fides tra storia e sistema* (Torino: Giappichelli, 3. Edizione, 2014), 31.

⁴⁸ Patrick Selim Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press), 1979.

⁴⁹ Fritjof Capra and Ugo Mattei, *The Ecology of Law* (Oakland: Berrett-Koehler Publishers), 2015.

⁵⁰ Sharon Byrd and Joachim Hruschka, "Kant on 'Why Must I Keep My Promise?'," *Chicago Kent Law Review* 81 (2006): 46-74, 60.

⁵¹ Byrd and Hruschka, "Kant," 54.

⁵² Joseph Raz, "Promises in Morality and Law," *Harvard Law Review* 95.4 (1982): 916-938.

⁵³ Melvin A. Eisenberg, "The Theory of Contracts," in *The Theory of Contract Law*, ed. Peter Benson (Cambridge: Cambridge University Press, 2001) 206; David Campbell, *Contractual Relations* (Oxford: Oxford University Press, 2022).

⁵⁴ Schermaier, "Bona Fides," 70.

exclusion, and the facilitation of transactions played an essential role as external determinants.⁵⁵

Accordingly, good faith imposed the duty to ‘act well.’ It is important to note that in the classical era, Roman law developed through case law and the requirements of this duty were established on a case-by-case basis. In this context, *bona fides* was often understood as the absence of certain behavioral elements, such as those that signified *dolus* (deceit/fraud) and *mala fides* (bad faith). In other words, the Romans found it easier to establish bad faith, when manifested in dishonest, deceitful, and fraudulent behaviour, rather than to prove the existence of purely internal phenomena. In the medieval era, *bona fides* began to be understood as the conceptual antonym of *dolus* and signified the lack of bad faith, as in refraining from fraudulent behaviour and deceptive practices.⁵⁶ Just like good faith, bad faith belongs to the inner sphere. However, they differ in how clearly they are manifested in the outer realm. For instance, bad faith behaviour, such as explicitly deceptive or dishonest action, is generally easier to demonstrate. As such, good faith is often understood as a state of the inner self, which can only be recognized by excluding various states of bad faith.⁵⁷

This exclusionary aspect of good faith was visible in Roman law in how good faith behaviour was measured based on societal standards such as the standard of ‘*bonus vir*’ or ‘*bonus pater familias*.’ This standard was based on a model person who was an average, honest, and loyal man and who does not deceive others in order to gain unfair advantage over them.⁵⁸ There were two fundamental elements of this standard. The first requirement was *bene agere* (acting well and in a good way) in *inter partes* transactions.⁵⁹ The second requirement was not engaging with fraudulent practices as this good man was depicted as a person who does not deceive or mislead others against common morality.⁶⁰

Bene agere required parties to protect and respect each other’s interests in social and legal relationships.⁶¹ This contributed to an ecology of contracts that were more relational than the nineteenth century notion of contracts, which were often depicted as one-shot bargains based on declarations of will.⁶² Together with other Roman law mechanisms such as rules on civil responsibility, this contributed to the facilitation of business life.⁶³ After all, Roman *bona fides* referred to trust, loyalty, and honesty among competitors, not among friends. In other words, *fides* and *bona fides* were not understood as self-sacrifice or altruism in law. They referred to a minimum level of morality and cooperation, which is essential in decentralized long-term business relations. This characteristic of Roman law still remained intact in the early modern civil codes and contract law designs. However, as they differ methodologically, the codification-based approach of civilian legal theory is often seen as detached from its Roman roots.

The influence of Christianity in Rome had a significant effect in how the interior realm played a role in legal relations. This also transformed how the behavioural standards *bona fides* entailed were understood and how its religious dimensions gained superiority over its technical legal implications. For instance, the effects of Christianity led to “acting well” to be considered

⁵⁵ Severino, *Buona Fede*, 49.

⁵⁶ Cicero, *De Officiis*, 3, 70; Giuseppe Falcone, “La formula ‘*ut inter bonos bene agere oportet et sine fraudatione*’ e la nozione di *vir bonus*,” *Fundamina* 20.1 (2014): 258-279.

⁵⁷ Robert Summers, “Good faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code,” *Virginia Law Review* 54.2 (1968): 195-267, 196.

⁵⁸ Cardilli, *Bona Fides*, 12.

⁵⁹ Antonio Fernández de Buján, “De los *arbitria bonae fidei* pretorios a los *iudicia bonae fidei* civiles” in *Il ruolo della buona fede oggettiva nell’esperienza giuridica storica e contemporanea*. Atti del Convegno Internazionale di Studi in Onore di Alberto Burdese, ed. Alberto Burdese and Luigi Garofalo (Padua: CEDAM, 2003): 31-59, 45.

⁶⁰ Cicero, *De Officiis*, 3, 61.

⁶¹ Schermaier, “Bona Fides,” 82.

⁶² Ian R. MacNeil, “Relational Contract: What We Do and Do Not Know,” *Wisconsin Law Review* 3 (1985): 483-525, 495 ff.

⁶³ Barbara Abatino, Giuseppe Dari-Mattiacci and Enrico C. Perotti, “Depersonalization of Business in Ancient Rome,” *Oxford Journal of Legal Studies* 31.2 (2011): 365-389.

in light of inner virtues such as *humanitas* (humanity), *benignitas* (goodness), *pietas* (piety), and *clementia* (mercy).⁶⁴ Christian anthropology contributed to a new understanding of the person and the inner self, as opposed to the pluralistic Roman understanding which combined naturalistic visions with pragmatic civil law policies. Nonetheless, Christianity strengthened the influence of a particular interpretation of *bona fides* whereby religious morality highlighted its inner dimension.

With the spread of Christianity in the post-classical period, for instance, the function of good faith became more evident when imposing stricter rules in order to protect the weaker parties in contractual relationships.⁶⁵ The effect of Christianity was clearly observable in law of persons, such as marriage, protection of women and children, and rules against the ill treatment of the slaves. Within this context, Roman conceptions which are often seen as more ‘individualistic’ were replaced by an idea of the ‘general welfare of community and brotherhood’ that carries a Stoic influence.⁶⁶ Through Christianity, *bonus vir* also transformed and *bene agere* started to assume a scope of action rooted on motives based on sentiments.⁶⁷ In the Byzantine period, during the reign of Justinian, the *Corpus Iuris Civilis* was compiled with the aim of uncovering and codifying classical Roman law. This was also formative in how equity was institutionally accepted as a source of law and *bona fides* as the behavioural standard at its base.⁶⁸

It is important to note that the absence of *mala fides*, as the subjective state of mind, played an important role in property law, particularly in the good faith acquisition of rights through specification or acquisitive prescription.⁶⁹ For instance, uninterrupted *bona fide* possession of a thing for a certain period of time leads to acquisitive prescription (*usucapio*) in civilian theory.⁷⁰ In Roman law, the requirement of good faith was limited to the moment when possession was first acquired. This rule was expressed by medieval jurists as “*mala fides superveniens non nocet*” (subsequent bad faith does not harm).⁷¹ However, this principle was carefully applied, and in practice, good faith was generally required for the entire period, in line with modern laws.⁷² It is also important to note that *bona fide* acquisition of rights was exceptional in Rome, as “*nemo plus iuris ad alium transferre potest quam ipse habet*” (no one can transfer more rights than they themselves possess) was a widely applied legal principle, and real ownership was prioritized over the reliance of well-intentioned third parties in terms of property law.⁷³

From this perspective *bona fides* was understood purely subjectively, referring to the inner state of “not knowing” something. It indicated a lack of factual information about a deficiency at the time of the acquisition of a right and a person’s excusable level of ignorance or misinformation about the existence of a situation. Yet, ignorance or misinformation arising

⁶⁴ Hugo Krüger, “Die humanitas und die pietas nach den Quellen des römischen Rechtes,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung* 19.1 (1898): 6-57.

⁶⁵ Karl Hackl, “Zu den Wurzeln der Anfechtung wegen laesio enormis,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung* 98.1 (1981): 147-161; James Gordley and Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law* (Cambridge: Cambridge University Press, 2006), 462.

⁶⁶ Riccobono and Nathan, “Roman Law,” 8.

⁶⁷ Riccobono and Nathan, “Roman Law,” 8.

⁶⁸ James Gordley “Good Faith in Contract Law in the Medieval Ius Commune,” in *Good Faith in European Contract Law*, ed. Reinhard Zimmermann and Simon Whittaker (Cambridge: Cambridge University Press, 2000): 93-118, 109.

⁶⁹ Vincenzo Arangio-Ruiz, *Istituzioni di Diritto Romano* (Napoli: Jovene, 2012, 14. Edizione), 196; Alberto Burdese, *Manuale di Diritto Privato Romano* (Torino: UTET, 1969), 358; René Robaye, *Le Droit Romain* (Louvain-la-Neuve: Bruylant, 2016, 5. Édition), 114, 140.

⁷⁰ Alessandra Bignardi, “Brevi Considerazioni Sulla Funzione della Buona Fede nell’Usucapio, in Particolare Nel Pensiero di Paolo,” in *Il ruolo della buona fede oggettiva nell’esperienza giuridica storica e contemporanea*. Atti del Convegno Internazionale di Studi in Onore di Alberto Burdese, ed. Alberto Burdese and Luigi Garofalo (Padua: CEDAM, 2003): 207-224, 209; Wolfgang Faber and Britta Lurger, *Acquisition and Loss of Ownership of Goods* (Munich: Selier, 2011).

⁷¹ Heinrich Honsell, *Römisches Recht* (Salzburg: Springer, 2015, 8. Auflage), 63; Arangio-Ruiz, *Diritto Romano*, 213; Burdese, *Diritto Privato Romano*, 362.

⁷² Alfred Söllner, “Bona Fides: Guter Glaube,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung* 122 (2005): 1-61, 40-41.

⁷³ Honsell, *Römisches Recht*, 62; Robaye, *Droit Romain*, 141.

from fault was not protected by law as otherwise it would violate *bona fides* and the standard of *bonus vir*. This was also encapsulated by the rule *nemo auditur turpitudinem suam allegans* (no one can rely on the right they obtained based on his own fraudulent behaviour).

The subjective and objective dimensions of *bona fides* are not detached from each other and present us with conceptual integrity. However, while the subjective good faith requires an investigation which is intimately connected to one's inner sphere, objective good faith in contractual relations operates through behavioural standards, conceptualized in legal practice.⁷⁴

B. Consensual Contracts

Cicero's works distinguished between the philosophical meaning of *bona fides* and its legal applications. The latter was primarily visible in the context of consensual contracts that are contracts formed solely through consensus, without the need for additional formalities. *Fides* was the extra-legal power that gave the obligations their legitimacy and ensured that mutual promises based on consent were deemed sufficient. It also constituted the ground for counter actions.⁷⁵ The consensuality of contracts became a general paradigm in early-modern contract law, in parallel to the Kantian idea of the autonomy of will. However, the developments of consensual contracts in Roman law, and in particular how *bona fides* was understood and interpreted in terms of the inner self of the contracting parties, played a crucial role in transforming consensual contracts from an exception into a rule.

As explained earlier, in the classical era, Roman law was highly pluralistic in its methodology and in terms of its scope of application. For instance, it referred to both *ius civile* and *ius honorarium* in terms of its legislative source. The *ius civile* signified civil law which initially arose from ancient customs and was later codified through laws (*lex, leges pl.*) whereas *ius honorarium* indicated legal norms and practices introduced by Roman magistrates, such as *Praetores*. Roman *ius civile* was often seen as formalistic, strict, and narrow. Therefore, the *ius honorarium* assumed functions to complement the *ius civile*, fill legal gaps, soften its strictness, and sometimes even correct it through introducing new rules which better responded to the contemporary realities. The *ius honorarium* created flexible legal rules primarily based on equity to overcome the rigidity of the law. For this reason, methodological analogies in the evolution of English and Roman legal systems are often highlighted in comparative legal scholarship.⁷⁶

The *ius honorarium* integrated equity into positive law. Similarly, *ius naturale* (natural law), *bona fides*, *utilitas* (fitness for purpose), and *bonum commune* (social benefit) were also seen as primary principles and grounds for justification when creating law.⁷⁷ They belonged to a pre-normative order and later transmitted to the legal sphere in the context of case-specific events. The *ius honorarium* overlapped with *ius gentium* (law of nations/law of foreigners) in terms of their area of application. For instance, the *ius gentium* was applied by *praetor peregrinus* which referred to the highest magistrate who dealt with legal disputes between citizens and foreigners, and in between foreigners. Moreover, the application of the *ius gentium* influenced the legal disputes between Roman citizens and the evolution of the *ius honorarium*. Apart from its function as the law of nations, the *ius gentium* was based on universal principles of natural law and natural reason (*ratio naturalis*) which transcend any specific legal system. In parallel, several passages in Cicero's works emphasized the natural law roots of *bona fides*

⁷⁴ Karl Larenz, Manfred Wolf and Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (München: C. H. Beck, 2012, 10. Auflage), 43; Simon Whittaker and Reinhard Zimmermann, "Surveying the Legal Landscape," in *Good Faith in European Contract Law*, ed. Reinhard Zimmermann and Simon Whittaker (Cambridge: Cambridge University Press, 2000): 7-63, 30.

⁷⁵ Herbert Hausmaninger and Walter Selb, *Römisches Privatrecht* (Wien: Böhlau, 2001, 9. Auflage), 298.

⁷⁶ Riccobono and Nathan, "Roman Law," 17.

⁷⁷ Hausmaninger and Selb, *Römisches Privatrecht*, 37.

which gained significance especially when considered alongside the development of *ius gentium*.⁷⁸

The importance of the *ius gentium* in the development of European private law lies in how most of the modern contract law doctrines were developed in this body of law, such as direct representation and consensual contracts.⁷⁹ Before the development of consensual contracts, the intention to make a promise and be bound by it, which resided in the inner sphere, along with its outer manifestation or declaration, was not sufficient to form an enforceable contract. Often contract formation required strict formalistic and ritualistic elements.

For instance, certain words had to be spoken in specific ways (*verbal contracts*), or something had to be given to the other party as a symbolic representation of future performance (*real contracts*).⁸⁰ The oldest contract in Roman law was a formal legal transaction called *nexum* which referred to a transaction made *per aes et libram* (with bronze and a scale) and constituted the origin of the sales contract. Another example was *stipulatio*, a verbal contract where the parties had to express their inner will in a certain verbal form.⁸¹

The development of consensual contracts, formed by the mere consensus of the parties, was a pivotal step in conceptualizing the inner self in civil law.⁸² Consensus means the conformity of the declarations of contractual will. It not only refers to the conformity of words, statements, and meanings, but also to the natural will and the ‘real’ state of minds of the parties. In other words, an accord between thoughts and words are sought both naturally and normatively. In Roman law consensual contracts referred primarily to the agreement of wills, without the requirement of delivering anything to the other party or performing any formal ritual. Consensual contracts emerged as synallagmatic (bilateral) contracts based on *bona fides* and *natural equity*.⁸³

In Rome, the expression *contractus* referred to enforceable and legally recognized contracts which existed *numerus clausus*.⁸⁴ In other words, Roman law presented us with a semi-closed system of contracts in which only limited types of contracts were available.⁸⁵ This system of contracts created legal predictability and reduced transaction costs for the contracting parties.⁸⁶

Consensual contracts such as sale, service, hire, lease, partnership, and mandate became part of this system around the last century of the republican era. Among these, especially partnership (*societas*) and mandate (*mandatum*) were seen as based on *fides*, as they were built on prior social relationships and mutual duties of loyalty. In addition, since synallagmatic contracts imposed mutual and reciprocal obligations on both parties, guaranteeing an environment of trust was essential.⁸⁷

The legal actions providing for the consensual contracts were named *iudicia bonae fidei* (good faith actions).⁸⁸ *Iudicia bonae fidei* was characterized by general good faith clauses added to the formulas of actions under the Roman formulary procedure. These clauses, known as ‘*ex fide bona*’ clauses, required the judge to oblige the parties to do or to give whatever good faith demands, thus directly incorporating common morality into strict law. *Bona fides* as fairness was seen as *summa vis*, and these actions were seen as having the highest power.⁸⁹

⁷⁸ Waldstein, “Römischen Juristen,” 72-77; Söllner, “Bona Fides,” 8; Honsell, *Römisches Recht*, 23.

⁷⁹ See *Ins.1.2.2.*; Francesco Gazzoni, *Obbligazioni e Contratti* (Napoli: Edizioni Scientifiche Italiane, 2015), 1008; Mario Talamanca, *Istituzioni di Diritto Romano* (Milano: Giuffrè, 2001), 32.

⁸⁰ Giovanni Pugliese, *Istituzioni di Diritto Romano* (Torino: Giappichelli, 1992, 2. Edizione), 573 ff.

⁸¹ Paul Frédéric Girard, *Manuel Élémentaire de Droit Romain* (Paris: Librairie Arthur Rousseau, 1918, 6. Édition), 494.

⁸² Honsell, *Römisches Recht*, 103; Arangio-Ruiz, *Diritto Romano*, 336.

⁸³ Paul Jörs, Wolfgang Kunkel and Leopold Wenger, *Römisches Recht* (Heidelberg: Springer, 1949, 3. Auflage), 208.

⁸⁴ See *Gai. Ins. 3.89*; *Ins.3.12*; Talamanca, *Diritto Romano*, 273; Villey, *Droit Romain*, 112-115; Monier, *Droit Romain*, 117.

⁸⁵ Talamanca, *Diritto Romano*, 273; Villey, *Droit Romain*, 112.

⁸⁶ Juan Javier Del Granado, “The Genius of Roman Law From a Law and Economics Perspective,” *San Diego International Law Journal* 13 (2011): 301-329, 312.

⁸⁷ Girard, *Droit Romain*, 543; Cardilli, *Bona Fides*, 83.

⁸⁸ Monier, *Droit Romain*, 117.

⁸⁹ Talya Ucaryilmaz, *Bona Fides* (Ankara: Yetkin, 2018).

In the Roman private contractual system, the sources of obligations were not only promises but also external social conditions such as formalistic elements or a shared idea of fairness and practice of trust in ancient transactions.⁹⁰ In this context, *bona fides* functioned instrumentally in promoting cooperation in transactional life, and represented the intrinsic value of promises as creating practices and relationships of trust.⁹¹ In this context, *bona fides* played an instrumental role in promoting cooperation in business life while also representing the intrinsic value of promises, fostering practices and relationships of trust.

Over time, the *numerus clausus* system in contracts softened and became open to the introduction of new types of contractual relations. One example was the gradual introduction of different types of pacts (*pacta*) which expanded the scope of consensual contracts. Similarly, during the reign of Justinian, the recognition of anonymous contracts (*contractus innominati*) expanded the scope of real contracts. This evolution towards freedom of contract was supported by *bona fides*, both as procedural and substantive means to guarantee the parties' investment of trust outside of a closed system of contracts. Freedom of contract became one of the defining elements of nineteenth century civil codes, particularly after the *Code Napoléon* in 1804 when contracts were regarded as having the force of law as they were reflections of the autonomy of will of contracting parties.⁹²

The significance of the autonomy of will was reflected in several theories in civilian contract law. For instance, according to the nineteenth century will theory, a contract was understood as a manifestation of the mutual and authentic will of the parties.⁹³ The contractual intent, which belongs to the inner sphere of parties, was regarded as the central element of the contract. Yet, this early view was often challenged as the inner spheres of contracting parties could never be fully understood, and thus a more objective approach was needed to interpret and understand the parties' intentions. Especially in civilian contract law, many theories that prioritized the declaration of the will over its subjective ontology gained attention.⁹⁴

Nevertheless, the inner will of the parties has always remained significant as the basis of consensus and, as such, of contractual relationships.⁹⁵ Based on its Roman understanding, good faith today functions as a principle of interpretation to reveal this inner sphere and the contractual intent of the parties. This is not a revelation in the exact sense, but rather a construction of the inner state based on external elements which belong to the ecosystem of contracts such as the status of the parties, negotiations, patterns, expectations, and practices. In this case, a contract becomes more than thoughts and words, and good faith becomes integral to its formation.⁹⁶

The development of consensual contracts in law was an essential step in how we understand contractual will today. In this context, *fides* was transformed from its earlier conception as the moral imperative to enforce promises to a contract law conception based on voluntary obligations and the facilitation of transactions.⁹⁷

C. *Aequitas Naturalis*

In the pre-classical and classical period, *fides* was seen as an invariable higher value and *bona fides* developed as a natural law principle, integrated into law. From the end of the classical period, in parallel to the decline of the formulary procedure, *bona fides* started to be gradually

⁹⁰ Raz, "Promises," 925.

⁹¹ Dori Kimel, "Neutrality, Autonomy, and Freedom of Contract," *Oxford Journal of Legal Studies* 21.13 (2001): 473-494.

⁹² Basil Markesinis, Hannes Unberath and Angus Johnston, *The German Law of Contract, A Comparative Treatise* (Oxford: Hart Publishing, 2006. 2. Edition), 43 ff.

⁹³ Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Rights* (Cambridge: Cambridge University Press, 2011): 107-121.

⁹⁴ Bernhard Windscheid and Theodor Kipp, *Lehrbuch des Pandektenrechts* (Frankfurt am Main: Rütten und Loening, 1887)

⁹⁵ Ingeborg Schwenzer, *Schweizerisches Obligationenrecht Allgemeiner Teil* (Bern: Stämpfli, 2012, 6. Auflage), 196.

⁹⁶ Schermaier, "Bona Fides," 79.

⁹⁷ Raz, "Promises," 935.

replaced by *aequitas naturalis* (natural equity).⁹⁸ The post-classical and medieval conceptualization of *aequitas naturalis* illustrated how the subjective elements of *bona fides*, related to the inner sphere, were understood in line with Christian moralism.

In the medieval era, canonical jurists explained *bona fides* and other concepts related to the *forum internum*. The bishop's power of adjudication in civil law matters had a significant effect on how inner phenomena were understood. The Medieval era was particularly important both for the development of the narrative of the inner self and the evolution of European contract laws as the religious usage of *fides* was reconciled with its legal meaning. Medieval jurists recognized the civil law implications of *bona fides*, primarily in light of classical Roman texts. In this context, *bona fides* was seen as that which required the highest measure of equity and a standard by which to define the content of the parties' obligations.⁹⁹

Glossators such as Vacarius, Azo, and Accursius frequently emphasized how honouring good faith was a requirement of natural equity.¹⁰⁰ Post-glossators such as Bartolus and his student Baldus made significant contributions to the understanding of *bona fides* in the civilian tradition. Both glossators and post-glossators studied the Justinianic compilation *Corpus Iuris Civilis*, and the classical Roman law texts. While the glossators approached these texts more dogmatically, the post-glossators studied them in a more analytical way, and prioritized commentaries on rules and cases while systematizing them. The works of both groups established the continuity between the end of Justinian's reign and the legal culture of the Western Roman empire which was revived in the Holy Roman Empire where Roman law was applied as *ius commune*.

Earlier medieval jurists did not define *bona fides* but instead described and schematized the cases where this principle should be applied.¹⁰¹ Built on its classical Roman understanding, they associated *bona fides* with loyalty to promises and the prohibition of deception. However, they did not put forward a general principle. It was Baldus who provided a clear and general understanding of *bona fides*. His perception of *bona fides* was heavily Aristotelian, as *aequitas* and *bona fides* were often used interchangeably.¹⁰²

One of the most important aspects of Baldus' works was how intention and conscience, as the subjective inner states of mind were seen as part of *bona fides*.¹⁰³ Similarly, *aequitas* was regarded as the *regula regulorum*, as the fundamental principle of a well-intentioned life.¹⁰⁴ The medieval understanding of *bona fides* was primarily a guide. Its civil law functions such as to correct the rigidity of law, to fill legal gaps, or to change existing norms were accepted in relation to *aequitas canonica*.¹⁰⁵

For instance, according to Aquinas, *aequitas* referred to the phenomenon that allows deviation from general laws in concrete cases.¹⁰⁶ In the works of Baldus, this reflected *aequitas in specie*, whereas *aequitas in genere* referred to reaching to a fair conclusion by considering all the circumstances of the specific case and the essence of the law.¹⁰⁷ *Bona fides* was seen as encapsulating several inner virtues in connection with medieval *aequitas*.¹⁰⁸ While keeping

⁹⁸ Waldstein, "Römischen Juristen," 75.

⁹⁹ See D.16.3.31pr. Tryphonus 9 disp.: *Bona fides quae in contractibus exigitur aequitatem summam desiderat*. Norbert Horn, *Aequitas in den Lehren des Baldus* (Köln: Böhlau, 1968), 103; Francesco Donato Busnelli, "Note in tema di buona fede ed equità" in *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea*. Atti del Convegno Internazionale di Studi in Onore di Alberto Burdese, ed. Alberto Burdese and Luigi Garofalo (Padua: CEDAM, 2003): 225-257, 227.

¹⁰⁰ Gordley, "Medieval Ius Commune," 100-114.

¹⁰¹ Gordley, "Medieval Ius Commune," 114-117.

¹⁰² John Dove Wilson, "Baldus de Ubaldis," *The Yale Law Journal* 12 (1902): 8-20, 17; Kenneth Pennington, "Baldus de Ubaldis," *Rivista internazionale di diritto comune* 8 (1997): 35-61, 39.

¹⁰³ Horn, *Aequitas*, 103.

¹⁰⁴ Gordley, "Medieval Ius Commune," 94, 108.

¹⁰⁵ Fritz Pringsheim, *Aequitas and Bona fides* (Milano: Pubblicazioni della Università Cattolica del Sacre Cuore, 1931).

¹⁰⁶ Gordley, "Medieval Ius Commune," 108.

¹⁰⁷ Horn, *Aequitas*, 36; Gordley, "Medieval Ius Commune," 109.

¹⁰⁸ Horn, *Aequitas*, 103.

one's word was a requirement of the virtue of loyalty, not lying was a requirement of the virtue of honesty. Both were characterized by positive actions. However, not deceiving the other party referred to the absence of bad faith or malicious intent, and as such, required a direct investigation into the inner state of the contracting party. *Mala fides*, as an internal phenomenon, was seen as leading to contractual injustice whenever one party suffered a loss due to bad faith conduct.

Accordingly, in the medieval era *bona fides* was characterized by three key elements: In addition to keeping the promises and not deceiving the other party, it also required both parties in a contractual relationship to be bound by implicit obligations that an honest person would undertake, even if they were not expressly agreed upon.¹⁰⁹ This built upon the classical approach where consensual agreements were often seen as requiring the parties to implicitly undertake duties and obligations to act in accordance with *bona fides*, as fairness, honesty, and loyalty.¹¹⁰

The implicit duties were seen as inherently included in the content of a contract, since they were the requirements of natural law. They were often seen as part of *naturalia negotii*, the terms that derive from the nature of the contract and which extend the *radix originalis* of the contractual relationship.¹¹¹ This approach later informed civil law theories on implied duties and obligations deriving from the trust relations between parties, such as duty to inform, duty not to disclose, duty to protect, or duty to cooperate, depending on the nature of the relationship.

In Roman law, as explained earlier, not all promises were binding.¹¹² The legal foundation of a promise which was necessary to constitute an enforceable legally recognized contract was referred as its '*causa*' (e.g. *causa credendi* – for the sake of credit, *causa solvendi* – for the sake of performance, or *causa donandi* – for the sake of donation). *Causa* was conceptually distinct from the subjective motives of the contracting parties. Rather, it signified the legitimate material basis of the transaction that provided its validity. Agreements that legitimately created obligations and could lead to legal action were referred to as *pacta vestita*, as opposed to *pacta nuda*, which did not give rise to legal actions (*ex nudo pacto actio non nascitur*).¹¹³

The works of medieval jurists and canon law had a significant impact in the evolution from "*ex nudo pacto actio non nascitur*" to "*consensu obligat*". For instance, Baldus argued for the requirement of a *causa* in consensual contracts in order to be binding under canon law.¹¹⁴ However the influence of Christian morality on civil law significantly affected the discussions on the obligation-creating functions of *pacta nuda*. For instance, *Decretales Gregorii IX*, an important collection of papal legal rulings issued by Pope Gregory IX in 1234 stipulated that *bona fides* must be observed in all contracts, as in the eyes of God all promises held equal value.¹¹⁵ However, unlike in the classical era, canonical jurists were more concerned with whether "breaking promises" constituted a sin, as a violation of divine law, rather than a mere breach of contract which would have led to contractual liability.¹¹⁶ In the civilian tradition, through the effect of *usus modernus pandectarum*, the significance of *causa* was removed from

¹⁰⁹ Horn, *Aequitas*, 103.

¹¹⁰ Waldstein "Römischen Juristen," 76; Whittaker and Zimmermann, "Legal Landscape," 19.

¹¹¹ Hausmaninger and Selb, *Römisches Privatrecht*, 230, Gordley, "Medieval Ius Commune," 101; James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1993), 63.

¹¹² Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 522; Arangio-Ruiz, *Diritto Romano*, 354.

¹¹³ See. D. 2.14.7.4. Ulpianus 4 ad ed. *Sed cum nulla subest causa, propter conventionem hic constat non posse constitui obligationem: igitur nuda pactio obligationem non parit, sed parit exceptionem*. This maxim is later taken into common law, as 'no promise would create an obligation unless underpinned by a consideration'. However, *causa* in the civilian contract law theory refers to a broader concept than consideration. Raz, "Promises," 928.

¹¹⁴ Zimmermann, *Law of Obligations*, 522.

¹¹⁵ See *Decretales Gregorii IX*, 1.35.1. Gordley, "Medieval Ius Commune," 114.

¹¹⁶ Gordley, "Medieval Ius Commune," 109-114.

the German contract law doctrine.¹¹⁷ Yet the rather complex institution of *causa* remained as an integral institution of civil law tradition, especially in determining the validity of causal transactions, unjust enrichment, and many more.¹¹⁸

In both the classical and medieval eras, the promise was understood as the intention to undertake an obligation, and as such included the moral duties imposed by *fides*.¹¹⁹ On the other hand, in its relationship to *aequitas naturalis* and Christian ethics, *bona fides* bridged the gap between the promisor's subjective intention, belonging to the inner sphere and the external conditions of the contractual environment, by attributing higher moral value to the promise. *Bona fides* held significant importance for the Church, as it was viewed as one of the inner virtues inherent in Christian doctrine. The Christian interpretation of good faith played a crucial role in shaping the medieval *ius commune* and by extension, European legal culture.¹²⁰

Conclusion

Roman *fides* symbolized loyalty to promises and keeping one's word. It was deeply rooted in the inner sphere of individuals, representing a divine presence within them and serving as a moral compass that guided both individual and collective actions. From the archaic period onwards, *fides* gradually transformed into a legal principle: *bona fides*. While *fides* was originally a phenomenon belonging to the inner realm, *bona fides* required the inner virtues of honesty, loyalty, and trust to be manifested outwardly through behaviour, particularly in keeping promises and honouring legitimate expectations in legal and social contexts.

This paper has explored the development of *fides* as an illustration of how the phenomena, which belonged to the inner self such as loyalty and truthfulness, were understood in different early periods of civil law. First, it traced how *fides* transitioned from the extra-legal realm to the legal sphere through the influence of natural law and Roman procedural law. Second, it revisited three key illustrations of its relevance in contractual relationships: the *bonus vir* (good man) standard, the origins of consensual contracts, and *aequitas naturalis* (natural equity) in both Roman and Medieval law.

This retrospective analysis has uncovered how inner virtues were understood in relation to the external realm in European legal history. It also highlighted how different historical periods, from the archaic period to medieval law, present us with a transhistorical pattern in how the phenomena that belonged to the inner self gained legal significance in contractual relationships. The connection between *bona fides* and the inner self emerges from the evolution of *Fides* from an internal, unmanifested aspect of human nature to a fundamental principle of positive law, with significant ethical weight.

The widespread incorporation of *bona fides* into civil codes and special legal instruments demonstrates how this concept belonged to multiple normative domains such as Roman religion, Christianity, ethics, and law over the centuries, and remained integral to European legal culture. Roman *bona fides* reflects the inherent tension between the legal significance of the inner subjective realm and the outer objective manifestations that contribute to reliability and transactional security in contractual relationships. Analysing *bona fides* through this transhistorical lens reveals its long-term impact, illustrating how it connected the inner state of the contracting parties with their externally manifested behaviour in legal relationships, influencing modern laws.

¹¹⁷ See Voet. *Commentarius ad Pandectas*. 2,14,9. Zimmermann, *Law of Obligations*, 553, Hausmaninger and Selb, *Römisches Privatrecht*, 63.

¹¹⁸ For the new reformulation of the functions of *causa* in French law in 2016 see <https://www.trans-lex.org/601101/french-civil-code-2016/> (last visited: 17.02.2025)

¹¹⁹ John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2. Edition, 2011).

¹²⁰ Severino, *Buona Fede*, 25, 53.