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Wishful Thinking; The Role and Development of Good Faith in the Roman Law of Contracts

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Abstract:
The paper outlines the theoretical achievements of the work of the Dutch historian Jan Romein and the legal historian and romanist Hoetink, which have become common wisdom in time. However, application of new insights into historical narratives has often been hesitant because of the "anything goes" mentality. This paper approaches one of Roman law's holy cows, namely the role and development of good faith in the Roman law of contracts and questions whether a move from historical interpretation to legal history may provide another narrative.

Keywords: good faith; Roman Law of contracts; Jan Romein; Hoetink

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"Do you think it's possible to see the past as it actually was?" I asked my sister. … "I see the past as it actually was," Maeve said. … "But we overlay the present onto the past. We look back through the lens of what we know now, so we're not seeing it as the people we were, we're seeing it as the people we are, and that means the past has been radically altered." … "Is this what they're teaching you in school?"

Ann Patchett[1]

Developments in the human sciences during the previous two centuries have left a trail of shattered beliefs. This paper relates the contributions made to the theory of history by Romein and Hoetink and the reception thereof: acceptance of subjectivity, the necessity of anachronisms and the dominant role of beliefs and the questioning of the continuity of legal development and legal tradition. The latter may be viewed as constructs made

1 PATCHETT, A. *The Dutch House*. London: Harper, 2019, p. 45.

to guard the illusion of progress and legal certainty, but not as true observations of legal reality.

In consequence, a modern development in contract has been utilised as a vehicle to better understanding of certain black holes in Roman legal development. Two developers of relational contract theory are briefly introduced and anachronistically transposed onto Roman legal history. The essence of relational theory, which is trust, is confirmed by numerous texts in the Digest. However, the next question, which requires attention is whether the concept of trust developed into the legal principle of good faith in the Roman law of contracts. Romanists are of the opinion that trust developed into such a principle with specific rules imposing ethical standards on contracting parties. However, textual interpretation allows doubts in this regard. Finally, it is concluded that an approach free from the need to be relevant may lead to other results than that which traditional opinions have supported.

1. Developments in historiography

The above citation from the work of Ann Patchett shows how the realisation that the past is plasticene has become first year student teaching material. This process has taken a long time as it had to overcome many obstacles. For the amateur historian the explanations by the *avant garde* Dutch historian Jan Romein and the versatile romanist and legal historian Hoetink may suffice to explain the main milestones on the road from moralising historical fiction via 19th century value free objective scientification to political and philosophical engaged historiography of the 20th and early 21st century.

In 1937 Jan Romein published his essay "Zekerheid en onzekerheid in de geschiedwetenschap"[2] and dealt in depth with objectivity v. subjectivity in the science of history. Romein related the quotation from Napoleon "la vérité historique est souvent une fable convenue," to which can be added another pearl of wisdom attributed to the emperor "L'histoire est une suite de mensonges sur lesquels on est d'accord." Both aphorisms reflect that 18th century historiography had no pretence of being science and relied on its moralising educational aspirations for its relevance. Romein explained that the German historian Leopold von Ranke[3] changed this *status quo* by establishing a methodology which elevated history into a science.[4] Romein mentioned how the newly discovered objectivity originally benefitted from the development of new sciences such as archeology, papyrology and epigraphy as well as new technology.[5] Nevertheless, the fast increasing amount of historical data, to which may be added the increasing number of academics, is diminishing the traditional *communis opinio doctorum.* Increasing acceptance of multiple beliefs introduced partial recognition of subjectivity.

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[2] ROMEIN, J. Zekerheid en onzekerheid in de geschiedwetenschap Het problem der historische objectiviteit. In: *Historische lijnen en patronen.* Amsterdam: Querido, 1976, pp. 90–119. Romein was influenced by Huizinga, who was one of the first Dutch historians to address the need for a theoretical foundation for historiography.

[3] See: https://www.britannica.com/biography/Leopold-von-Ranke.

[4] ROMEIN, *op. cit.*, p. 98.

[5] Ibidem, p. 92.

1.1 Subjectivity

Romein distinguished three types of subjectivity, the personal, the group and that induced by *Zeitgeist*.[6] It falls outside the scope of this paper to deal with the subtle analysis, striking examples and other mechanisms utilised by this author, but it should be noted that he lived and wrote his essay during the 1930's, a period during which in his neighbouring country *die Umwertung aller Werte* dictated new paradigms in many sciences. It should not surprise that Romein talked about vulgar partiality, which he described as mindlessly marching behind a flag.[7] On the other hand, he adhered to strong political and sociological convictions and stipulated that without such compass and the resulting hope for the future, the study and description of history would be without meaning. Equal acceptance of all historical narratives coloured by blind partiality would lead to the same result.[8]

The relevance of the above for legal history was perceived by Hoetink who developed these ideas.

1.2 Historical interpretation versus legal history

The romanist and legal historian Hoetink applied the theoretical observations of Huizinga and Romein into legal history. He made a clear distinction between historical interpretation and legal history[9] and acknowledged that the latter only became a reality the moment codification and changing values steered historical interpretation into a pragmatic teleological direction taking socio-economic, political and ethical values into consideration. Hoetink admitted that legal historical research had largely coincided with historical interpretation. He recognised the subjective elements, the role of theoretical and other beliefs, the necessity of anachronisms and made the daring proposition that the continuity of legal development and the resulting legal tradition are man-made constructs safeguarding the illusions of progress and legal certainty, but not observations of legal reality.[10]

1.3 Kuhn, Barzun, partiality and a variable past

This is not the place to discuss the influence of the new methodological beliefs in different countries and paradigms, but the ideas of these Dutch historians, contentious as they were during the mid-twentieth century, were elsewhere generalised by Thomas Kuhn[11] and are since reflected in most intellectual approaches to historiography. However, application has often lagged behind or lost sense of reality in extreme partiality. The latter provides an easy justification to ignore the subjective element in historiography and practice "Je ne suis qu'un historien, nullement philosophe; je cultive mon petit jardin, je fais mon métier,

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6 Ibidem, pp. 105, 109.

7 Ibidem, p. 102.

8 Ibidem, p. 113–115.

9 HOETINK, H. R. Historische Rechtsbeschouwing. In: *Rechtsgeleerde Opstellen*. Alphen aan den Rijn: Tjeenk Willink, 1982, pp. 244–273.

10 Ibidem, pp. 255–265.

11 Thomas S. Kuhn (1922–1996), American historian and philosopher of science. *The Structure of Scientific Revolutions*. Chicago: University of Chicago Press, 1962, popularised the concept "paradigm" and the idea that different paradigms competed for hegemony. Kuhn stated that a paradigm does not only relate to theory, methods, techniques, and methodology, but also to assumptions, hypotheses, and values. A choice of paradigm is influenced by beliefs, religious, philosophical, scientific, or otherwise.

honnêtement, je ne me mêle pas de ce qui me dépasse; ne sutor ultra crepidam … altiora non quaeseris."[12]

The resulting relativism may be summarised in the maxim "the past is a variable; as we change, history changes". A similar conclusion has been reached by Barzun,[13] whose theory of aspect is based on the proposition that no event, object or person can ever be viewed in her totality. He used the pictorial trope of a mountain, the many aspects of which make it impossible to grasp the totality. Thus, each historian concentrates on one or maybe a few aspects, which he considers to be the essence.[14] Barzun held that this explains the diversity in interpretation by historians in their depiction of different pasts.[15] He acknowledged partiality as a given and did not enter into the perilous debate of subjectivity in historiography. This explains that what was revolutionary during the first half of the last century has become generally accepted "wisdom" today.[16] However, the thin line between partiality, condemned by Romein but taken for granted by Barzun brings another important aspect of the debate into focus, *i.e.*, what constitutes responsible historical research.

It is trite that a certain subjectivity and the use of anachronisms in historiography are facts as unavoidable as it is impossible to exclude beliefs from the interpretation and understanding of the past. Moreover, these beliefs are based on the past, but also influenced by the present and the hopes and fears for the future.

1.4 Communis opinio doctorum

Nevertheless, there are still boundaries between historical fiction, political propaganda, religious fanaticism and responsible historical research, albeit that the latter is based on present day interests. Until the recent past the criterium was to be found in the *communis opinio doctorum*, or the *consensus* of the relevant scientific community.[17] However, in the modern global village a *communis opinio doctorum* is becoming increasingly evasive; the fiction that this unanimous wisdom resides in anonymous peer evaluation has enabled the academic establishment guarding yesterday's orthodoxism to safeguard the same, but stifles critical thought and academic debate. A benefit of the fourth industrial revolution is the emergence of electronic publishing, which enables the distribution of new ideas, but can control neither quantity nor quality.

The above places the topic of the paper in a modern perspective. First, even in South Africa the application of Roman law has been marginalised, with the concomitant elimination of the teaching of this discipline from the law curriculum. An unintended consequence is that this has deleted the almost desperate desire to prove relevance of research in this field, in other words historical interpretation may be replaced by "pure" historical research. In consequence, the proposition that historical development is a construct *ex post*

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12 MARROU, H. I. *De la connaisance historique.* Paris: Le Seuil, 1954, p. 11.

13 BARZUN, J. *From Dawn to Decadence 500 Years of Western Cultural Life 1500 to the Present*. New York City: Harper Perennial, 2000.

14 Ibidem, pp. 46–47, 174, 246–7, 250, 253, 430–1, 435–437, 568–574, 652–656, 759–763, 768–9.

15 THOMAS, P. The standpoint determines the view: Jacques Barzun's theory of aspect. In: DU PLESSIS, P. *New Frontiers: Law and society in the Roman world*. Edinburgh: Edinburgh University Press, 2014.

16 *Cf*. JANSSEN PERIO, E. M. *Een nieuwe wereld*. Baarn: Ambo, 2000, where the critical "Kwetal" shows recent historiography.

17 HOETINK, H. R. Het waarde-oordeel in de sociale wetenschappen. In: *Rechtsgeleerde Opstellen*. Alphen aan den Rijn: Tjeenk Willink, 1982, pp. 289–296.

facto and not the armoured train of human progress, slowly advancing throughout history, diligently fuelled by influencers from religion, philosophy, science and political ideologies,[18] deserves consideration. The troika of *produktives Misverstehen*, legal tradition and anachronism may be useful tools in a new approach to certain dogmas of Roman law, for example the development and role of contractual good faith.

Legal development needs a beginning and the Historical School which studied Roman law with a view of application in "modern" society, found this in the dark ages of pre-classical Roman law, where sources were scarce. Thus, big gaps in the narrative remain unexplained. This paper addresses one of these and proposes a possible explanation, borrowing the latter from recent developments in the law of contract.

2. Relational Contract Theory

During the second half of the previous century Anglo-American contract lawyers developed the concept of the relational contract to address the shortcomings of traditional classical contract law.[19] Macaulay analysed the results of his empirical research into business practice[20] and concluded that in business, contracts are unnecessary for a variety of reasons: the parties know each other, they have dealt with each other before and desire to do so in future; they are careful of their reputation and personal relationships; contractual negotiations would show lack of trust, while it is an unwritten law that commitments are honoured; finally social pressure is more effective than legal sanctions.[21]

McNeil approached the problems between the law of contract and socio-economic reality from a doctrinal starting point and developed his own theory.[22] The commonalities and conclusions of both approaches are rather similar, namely long-term contracts[23] are flexible and rely on extra-legal sanctions, while solidarity and co-operation are essential elements. Hawthorne has argued persuasively that these characteristics can be and have been accommodated in traditional classical contract law by way of good faith, which

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18 Both Christianity and communism/socialism are based on the perfectibility of mankind, which was taken over by humanism, the enlightenment and philosophers and scientist such as Marx, Hegel, and Darwin.

19 For an explanation *cf.* HAWTHORNE, L. Relational contract theory, principles of European contract law – long-term contracts, and the impact of implicit dimensions. *THRHR (Journal of Contemporary Roman-Dutch Law)*, 2007, Vol. 70, pp. 371–390.

20 Steward Macaulay interviewed businessmen and legal advisers from 43 companies, examined 850 standard form contracts and studied case law concerning manufacturing corporations. He published his conclusions in 1963: Non-contractual relations in business: A preliminary study. *American Sociological Review*, 1963, Vol. 28, No. 1, pp. 55–67; also MACAULAY, S. The real and the paper deal: empirical pictures of relationships, complexity and the urge for transparent simple rules. In: CAMPBELL, D. – COLLINS, H. – WIGHTMAN, J. (eds.). *Implicit dimensions of contract: Discrete, Relational and Network Contracts*. Oxford: Hart Publishing, 2003, p. 81ff.

21 For other empirical research *cf.* MACAULAY, *Implicit dimensions*, p. 80f, note 69.

22 MACNEIL, I. The many futures of contract. *Southern California Law Review*, 1974, p. 691ff; MACNEIL, I. Restatement (second) of contracts and presentiation. *Virginia Law Review*, 1974, p. 589ff; MACNEIL, I. *The new social contract: an inquiry into modern contractual relations*. New Haven: Yale University Press, 1980; MACNEIL, I. Reflections on relational contract. *Zeitschrift fur die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics*, 1985. Vol. 141, No. 4, p. 541; MACAULAY, *Implicit Dimensions*, p. 80ff.

23 Cf. *Contrats à execution succesives* and *dauernde Schuldverhältnisse* in French and German doctrine. HAWTHORNE, Relational contract theory, p. 374.

places it in the modern contract law paradigm.[24] This raises questions concerning the origin and development of *bona fides* and it is the purpose of this paper to enquire whether the traditional description of good faith in Roman law has been an historical interpretation rather than historical research.

3. Introduction of *contractus bonae fidei*

It is common knowledge that a momentous development within Roman law was the introduction of the *bonae fidei* contracts. Introduction of the *exceptio doli* into the praetorium *album* during the late republic is usually viewed as a logical concomitant event.

In *Das römische Privatrecht*[25] Kaser names the transformation of the formal, limited, strict law of contract into a system adapted to a developed international economy by way of the power of *fides,* the most formidable achievement of the Roman jurists. He is also of the opinion that *fides* was not restricted to the enforceability of certain agreements, but also determined their content.[26] Whether *fides* obligations developed as a result of commercial transactions with *peregrini* or within Roman society is not clear, but that the first recognition of enforceability came from the *praetor* is stated unequivocally, as well as, that in early classical law *oportere ex fide bona* had become an obligation of the *ius civile*.[27]

3.1 Timeline from the Twelve Tables to the edict of the praetor peregrinus

It is regrettable that the size of the early Roman population remains shrouded in mystery and is hardly debated.[28]

However, the novel interpretation of fifth century BC Roman society by the contributors to *Le Dodici Tavole,*[29] placing the class struggle in another context and arguing that trade already played a role, did not question the small beginnings of the city state. The early demographic numbers Scheidel mentions for the third century BC range between 200 000 and 300 000, which probably concerns males over 17 years old. Keeping in mind the expansion of the Roman power between 450 and 300 BC guestimates are inadvisable.

Important milestones in the development of Roman law are the institution of the office of *praetor* in 367 BC and the division of *praetor urbanus* and *peregrinus* dating from 242 BC; the *formula* procedure dates from before the *Lex Aebutia,* which places it in the 2nd century BC.[30]

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[24] Ibidem, p. 372f.

[25] KASER, M. *Das römische Privatrecht. I. Das altrömische, das vorklassische und klassische Recht*. München: C. H. Beck'sche Verlagsbuchhandlung, 1971.

[26] Ibidem, p. 475, 485ff.

[27] Ibidem. For an explanation NAUMOWICZ, P. *Fidei bonae nomen et societas vitae. Contribution à l'étude des actions de bonne foi.* Dissertation. École doctorale histoire du droit, philosophie du droit et sociologie du droit, Paris, 2011, pp. 201–486. Available at: www.These.fr/153479493.

[28] SCHEIDEL, W. *Roman Population Size: The Logic of the Debate* (July 2007). Princeton / Stanford Working Papers in Classics Paper No. 070706. Available at: https://ssrn.com/abstract=1096415 or http://dx.doi .org/10.2139/ssrn.1096415.

[29] HUMBERT, M. (a cura di). *Le Dodici Tavole. Dai Decemviri agli Umanisti*. Pavia: IUSS Press, 2005.

[30] KASER, M. *Das römische Zivilprozessrecht*. München: Beck, 1966, pp. 107–115.

4. Relational contract

This means that in the pre-*formula* society small everyday transactions, be it in the emporium, on the farms, in the shops and workshops, and on the market would take place outside the limited number of strictly formal juridical acts. Next to the Twelve Tables a parallel commercial system of customs ruling barter, short term credit for small amounts, informal pooling of resources, lending and borrowing, asking favours based on neighbourly and family solidarity, in short, the prototypes of the *negotia bonae fidei* must have existed for transactions between citizens amongst themselves, foreigners amongst themselves in Rome and citizen and foreigner. This offers an alternative to the theory that the *negotia bonae fidei* originated from the *ius gentium* and were introduced into Roman law by the edict of the *praetor peregrinus*.[31]

The only indication that enforceability of such transactions was introduced by way of the *formula* procedure, leads to the question how "international" dealings and everyday transactions were enforced during the preceding centuries.

Kaser mentioned informal loans and other business transactions based on *fides*[32] and analogy leads to the relational contract theory. The originators MacNeil and Macaulay[33] found mutual trust and solidarity the basis of contractual relationships[34] in closed groups of small numbers and enforceability by non-legal sanctions, such as loss of reputation and the threat of exclusion.[35] To qualify Roman society during the first half of the republican period as a closed group should not meet with opposition. It is accepted that *fides* in the sense of trust and trustworthiness played an important role in Roman society and the idealistic Cicero held *fides* to be the basis of justice.[36] To see the analogy with relational contract in Roman society before the conquest of Italy is hardly a novel hypothesis.[37] The expansion of Roman power, territory and population necessitated introduction of these transactions in the edict of the *praetor* as the inevitable result of the societal changes and the concomitant multiplication of commercial relations and resulting anonymity of parties. Another point to keep in mind is that Rome only started minting her own silver coins about 268/9 BC. Before this date the variety of foreign silver coins in circulation and counterfeiting required

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31 Much depends on the definitions of *ius civile* and *ius gentium*. However, both theories have supporters, and a definite answer is unlikely. Lately NAUMOWICZ, *op. cit.*, pp. 44–486.

32 KASER, *Das römische Privatrecht*, p. 170f, 178, 200, 203f, 475. *Cf.* Cic. *De officiis*, III, 61.67; NAUMOWICZ, *op. cit.*, 246ff.

33 HAWTHORNE, L. Relational Contract Theory: Is the antagonism directed at discrete exchanges and presentiation justified? In: GLOVER, G. (ed.). *Essays in honour of AJ Kerr*. Durban: Lexis Nexis Butterworths, 2006, pp. 137–157.

34 Ibidem, p. 153.

35 HAWTHORNE, Relational Contract Theory, p. 143: "MacNeil has developed the following rules: … ; and finally, the sanction for bad behaviour is obviously refusal to contract in the future; Also at 45: Beale has stated that: [F]ormal use of contract remedies to settle disputes was unusual"; Also n. 52 Macaulay …: Disputes are frequently settled without reference to the contract or to potential or actual legal sanctions."

36 Cic. *De Officiis*, I, 23: *Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*.

37 *Cf.* CHIUSI, T. *Grave est fidem fallere*: Vertrauensschutz im römischen Recht. In: VAN DEN BERGH, R. et al. (eds.). *Meditationes de iure et historia.* Essays in honour of Laurens Winkel. *Fundamina* (ed. Specialis), 2014, Vol. 20, No. 1, pp. 150–162.

the intervention of moneychangers who charged a fee.[38] Cicero still considered money an object and not a means of payment[39] and the practice of storing money in closed, sealed sacks, theft, robbery and scarcity of coins all make it difficult to envisage economic life during the first half of the republic, let alone a state sanction on non-performance of everyday contracts consisting in payment of a monetary compensation.

The question this paper addresses is, if and how *fides,* from the basis for enforceability, developed into one of the ruling principles of contract law, as optimistically described by Cicero in his *De Officiis* and generally propositioned by romanists.

5. Contemporary interpretation of *bona fides* in Roman law

The idealistic optimism, which Cicero expressed when he in *De officiis* implied that *bona fides* has such force, that dishonesty could be banned from Roman law,[40] is reflected in the positive narrative of modern Roman law.

Thus, Kaser held that good faith became the norm according to which the judge had to decide the case. He held that the jurists laid down concrete and established rules.[41] Zimmermann describes an extended liability of the *actio empti* driven by the *ex fide bona* in the *formula*.[42] Schermaier describes the advances of good faith in the substantive law as the brilliant development of Roman contract law and represents the *communis opinio* when he holds that "substantive rules were created which have become an integral part of our modern understanding of the law".[43] More recently a novel hypothesis has been proposed by Naumowicz.[44] Derived from procedural law this author finds the reason for the *actiones bonae fidei* in the *societas vitae* existing between the parties with the main effect an extension of the judiciary discretion.

To re-evaluate the contractual role of good faith in Roman law certain titles in the Digest are investigated for texts dealing with contractual good faith.[45]

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38 THOMAS, P. J. – BORAINE, A. Ownership of money and the action Pauliana. *THRHR*, 1994, Vol. 57, p. 680f.

39 Cic. *Ad Atticum*, 12, 27.

40 Cic. *De Officiis*, III, 70: *Q. quidem Scaevola, pontifex maximus, summam vim esse dicebat in omnibus iis arbitriis, in quibus adderetur EX FIDE BONA, fideique bonae nomen existimabat manare latissime, idque versari in tutelis, societatibus, fiduciis, mandatis, rebus emptis, venditis, conductis, locatis, quibus vitae societas contineretur; in iis magni esse iudicis statuere, praesertim cum in plerisque essent iudicia contraria, quid quemque cuique praestare oporteret*. Also III, 61: *Quod si Aquiliana definitio vera est, ex omni vita simulatio dissimulatioque tollenda est.*

41 KASER, *Das römische Privatrecht*, p. 487f.

42 ZIMMERMANN, R. *The law of obligations. Roman foundations of the civilian tradition*. Cape Town: Juta, 1990, p. 296ff, 320ff.

43 SCHERMAIER, M. J. *Bona fides* in Roman contract law. In: ZIMMERMANN, R. – WHITTAKER, S. (eds.). *Good faith in European contract law*. Cambridge: Cambridge University Press, 2000, pp. 83–88. However, he declares that the predominant use of good faith was to sanction fraudulent behaviour and *ex officio* consideration of *pacta* by the judge.

44 NAUMOWICZ, *op. cit.*, *passim*.

45 Throughout the Digest good faith appears in many different guises. The common denominator, however, is that all texts deal with persons who were under a (false) belief as the result of (misplaced) trust. Thus, the person serving in good faith as a slave, persons acquiring or transferring possession believing that they were acquiring or transferring ownership and those who spend money or collected produce believing they were entitled to do so cross paths with contracting parties acting in good faith. This paper deals exclusively with the latter, although a clear distinction of often difficult to maintain.

6. Selected *Digesta* texts dealing with contractual good faith

The first list of *arbitria, in quibus adderetur ex fide bona* is by Cicero, who mentions guardianship, partnership, *fiducia*, mandate, purchase and sale, and letting and hiring.[46] Gaius added *negotiorum gestio*, deposit, and *res uxoria* as *bonae fidei iudicia*.[47] Finally, Justininan's Institutes teach that the *actiones bonae fidei* were those from purchase and sale, letting and hiring, *negotiorum gestio*, mandate, deposit, partnership, guardianship, loan for use, pledge, exchange, for the division of an inheritance, for the division of co-ownership, to obtain an estate and the *actiones praescriptis verbis* and *de aestimato*.[48]

However, the investigation in this paper is limited to the titles dealing with deposit,[49] mandate,[50] partnership,[51] purchase and sale,[52] and letting and hiring,[53] which form a cluster, are pure contractual and have stood the test of time.

It is obvious that the above transactions must have been common practice for centuries before inclusion in the praetorian edict(s). Neighbourly and commercial practices developed into customs, and whether this took place within the closed, static Roman society or within international commerce[54] will remain unclear and is irrelevant for the purpose of this paper. The importance is found in the fact that the "rights and duties" of the parties were traditionally enforced extra-judically, either by peer pressure or the threat of social exclusion and should this prove fruitless arbitration by old wise men/merchants offers itself as an alternative. A similar scenario evolved from the research by Macaulay into the business world of the United States of America.[55]

As mentioned above it has been a common belief that relationships based on trust flourish in small, closed and static societies, but become difficult to achieve in a big, open and dynamic environment. Thus, the narrative has been that as Roman society and economy expanded and transformed judicial enforcement was necessitated.[56] This would explain the praetorian introduction of the *contractus ex fide* in the edicts. It remains an open question when this event took place, but it is certain that it was by necessity linked to the procedure *per formulam*.[57]

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46 Cic. *De Officiis*, III, 70: *quidem Scaevola, pontifex maximus, summam vim esse dicebat in omnibus iis arbitriis, in quibus adderetur ex fide bona, fideique bonae nomen existimabat manare latissime, idque versari in tutelis, societatibus, fiduciis, mandatis, rebus emptis, venditis, conductis, locatis.*

47 Gai 4, 60: *Sunt autem bonae fidei iudicia haec: ex empto uendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, rei uxoriae.*

48 Iust. *Inst.* 4, 6, 28. *Actionum autem quaedam bonae fidei sunt, quaedam stricti iuris, bonae fidei sunt hae: ex empto, vendito, locato, conducto, negotiorum gestorum, mandati, depositi, pro socio, tutelae, commodati, pigneraticia, familiae erciscundae, communi dividundo, praescriptis verbis quae de aestimato proponitur, et ea quae ex permutatione competit, et hereditatis petitio.*

49 D. 16, 3 *Depositi vel contra*.

50 D. 17, 1 *Mandati vel contra*.

51 D. 17, 2 *Pro socio*.

52 Book 18 and D. 19, 1 *De actionibus empti et venditi*.

53 D. 19, 2 *Locati conducti*.

54 CHIUSI, *op. cit.*, p. 150ff; *contra* NAUMOWICZ, *op. cit.*, 30ff.

55 *Supra* nn. 20 and 21.

56 KASER, *Das römische Privatrecht*, p. 474ff, 485ff; SCHERMAIER, *op. cit.*, pp. 62–92.

57 KASER, *Das römische Zivilprozessrecht*, pp. 107–115.

Analysis of the references to (*bona) fides* in the above-mentioned titles shows that most interpretations derive from the Janus of trust (both passive and active), faith and trustworthiness.[58] *Fidem praestare*, *fidem implere*, *fidem fallere*, *fidem habere*, *fides solvere e.a*. bear testimony to this understanding of *fides*.

Kaser indicated this meant that enforceability derived from good faith, or trust.[59] Schermaier has succinctly set out the various opinions and common ground and uncertainties on the topic.[60] More recently Naumowicz has added another interpretation leading into a new direction.[61] A new development in the Swiss law of contract, where *Vertrauungsschutz* has been introduced as a source of obligations, should also be mentioned.[62]

Since its inclusion in the edict the *bona fides* was not limited to be the binding force of trust. The *formula* gave the judge the choice between enforcement or non-enforcement based on the relation of trust between parties as well as the determination of the amount of the sentence should he decide to condemnation of the defendant. In consequence, his instruction included a review of the circumstances leading up to the contract, in other words the pre-contractual relationship.

The texts show adequate evidence that Cicero's observation that precontractual *dolus* had been banned from Roman law was correct.[63] Moreover, that the judge's investigation

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58 *Cf*. D. 16, 3, 1pr. (Ulp. 30 *ad ed.*): *(f)idei eius commissum*; D. 16, 3, 1, 4 (Ulp. 30 *ad ed.*): *(c)um quis fidem eligit*; D. 16, 3, 1, 23 (Ulp. 30 *ad ed.*): *Hanc actionem bonae fidei esse dubitari non oportet*; D. 16, 3, 5pr. (Ulp. 30 ad ed.): *(n)on enim de fide rupta agitur*, (the *actio depositi contraria*); D. 16, 3, 11 (Ulp. 41 *ad sab*): *(r)ectissime ex bona fide: nec enim convenit bonae fidei abnegare id quod quis accepit*; D. 16, 3, 24 (Pap. 9 *quaest.*): *(q)uid est enim aliud commendare quam deponere*; D. 16, 3, 31, 1 (Tryph. 9 *disp.*): *(h)aec est bona fides, ut commissam rem recipiat is qui dedit*; D. 17, 1, 7 (Pap. 3 *resp.*): *(f)idem adhiberi placitis oporteat*; D. 17, 1, 10pr. (Ulp. 31 *ad ed.*): *(b)onam fidem praestare eum oportet qui procurat*; D. 17, 1, 12, 11 (Ulp. 31 *ad ed.*): *(q)uasi adversus bonam fidem mandatum sit*; D. 17, 1, 22, 4 (Paul. 32 *ad ed.*): *(e)x bona fide praestare et pretium*; D. 17, 1, 22, 5 (Paul. 32 *ad ed.*): *(s)i non praestet fidem*; D. 17, 1, 29, 6 (Ulp. 7 *disp.*): *(t)amen fidem implevit*; D, 17, 1, 33 (Iul. 4 *ex minic.*): *(f)idem eius spectasse videtur*; D. 17, 1, 53 (Pap. 9 *quaest.*): *(q)ui fide alterius*; D. 17, 1, 60, 4 (Scaev. 1 *resp.*): *(r)es ex fide agenda esset*; D. 17, 1, 62, 1 (Scaev. 6 *dig.*): *(u)t fidem dicas pro Publio Maevio apud Sempronium*; D. 17, 2, 35 (Ulp. 30 *ad sab.*): *(u)t bonam fidem praestet*; D. 18, 1, 19 (Pomp. 31 *ad quint. muc.*): *(f)idem habuerimus*; D. 18, 1, 40pr. (Paul. 4 *epit. alfeni dig.*): *(f)ides soluta esset*; D. 18, 3, 5 (Nerat. 5 *membr.*): *(f)idem fefelisset*; D. 19, 1, 49pr. (Hermog. 2 *iur. epit.*): *(i)n fidem suam recipiat*; D. 19, 2, 19, 9 (Ulp. 32 *ad ed.*): *(f)idem contractus impleri*; D. 19, 2, 21 (Iav. 11 *epist.*): *(b)ona fides exigit, ut quod convenit fiat*; D. 19, 5, 9 (Pap. 11 *resp.*): *(s)i fidem contractus non impleat*.

59 KASER, *Das römische Privatrecht*, p. 170f, 178, 200, 203f, 475.

60 SCHERMAIER, pp. 70–83.

61 NAUMOWICZ, *op. cit.*, *passim*. For a review of opinions of leading romanists on this topic see this author pp. 28–33 and footnotes.

62 PICHONNAZ, P. *Les fondements romains du droit privé*. Zurich-Bâle: Schulthess, 2020, p. 416: "La doctrine modern a toutefois tendance à redessiner cette tripartition, en faisant appel à de nouvelles forms. La responsabilité fondée sur la confiance, que le tribunal federal traite comme des obligations fondées … sur la bonne foi ou une autre source." Fn. 1439 refers to CHAPPUIS, CH. – WINIGER, B. (eds.). *La responsabilité fondée sur la confiance*. Zürich: Schulthess, 2001; See also SMITS, J. M. Contractuele gebondenheid thans. *Nederlands Tijdschrift voor burgerlijk recht*, 1998, Vol. 15, pp. 341–345.

63 D. 16, 3, 32 (Cels. 11 *dig.*): *nisi tamen ad suum modum curam in deposito praestat, fraude non caret: nec enim salva fide minorem is quam suis rebus diligentiam praestabit*; D. 17, 2, 3, 3 (Paul. 32 *ad ed.*): *quia fides bona contraria est fraudi aut dolo*; D. 18, 1, 68pr. (Procul. 6 *epist.*): *bonam fidem … id est … ut a te dolus malus absit*; D. 18, 1, 57, 3 (Paul. 5 *ad plaut.*): *et iudicio, quod ex bona fide descendit, dolo ex utraque parte veniente stare non concedente*; D. 19, 1, 6, 9 (Pomp. 9 *ad sab.*): *dolum malum eius, quem semper abesse oportet in iudicio empti quod bonae fidei sit*; D. 19, 1, 37 (Paul. 14 *ad plaut.*): *sicut aequum*

into the precontractual relationship between parties could and should also consider *pacta*.[64] Furthermore, the words *ex fide bona* in the *condemnatio* of the *formula* gave the judge the discretion to determine the amount of the *condemnatio pecuniaria*. This had various implications. In D. 16, 3, 24 it is opined that the judge has the same power as a *stipulatio* in respect of interest,[65] which developed into the default rule that in actions based on good faith interest is owed.[66] Of importance is the statement that this is due not in terms of the obligation, but on account of the office of the judge.[67] Based on the same reasoning analogous application brought produce[68] and expenses[69] into the deliberations of the judge.[70] The same applies to *compensatio*[71] and acquittal when performance *inter moras litis*[72] had taken place.

However, the question remains whether *bona fides* added a determined principle and defined rules to the Roman law of contracts and/or implicit dimensions, that is understandings and expectations, to *bonae fidei iudicia* in Roman law.

7. Texts deemed to provide guidelines

The following texts may be relevant in this context and provide guidelines.

D. 19, 1, 1, 1 (Ulp. 28 *ad sab.*): *(o)mnia enim quae contra bonam fidem fiunt veniunt in empti actionem*.[73]

This clause shows great promise as it could be interpreted that all instances of application of this action discussed in this title would show the whole breadth of behaviour contrary to good faith relative to a sale. This would make it possible to concretise this principle and derive rules.

However, the context of *lex* of this title should be considered. Paragraph 1 discusses instances of sale in which a servitude had been concealed and different permutations are considered. However, in all situations the seller knew about the servitude and Ulpianus concludes: *...et generaliter dixerim si improbato more versatus sit in celanda servitude,*

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est bonae fidei emptori alterius doli non noceres, ita non est aequum eidem personae venditoris sui dolum prodesse; D. 19, 2, 35pr. (Afr. 8 *quaest.*): *de eo, qui ....et bona fide negotium contraxerit, non de eo, qui alienum praedium per fraudem locaverit.* NAUMOWICZ, *op. cit.*, p. 664ff.

64 D. 18, 5, 3pr. (Paul. 33 *ad ed.*): *quia bonae fidei iudicio exceptions pacti insunt*; D. 18, 5, 7, 1 (Paul. 5 *quaest.*): *vix bonae fidei convenire ex pacto stare*.

65 D. 16, 3, 24 (Pap. 9 *quaest.*): *Et est quidem constitutum in bonae fidei iudiciis, quod ad usuras attinet ut tantummodo possit officium arbitri quantum stipulatio.*

66 D. 16, 3, 28 (Scaev. 1 *resp.*): *Deberi ex bonae fidei iudiciis usuras, sive percepit sive pecunia in re sua usus est*.

67 D. 19, 1, 49, 1 (Hermog. 2 *iur. epit.*): *usurae peti non possunt, cum hae non sint in obligatione, sed officio iudicis praestantur*; D. 19, 2, 54pr. (Paul. 5 *resp.*): *usurae enim in bonae fidei iudiciis etsi non tam ex obligatione profiscuntur quam ex officiis iudicis applicentur.*

68 D. 18, 4, 21 (Paul. 16 *quaest.*): *fundi venditor fructus praestet bonae fidei ratione.*

69 D. 17, 1, 56, 4 (Pap. 3 *resp.*): *Sumptus, bona fide necessario factos, ..., iudicio mandati restitui necesse est*; D. 17, 1, 12, 9 (Ulp. 31 *ad ed.*).

70 The same applies to *compensatio* and absolution when payment *inter moras litis* has taken place.

71 PICHONNAZ, P. *La compensation*. Fribourg: Editions Universitaires Fribourg Suisse, 2001.

72 *Satisfactio post acceptum iudicium*. NAUMOWICZ, *op. cit.*, p. 39, 131, 180, 512, 586, 604ff, 656, 743ff, 761, 857ff.

73 Everything done contrary to good faith falls under the *actio empti*.

debere enim teneri.[74] Noteworthy is that failure to warn was mentioned on equal terms with denial when asked.[75]

D. 17, 1, 29, 4 (Ulp. 7 *disp.*): *(d)e bona fide enim agitur, cui non congruit de apicibus iuris disputare.*[76]

This remark makes the legal profession superfluous and may be considered a precursor of the courses in street law and plain legal language. Naumowicz argues that in this context Ulpian places important limits on the duties of the mandatarius/surety. However, both Naumowicz and the hypothetical argument ascribed by him to Ulpian abound in legal subtleties (*apices iuris*).[77]

D. 17, 1, 54pr. (Pap. 27 *quaest.*): *(placuit enim prudentioribus affectus rationem in bonae fidei iudiciis habendam).*[78]

Naumowicz mentions this text as an example of analogous reasoning justifying a solution with reference to a similar solution reached in another *iudicium bonae fidei*.[79] However, the same as Papinian, the author omits to refer to the precedent. Moreover, this assertion is contrary to the present *communis opinio* as represented by Kaser who stated that affections were as a rule not taken into consideration.[80]

D. 19, 1, 48 (Scaev. 2 *resp.*): *(d)ebere venditorem et instrumentum fundi et fines ostendere: hoc etenim contractui bonae fidei consonant.*[81]

It may be argued that this obligation is already defined in D. 18, 6, 8pr. (Paul. 33 *ad ed.*): *(e)t si id quod venierit appareat quid quale quantum sit.*[82]

D. 19, 2, 29pr. (Alf. 7 *dig.*): *(n)am bona fides exigit, ut arbitrium tale praesterur, quale viro bono convenit.*[83]

This text dealing with *locatio conductio operis* lays down the rule that discretion exercised within the contract should be measured against the norm of a good man.[84]

D. 17, 1, 10, 3 (Ulp. 31 *ad ed.*): *(q)uia bonae fidei hoc congruit, ne de alieno lucrum sentiat.*[85]

The context of this text relates to a procurator who lent money entrusted to him out at interest without a mandate to do so. The decision that he should pay the profit accrued to the mandator, is consistent with the relationship of trust between the parties. However, to isolate

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[74] As a general rule I would say that he should be held liable if he tried to hide the servitude in a deceitful manner.

[75] D. 19, 1, 1, 1 (Ulp. 28 *ad sab.*): *sed scire venditorem et celare sic accipimus, non solum si non admonuit, sed et si negavit servitutem istam deberi, cum esset ab eo quaesitum.*

[76] For it deals with good faith and it is contrary to good faith to dispute about legal subtleties.

[77] NAUMOWICZ, *op. cit.*, pp. 541–544.

[78] For the jurists have agreed that account is to be taken of affection in actions of good faith.

[79] NAUMOWICZ, *op. cit.*, p. 137f.

[80] Ibidem, p. 491.

[81] (If from the document the rights of the deceased in the farm and the boundaries not become clear) the seller must show both the documents relating to the farm and the boundaries as is fitting in a contract based on good faith.

[82] And if the thing sold is clear, what it is, of what kind and quantity.

[83] Good faith demands that the judgment is such as fits a good man.

[84] *Cf.* COLLINS, H. Discretionary powers in contracts. In: CAMPBELL, D. – COLLINS, H. – WIGHTMAN, J. (eds.). *Implicit dimensions of contract: Discrete, Relational and Network Contracts.* Oxford: Hart Publishing, 2003, pp. 219–254.

[85] Because it agrees with good faith that one should not make a profit at the expense of another.

the above fragment and view this as a rule laid down by Roman jurisprudence is pushing the boundaries of interpretation.

D. 16, 3, 31 (Tryph. 9 disp.): *Bona fides quae in contractibus exigitur aequitatem summam desiderat: sed eam utrum aestimamus ad merum ius gentium an vero cum praeceptis civilibus et praetoriis? … 1. Incurrit hic et alia inspectio. Bonam fidem inter eos tantum, quos contractum est, nullo extrinsecus adsumpto aestimare debemus an respectu etiam aliarum personarum, ad quas id quod geritur pertinent? … et si rem meam fur, quam me ignorante subripuit, apud me etiamnunc delictum eius ignorantem deposuerit, recte dicitur non contrahi depositum, quia non est ex fide bona rem suam dominum praedoni restituere compelli.*[86]

This text deserves context as well. Hallebeek[87] in his remarks on the monograph by Kathrin Fildhaut on the *Disputationes* of Tryphoninus[88] concludes that this work was not composed to serve legal practice, neither judicial nor advisory. He considered it a legal--didactical manual, which raises the question of its inclusion in the Digest, as the practical relevance of this text is hard to grasp and the dogmatic points raised purely hypothetical.

The last relevant text in these titles has received most attention.[89]

D. 19, 1, 11, 1 (Ulp. 32 ad ed.): *(n)ihil magis bonae fidei congruit quam id praestari, quod inter contrahentes actum est. Quod si nihil convenit, tunc enim praestabuntur, quae naturaliter insunt huius iudicii potestate.*[90]

The text announces to list the *naturalia*[91] of purchase and sale and states that these can be enforced with the *actio empti* unless the parties have agreed otherwise. Whether the *naturalia* derive from *bona fides* or from commercial practice remains an open question.

The text discusses interpretational differences relative to delivery, eviction, *vacua possessio*, the duty to provide *cautiones* concerning animals[92] and *cautiones* against eviction and for delivery of *vacua possessio* (of slaves),[93] warranties that slaves are not

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[86] The good faith that is required in contracts calls for level dealing in the highest degree; but do we assess level dealing by reference to the law of nations only, or, in truth, in connection with the precepts of the civil and praetorian law? … A further observation is to be made here. As to good faith are we simply to assess it as between those who are party to the contract with no consideration of an outside individual or are we to assess it having regard also to other persons whom the matter concerns? … and if a thief takes an object from me without my knowing and then deposits it with me, still in ignorance of his wrong, it will rightly be contended that there is no contract of deposit since it is not in accord with good faith that the owner is compelled to restore his own property to a robber.

[87] HALLEBEEK, J. Some remarks concerning the disputationum libri XXI of Tryphoninum. *Tijdschrift voor Rechtsgeschiedenis*, 2006, Vol. 74, No. 1–2, pp. 149–157.

[88] FILDHAUT, K. *Die libri disputationum des Claudius Tryphoninus: Eine spätklassische Juristenschrift.* Berlin: Duncker & Humblot, 2004. Neither this work nor publications by Orestano, Nörr, Guarino, Liebs and Six, mentioned by Hallebeek were available and the remarks by the latter on the *Disputationes* are the only source.

[89] ZIMMERMANN, *op. cit.*, p. 320ff; SCHERMAIER, *op. cit.*, p. 85f.

[90] Nothing is more in agreement with good faith than to perform wat the contracting parties have agreed upon. If they have not agreed anything on a specific point, they must perform what falls naturally within the scope of this action.

[91] The default clauses, which become operative if the parties have not made alternative arrangements. HUTCHINSON, D. – PRETORIUS, CH. et al. *The law of contract in South Africa*. Cape Town: Oxford University Press Southern Africa, 2017, p. 247f.

[92] D. 19, 1, 11, 4 (Ulp. 32 *ad ed.*): *Animalium quoque venditor cavere debet ea sana praestar*e.

[93] Paras 8, 9 and 18 of D. 19, 1, 11.

runaways or come with noxal liabilities,[94] rescission of the contract,[95] the return of the *arrha*,[96] liability for a slave running away and being without noxal liability,[97] the amount to be claimed[98] and a variety of descriptions of fraud.[99] *Bona fides* is mentioned twice, in para 1 and in para 18: *(n)eque enim bonae fidei contractus hac patitur conventione ut emptor rem amitteret et pretium venditor retineret.*[100]

Nevertheless, this text plays a paramount role in the interpretation extending good faith into the seller's liability for eviction and latent defects. This is not the place to analyse the literature within twentieth century Roman law, which Zimmermann and Schermaier fully supply.

8. Observations

The belief that *fides* in a second manifestation as *bona fides* developed into a concrete norm with definite rules for contractual behaviour is among others built upon the development of the *actio empti*. D. 19, 1, 11, 5 (Ulp. 32 *ad ed.*) plays an important role in the latest opinions on the extended range of the *actio empti*.[101] In this text the ignorant buyer of a woman who thought he had bought a virgin is mentioned under error.[102] In D. 19, 1, 11, 5 the same facts are mentioned as well as the fact that the seller knowingly let the buyer persist in this mistake. This situation is analogous to that of the seller in D. 19, 1, 1, 1 (Ulp. 28 *ad sab.*) who failed to warn the buyer of ground subject to a servitude. In the latter text Ulpian considered such behaviour deceitful and the *actio empti* in consequence applicable. However, the conclusion that D. 19, 1, 11, 3 (Ulp. 32 *ad ed.*) provides confirmation that the *actio empti* had developed into a general *actio redhibitoria*[103] is an audacious step. In paragraph 3 no qualifications are presented,[104] while in paragraph 5 it was explicitly stated that in the case of the deceitful seller the erring buyer could not rely on the *actio redhibitoria* but could make use of the *actio empti* to demand cancellation. Another possible interpretation of the latter paragraph could be that the discretion allowed to the judge in terms of the *actio empti* included cancellation,[105] which could either be based on fraud or on error. Zimmermann describes the aedilitian actions as imposing an "objective" liability on the vendor.[106] He also mentioned how the texts on latent defects caused difficulties until the pandectists solved the conundrum. Such narrative ignores the reality that the intervention of the *aediles* indicated the absence of trust and faith in certain sectors of the market. This was rectified

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[94] Paras 7 and 8 of D. 19, 1, 11.

[95] Paras 3, 5, and 6 of D. 19, 1, 11.

[96] Para 6 of D. 19, 1, 11.

[97] Paras 7 and 8 of D. 19, 1, 11.

[98] Paras 9, 10, 11, 12, 14, 15, 16, 17 and 18 of D. 19, 1, 11.

[99] Paras 5, 15,16, 18 of D. 19, 1, 11.

[100] A contract of good faith does not allow inclusion of a clause in terms whereof the buyer could lose the object bought and the seller would keep the price paid.

[101] ZIMMERMANN, *op. cit.*, p. 320ff.

[102] D. 18, 1, 11, 1 (Ulp. 28 *ad sab.*).

[103] ZIMMERMANN, *op. cit.*, p. 321.

[104] A less complicated interpretation may be that rescission could also be claimed with the *actio empti.*

[105] See also D. 19, 1, 11, 6 (Ulp. 32 *ad ed.*): *Iulianus ex empto agi posse ait* (in a case where the sale was void); *et Iulianus diceret ex empto agi posse* (where the ring given as earnest was not returned after payment of the price and delivery of the object sold).

[106] ZIMMERMANN, *op. cit.*, p. 321.

by the introduction of strict liability[107] on some vendors, which included *bona fide* sellers. This rather augurs a lack of good faith in the market and to use such development as argument that extension of strict liability within the scope of the *actio empti* was a positive development of the power of good faith, stretches the imagination.

However, this is not the time or place to embark into this age-old and infinite debate. The objective of this paper is to present the difference between historical interpretation and legal history *ars artis gratia* and suggest that this may lead to alternative interpretations of Roman law.

9. Contextualisation within a modern contract law paradigm

Macaulay's research has shown that even in a society with over three hundred million members and an international economy spanning the world, economic clusters continue to exist in which age-old traditions of trust and solidarity remain dominant.

It stands to reason that in the Roman world similar clusters operated within trade, commerce and industry. On the market for slaves and certain animals the commercial practices were obviously guided by such ethical standards that the aediles were forced to intervene. The wine industry followed their own customs and practices. A glimpse thereof is offered when an outsider, Labeo, deemed it normal that a wine barrel should be fit to hold wine without special guarantees.[108]

However, to build a theory of good faith on unrelated fragments with the objective to show a gradual elevation of Roman business morality, which may well have included a nascent consumer protection, is a daring enterprise which may have been influenced by contemporary circumstances, fears and aspirations. MacNeil undertook construction of a similar general theory and his contribution in *Implicit Dimensions* starts as follows: "A widespread perception has long existed that relational contract theory is an analytical tool in favour of state-intervention in contractual relations; of co-operation rather than conflict; of communitarian, liberal, and/or radical values; of continuance rather than break-up of relations; and of many other 'soft and cuddly' values often associated with humanitarianism."[109]

It is an open question whether the same hard-nosed condemnation might not have been the reaction of the Roman jurists, the men of practice.

Within the parameters of a contextual appraisal it should be kept in mind that this powerful role of good faith developed supposedly in a context in which jurists such as

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107 For the changes in strict liability in Roman law THOMAS, P. A loose horse on the road. In: CHEVREAU, E. – MASI DORIA, C. – RAINER, J. M. (eds.). *Liber amicorum. Mélanges en l'honneur de Jean-Pierre Coriat*. Paris: Pantheon-Assas, 2019, pp. 967–976.

108 D. 19, 1, 6, 4 (Pomp. 9 *ad sab.*). *Labeo contra putat et illud solum observandum, ut, nisi in contrarium id actum sit, omnimodo integrum praestari debeat: et est verum.*

109 MACNEIL, I. Reflections on relational contract theory after a neo-classical seminar. In: CAMPBELL, D. – COLLINS, H. – WIGHTMAN, J. (eds.). *Implicit dimensions of contract: Discrete, Relational and Network Contracts*. Oxford: Hart Publishing, 2003, pp. 207–217; also FEINMAN, J. M. Relational contract theory in context. *Nw. U. L. Review*, 1999–2000, Vol. 94, No. 3, pp. 737–748.

Ulpian,[110] Paul,[111] Pomponius[112] and Hermogenian,[113] all stated unequivocally that *invicem se circumscribere* is allowed in sale and lease, which is euphemistically translated as "to overreach each other or the reciprocal taking of advantage".[114] The duty to inform the co-contractant during pre-contractual negotiations championed by Cicero is found twice, *i.e.* in D. 19, 1, 1, 1: *(n)on solum si non admonuit*, and D. 19, 1, 11, 5: *(s)ciens errare eum venditor passus sit*, and in both instances the context was such that fraud could be construed.

Liability for latent defects relied on the introduction of the *actio quanti minoris* and the *actio redhibitoria* by the *aediles* rather than on good faith.[115]

The persistent reliance on *stipulationes* to make provision for possible eviction and other eventualities[116] as supplement to the consensual sale also throws doubt on the real force of good faith in litigation.

Finally, it should be questioned whether the rules laid down by good faith as mentioned by romanists are to be understood as rules in the modern legal doctrine or as *regulae* throughout legal history.[117]

10. Conclusion

If the distinction drawn in the first part of this paper between historical interpretation and legal history is accepted, the question arises whether alternative interpretations of the law of the past are not appropriate. Such interpretations should be free from the desire of relevance, free from system building, free from good intentions of introducing values in the law of contract.

The above reconnaissance shows that the titles dealing with five important nominate contracts based on good faith in Roman law primarily indicate that *fides* expressed the source of the obligation and as such determined the content thereof to the extent that the judge was instructed to decide in accordance with this standard: condemnation or acquittal, in the first case the amount of the *condemnatio*, which meant taking into consideration pre-contractual behaviour of the parties as well as their conduct during litigation.[118] These inclusions into the power of the judge not only streamlined the procedure, but also promoted equity.

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[110] D. 4, 4, 16, 4 (Ulp. 11 *ad ed.*): *Idem Pomponius ait in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire.*

[111] D. 19, 2, 22, 3 (Paul. 34 *ad ed.*): *Quemadmodum in emendo et vendendo naturaliter concessum est quod pluris sit minoris emere, quod minoris sit pluris vendere et ita invicem se circumscribere, ia in locationibus quoque et conductionibus iuris est.*

[112] D. 4, 4, 16, 4 (Ulp. 11 *ad ed.*): *Idem Pomponius ait in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire.*

[113] D. 19, 2, 23 (Hermog. 2 *iur. epit.*): *Et ideo praetextu minoris pensionis, locatione facta, si nullus dolus adversarii probari possit, rescindi locatio non potest.*

[114] Watson's translation of above texts. ZIMMERMANN, *op. cit.*, p. 256ff; in the latter's footnotes the authoritative literature can be found.

[115] KASER, *Das römische Privatrecht*, p. 476.

[116] Ibidem.

[117] THOMAS, P. J. Quod quisque in alterum statuerit ut ipse eodem iure utatur; the golden rule? In: PIRO, I. (ed.). *Opera omnia: Scritti per Alessandro Corbino*. Tricase: Libellula, 2016, Vol. VII, pp. 165–178.

[118] The instruction to the judge implied inclusion of exceptions, consideration of interest, produce and expenses, *compensatio* and the possibility to acquit the defendant in the event of payment *inter moras litis*.

The paradoxes found in the Roman law sources may well result from a multitude of causes. One such possibility may be context, or rather lack of context. Not only are many texts cited and linked to other texts out of context, but even the text as such had already been taken out of context. As contextualism has become a force in modern contract law,[119] the harmful side-effects of ignoring context have been pointed out recently in *Implicit Dimensions of Contract*.

No title in the Digest was dedicated to *actiones / arbitria / iudicia / contractus bonae fidei*, nor does any text show an indication that a monograph on this topic was written. In consequence, isolated texts throughout the Digesta have been collected and rearranged into a body of principles, rules of law, *regulae juris*, irrespective of the context and the question of the casuistic character of Roman law.

The supreme question relative to the role of good faith in the Roman law of contracts should be whether the Roman jurists conceived contractual justice as procedural or substantive. This divide derives from political and philosophical sources. Priority of liberty, the individual and her autonomy are held to favour preference for a law of contract aimed at maximisation of wealth. This is opposed to a more communitarian approach considering the welfare of all and not eschewing regulation of contractual practices. Thus, the inquiry shifts to ethical standards which may range from pure self-interested individualism to an ethic of co-operation. During the millennium-plus of the first life of Roman law – from the Twelve Tables to Justinian – no uniform answer can be expected neither diachronically nor synchronically. However, it has been a long-held belief that individualism finding expression in freedom of contract and the binding force of the free will of the individual fuelled by the profit motif, has been one of the dominant characteristics of Roman law, which would explain the success and longevity of her second life.

Contradictions within the law show the hard reality of legal practice, where valid arguments for both sides are often made and decisions may vary as the result of extraneous unmentioned factors. Even the gap between academia and practice was not totally absent from Roman law: Cicero, Gaius and Quintilian represented academia and the works of the first play an important role in the promotion of good faith.

The Digest show that the *stipulatio* remained throughout Roman law the most common contract, in spite of or just because of the black letter law character of this contract.

The fact remains that Cicero's belief in the power of good faith found reflection during the 19th century and by way of the Historical School and the pandectists in the BGB.[120] Whether this should be attributed to the changing socio-economic and political circumstances to which their work responded or represented a realistic interpretation of Roman law is an open question.

This investigation into the contracts of sale, lease, *societas*, deposit and mandate supports the theory that *fides* originated as the foundation of the *negotia bonae fidei.* It also

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119 BROWNSWORD, R. After investors: interpretation, expectation and the Implicit dimension of the "new contextualism". In: CAMPBELL, D. – COLLINS, H. – WIGHTMAN, J. (eds.). *Implicit dimensions of contract: Discrete, Relational and Network Contracts.* Oxford: Hart Publishing, 2003, pp. 103–141.

120 Section 242 of the German Civil Code provides that the debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration. Section 157 provides that contracts shall be interpreted according to the requirements of good faith. It is accepted that sec 242 supplements the law and determines contractual relationships.

shows that *fides* developed into *bona fides*, an undefined principle from which certain rules derived. Such rules and their character, be it binding rules, *regula*, *i.e.*, rules of fist, or *ad hoc* casuistic points made on the basis of a sense of equity, did not show clearly in the investigated titles. However, an abundant number of texts dealing with these matters is scattered over the Digest and deserves further research.