FROM *BONA FIDES* TO *LABA TICĪBA*: HISTORICAL INTERPRETATION OF GOOD FAITH PRINCIPLE IN LATVIAN LAW TO PROTECT PAYMENT SERVICE CONSUMERS' RIGHTS FROM DE-BANKING

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Abstract

This paper focuses on a scientific analysis of the genesis and historical development of the good faith principle as a doctrinal interpretation of the Latvian regulations' governing issues when closing a payment account against a consumer's will. Starting from the origin of *bona fides* in archaic Roman law and its rediscovery by Justinian's *Corpus Juris Civilis*, passing through its application in the western medieval *ius commune* and its continental renaissance in the early twentieth century, noting its limited place in the Code of Civil Laws of the Baltic Provinces and paying tribute to its triumph in Latvian Civil Law, this paper focuses on the evolution of attitudes towards this principle in modern legal science and case law. This comparative historical research shows that a clear definition of good faith could be found through a system-historical interpretation of the good faith rule. This should help identify the target essence of subjective rights and duties under each legal rule governing specific legal relationships. Therefore, when de-banking, in view of good faith, the target essence of a bank's right to withdraw from an account contract is to save justice by respecting the justified consumer's interest in retaining payment services.

Keywords: *Bona Fides*, Good Faith, Historical interpretation, De-banking

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1. Introduction

When closing a bank account against the will of a payment services consumer, overly strict positivism when applying legal rules and contractual conditions, which authorize a bank to terminate an account agreement unilaterally, is a barrier to effectively protecting the consumer's rights. Regulatory dualism also does not contribute to justice concerning this issue. To mitigate this, the author proposes to turn to the time-tested Roman maxim of *bona fides* as a doctrinal interpretation of modern Latvian legislation regulating banks' withdrawal of payment services. Such an *interpretatio prudentium* is ineffective without a scientific analysis of the genesis and historical development of the good faith principle to which this research is devoted.

Starting from the origin of this legal principle in archaic Roman law and its rediscovery of Justinian's *Corpus Juris Civilis*, passing through its application in the western medieval *ius commune* and its continental renaissance of the early twentieth century, this paper focuses on the triumphant "laba ticība" approach by 1937 Latvian Civil Law. Paying tribute to the role of good faith in restoring the supremacy of law under the Western legal tradition after the fall of the occupying communist regime, the author analyses the evolution of attitudes towards this principle in Latvian modern legal science and case law.

The methodological basis of this research is based on formal logical and general scientific approaches (analysis and synthesis, abstraction and concretization, deduction, induction, comparison, and analogy). To begin, a special historical and legal scientific research method was used.

2. Advent of *dona fides*

There is no doubt that the notion of good faith, known as *bona fides*, finds its origin in Roman law.[1] In the old *ius civile's* time,[2] when subjective rights being enforceable by law were defined only by the limited number of claims recognized by legislation - on the Twelve Tables or by subsequent *plebiscita*[3] - and were actionable exclusively by the utterance of the correct solemn *formulae* before the *praetor*[4] later named the procedure of *legis action*,[5] the concept of *fides*[6] - literally, faith – was a moral and sacral principle supported by religious sanctions.[7] In this context, *fides* served as an extra-legal basis for the enforcement of relations not admitted by civil law, but in which a man had given his word. It required that his word must be kept and that his conduct conform with it.[8] Thus, *fides* generated an obligation, not unlike one arising from the strict civil law. However, from the viewpoint of the old *ius civile*, it was still not a legal principle of obligation, but rather its precursor.

As the Republic advanced, the need for developing society and commerce overran the limitations of the *legis actiones.*[9] Probably during the third century BC, a response to these challenges became a supplementation of the *legis actiones* by a new type of procedure - the formulary system.[10] This was no longer reliant on the utterance of ritual phrases by the parties in the dispute. The *agere* of the plaintiff and defendant was confined to a free recital of the facts and the submission of both to the procedural formula issued by the praetor, which established the litigation program and appointed a judge to determine the dispute.[11] This judge had to examine the facts of the case as described in the *formula* (*demonstratio*)[12] and pass judgement on the asserted claims and defences (*intentio*). The *formula* also contained instructions for the judgement (*condemnatio*), should the plaintiff's assertions prove correct.[13] Since the *formulae* had to be publicly announced by the new *praetor*[14] in his yearly edict (*ius honorarium*), its arrangement offered extensive opportunities to expand the list of enforceable actions.

Besides, since the formula contained not just a recital of the agreed facts and a direction as to the judge's task, but a reference to the foundation of the action, it could determine its common objective standard (*una norma obiettiva*), which might be "fides bona."[15] In this way, "*bonae fidei indicia*" were devised as the formulae commencing with a *demonstratio.*[16]

It is unknown at what point the edict began to contain actions based not on the old *civil oportere,* but rather on the *oportere ex fide bona*. Italian jurist Mario Talamanca[17] and some other researchers[18] date the emergence of *bonae fidei indicia* as far back into the third century BC, because they connect it more closely with the development of the formulary procedure. Conversely, the famous German legal

[1] Whittaker and Zimmermann, 2000, at 16
[2] Bove, 1971.
[3] Kaser and Hackl, 1996, at 35
[4] Guarino, 1984, at 176
[5] Pugliese, 1961 at 11
[6] Kunkel, 1939, at 2
[7] Wieacker, 1963, at 29-31
[8] Turpin, 1965, at 262
[9] Ibid. at 263
[10] Wieacker, 1989, at 447
[11] Selb, 1978, at 199
[12] A *demonstratio* was contained only in actions for a claim, the amount of which was still uncertain at the time when the action was brought (actions for an incertum).
[13] Schermaier, 2000, at 73
[14] Wieacker, 1989, at 429
[15] The example of formula for *actio empti* (*actio depositi*) would have run as follows: "*Quod Aulus Agerius de Numerio Negidio bominem, quo de agitur, emit,–quod Anlus Agerius apud N–um N–um mensam argenteam, qua de agitur, deposuit–qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, ejus, judex N–um N–ium Aulo Agerio condemna, si non paret, absolve*." (Zaikov, 2012, at 472).
[16] Arangio-Ruiz, 1946, at 25
[17] Talamanca, 1993, at 303
[18] For example, Kaser and Hackl, 1996, at 153

historian Franz Wieacker[19] estimates its emergence to have occurred during the second half of the second century BC only as a procedural reform to modernize the existing *ius civile* remedies. In contrast to both above, Luigi Lombardi,[20] the Italian professor of Philosophy and Law, argues that the *bonae fidei indicia* did not come into being until "*ai tempi di M. Catone e Q, Mucio*," that is, until Cicero's time. At any rate, Cicero's *De Officiis* contains a catalogue directly quoted from Quintus Mucius Scaevola Pontifex, of those contractual relationships that were subject to *bona fides*.[21] Therefore, we can safely say that at the beginning of the first century BC, *bona fides* had definitely ceased to be ethical yardsticks of contractual liability and were incorporated into the praetorian law (*ius honorarium*).[22]

The genesis and typology *of bonae fidei iudicium* reconciled[23] the two types of fides application when *bona fides* was initially invoked as the ground of obligation,[24] that is, when it formed its new source where it was only the measure of the judge's discretion,[25] where it merely supplemented the old *civilian oportere*, thus giving the judge a tool to assess the standard of performance required. While the modern lawyer finds this dilemma essential, in the Classical Roman law view, this is somewhat of a false dichotomy.[26] Indeed, as claims based on *bona fides* had no statutory grounds,[27] they could only be enforced through the formulary procedure. In turn, the *ex fide bona* clause of the formula extended the *officium* of the judge from factfinding and applying the terms of the formula to these facts to an assessment of the legal merits of the case.[28] He was free to consider the claim himself and assess, according to the principles of good faith, whether and to what extent the claim was substantiated. A significant element of the *praetor*'s task was thereby transferred to the judge. Of course, the judge did confine himself to the formula issued by the praetor, but the bona fides clause allowed him to shape its substantive content. Therefore, even where *bona fides* was the basis of liability, it had, *per se*, also governed the exercise of the judicial function to broaden the scope of the judge's discretion for wholly investigating the circumstances of the case.[29]. However, for the ideal of fides to be legally relevant, it had to be set up as the standard of one of the claims protected by a procedural formula.[30] Since the *praetor* was specifying more closely, the civil *oportere* was unlikely given the novelty of the claims.[31] If the *formula* was nevertheless conceived *in ius*, describing the plaintiff's obligation as *dare facere oportere*,[32] it might be assumed that the praetor regarded fides as a new source of obligations separated from the actions of the older *ius civile.*[33]

Ultimately, the *bona fides* approach gave the Roman judge equitable discretion to decide the case before him in accordance with what appeared to be fair and reasonable.[34] However, applying this procedural *formula* did not lead to uncertainty and arbitrariness, which have become a nightmare for modern legal positivists. This was due to a concrete and uniform understanding of what accorded with both *fides* and *bona fides*. This insight was rooted in Roman social ethics that recognized the comprehensive duties of fidelity and faithfulness and encompassed both citizens and peregrines.[35]

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[19] Wieacker, 1963, at 34
[20] Lombardi, 1961, at 180
[21] Schmidlin, 1980, at 365
[22] Schermaier, 2000, at 74
[23] Kaser, 1966, at 27
[24] Kunkel, 1939, at 5
[25] Carcaterra, 1964, at 36 and 45
[26] Turpin, 1965, at 266
[27] Cicero, *De officiis* 3, 61 (In Dyck, 1996, at 570)
[28] Schermaier, 2000, at 76
[29] Turpin, 1965, at 266
[30] Schmidlin, 1980, at 369
[31] Noordraven, 1988, at 349
[32] Watson, 1965, at 172
[33] Schermaier, 2000, at 75
[34] Zimmermann, 1996, at 667
[35] Schermaier, 2000, at 77

Whereas *fides* were understood as remaining faithful to one's word,[36] *bona fides* was applied to ascertain the content of contracts concluded.[37] Faithfulness to one's word is a precondition of any legal intercourse, and Cicero, therefore, describes it as *fundamentum iustitiae.*[38] *Per contra*, the *bona fides* does not demand performance itself, but by requiring the parties to act honestly, it influences the way performance occurs.[39]

While the way in which *fides* was extended to *bona fides* is largely unclear,[40] its qualification as *bona fides* emphasizes the new substantive specificity of that standard of behaviour. Cicero clarifies it as a specific duty of loyalty based on the older fiduciary relationships (*bene agere*)[41] of the Roman citizen who acted carefully and prudently and who respected the interests of his contractual partner, i.e., who acted as *bonus vir.*[42] In the early times, the *arbitrium boni viri* were seen to be an independent verdict of an arbitrator, which took into consideration the interests of both parties.[43] As Prof. Bruno Schmidlin noted, the latter point indicates that the *bonae fidei iudicia* were intended to provide the opportunity to weigh up both parties' interests when assessing an enforceable claim.[44] Therefore, the development of the *bonae fidei iudicia* was patterned from the three central elements of the classical *bona fides:*[45] (1) the substantive determination of the old fiduciary relationships (*bene agere*); (2) the binding nature of even an informal promise; (c) the officium of the judge who had to balance both parties' interests.[46] This reasoning helps us to detach evolved *bona fides* from source fides to overcome the spell of overly strict positivism.

The expansion of judicial discretion in assessing the merits of a case, which was based on the *bona fide* clause under the auspices of a general value system,[47] tamed the excessive procedural formalism.[48] Eventually, the *bona fides* itself was able to reconcile *with iudicia stricti iuris* through the formula clause known as "*exceptio doli.*"[49] Cicero describes the standard of *bona fides* - the notion of *bene agere* - as the conceptual opposite of fraudulent behaviour (*dolus*).[50] In turn, any act of *dolus* would usually result in a judgment against the guilty party, irrespective of whether it occurred during the contracting process or was committed by means of instituting the proceedings. Conversely, the judge would not allow a contractual action to be brought forth by the fraudulent party to succeed.[51] This located *dolus,* not so much in personal misconduct, but rather in inequity or injustice that would flow from the action being allowed to succeed.[52] Therefore, the *exceptio doli* was inherent in the *bonae fidei iudicia*,[53] and the judge would always implicitly consider whether the plaintiff's claim, or the bringing of the action was based on *dolus,*[54] that is, tested by *bona fides* tools. This serves as a

[36] Cicero, *De officiis* 1, 23: "*credamus ..., quia fiat, quod dictum est, appellatam fides*" (Dyck, 1996, at 115)
[37] Schermaier, 2000, at 78
[38] Cicero, *De officiis* 1, 23: '*Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*" (Dyck, 1996, at 115)
[39] Schermaier, 2000, at 78
[40] Nörr, 1991, at 43
[41] Cicero, *Topica* 42 (Reinhard, 2006, at 150)
[42] Schmidlin, 1980, at 362
[43] Broggini, 1957, at 115
[44] Bruno Schmidlin, 1980, at 365
[45] Martin Josef Schermaier, 2000, at 82-83
[46] Magdelain, 1990, at 591-652
[47] In some late classical texts, *bona fides* is even linked to the moral category of the boni mores (The Digest of Justinian: D. 16, 3, 1, 7 and D. 22, 1, 5 – Watson, 1998, at 11 and 177); Mayer-Maly, 1986, at 151 and 158
[48] Schermaier, 2000, at 84
[49] Whittaker and Zimmermann, 2000, at 16
[50] Cicero, *De officiis* 3, 14 (Miller, 1913, at 330).
[51] Schermaier, 2000, at 86
[52] MacCormack, 1986, at 263
[53] Julian states "*quia hoc iudicium fidei bonae est et continet in se doli mali exceptionem*" (The Digest of Justinian: D. 30, 84, 5 - Watson, 1998, at 24)
[54] Schermaier, 2000, at 87

good guideline for modern justice to stop pitting imperative legal rules against the standard of good faith behaviour.

From the end of the classical period, the decline and eventual abolition of the formulary procedure gradually led to an absorption of the concept of *bona fides* into the broader notion of *aequitas* (equity)[55] which, among others, combined the two basic meanings of *fides*: keeping one's word and observing a certain standard of behaviour.[56] Along with *humanitas* and *benignitas,*[57] *aequitas* proved to be more flexible and comprehensive than the concept of *bona fides*, confined as it was to the ideas of loyalty and fair dealing between contracting parties.[58] At the same time, it had given rise to such finely nuanced considerations and shaped such legal institutions that became part and parcel of the civilian heritage on which the modern legal systems are based. Liability for latent defects, the rules relating to the implied warranty of peaceable possession, rescission of contracts on account of mistake, and *metus* inspired these and many other institutions of modern contract law to owe their appearance and development to conscientiousness the *iudicia bonae fidei* of Roman law.[59] *Per se*, the *bona fides* was completely reborn into substantive principle, therby throwing off its procedural shell.

3. Medieval restoration and new meanings

Throughout the Middle Ages and in the early modem period, *aequitas* remained at the forefront of discussion as a counterpoise to the *ius strictum* (strict law)[60], but it was commonly identified with *bona fides*. The medieval jurists who wrote about Roman and Canon law used the terms 'good faith' or 'equity' to describe three types of conduct expected of the contracting parties: (1) each party should keep his word; (2) neither should take advantage of the other by misleading him or by driving too harsh a bargain; (3) each party should abide by the obligations that an honest person would recognize even if they were not expressly undertaken.[61] However, instead of defining the essence and substance of the *bona fides* concept as a general lodestar for the legal regulation of contractual relationships, the jurists built a rudimentary schema for classifying their Roman legal texts to describe discrete situations in which good faith was required and how the parties should act in each case.[62] In the field of contract law, then, good faith and equity remained amorphous concepts, while one might have expected a clear statement from the Canon lawyers in terms of what Christian morality required.

These "phantom pains" of the Middle Ages are still manifest today when modern jurists warn that one should not expect to find a clear rule of good faith,[63] but should be content only with listing various situations where the courts found good faith to be violated (according to German lawyers, so-called "*Fallgruppen*"[64]). Similarly, the American lawyer Robert Summers described good faith as an "excluder," that is, "a concept that cannot be defined but excludes heterogeneous instances of bad faith."[65] Accordingly, even though good faith has long been elevated to the rank of the rule of law in many jurisdictions, modern lawyers continue to imitate their colleagues from the past, who explained what good faith is in every specific situation with systems or schemas that seem entirely independent from any general conception of good faith.[66]

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[55] Beck, 1955, at 24
[56] Waldstein, 1976, at 77
[57] Beck, 1955, at 29
[58] Schermaier, 2000, at 89
[59] Whittaker and Zimmermann, 2000, at 17
[60] Schröder, 1997, at 265
[61] Gordley, 2000, at 94
[62] Ibid.
[63] Roth, 2007, § 242
[64] Hesselink, 2011, at 289
[65] Summers, 1968, at 196
[66] Gordley, 2000, at 117

Similarly, the Canonists repeated the civilians' conclusion that in contracts of good faith, unlike those of strict law, the parties are bound to the unexpressed terms that good faith requires.[67] They said that the terms to be read into an agreement absent express provision came from the 'nature' of the contract.[68] Then, the jurists concluded that every kind of contract had its natural terms and that a party must observe them as a matter of good faith and equity and the *ius gentium.*[69] However, they never explained the relationship between the "nature" or "substance" of a contract on the one hand, and equity, good faith, and the *ius gentium* on the other.[70] Instead, they fitted the Roman texts into a different schema where good faith meant doing whatever else could be expected of an honest person engaged in a given type of transaction.[71]

Nevertheless, a way out of this deadlock was found at the end of the Middle Ages, when Baldus de Ubaldis, the last great medieval jurist, developed a coherent idea of good faith through equity.[72] He seemed to have done so by drawing on the philosophical ideas he had borrowed from Aristotle and Thomas Aquinas.

Baldus identified good faith with equity[73] and conscience,[74] like the jurists who preceded him. But he gave special attention to one particular critical principle of good faith: the requirement that no one should be enriched at another's expense. This principle looks like the principle of equality, which, according to Aristotle[75] and Thomas Aquinas,[76] is the foundation of commutative justice defined as exchange. While distributive justice secured each citizen a fair share of whatever wealth and honour the society had to divide, commutative justice preserved each citizen’s share.[77] Thus, according to Aristotle, each party in an exchange had to give something of equivalent value to what he received.[78] For Baldus, it is "the rule of rules in the life of conscience," which he called "natural" or "general" equity.[79]

To avoid confusion when explaining the word "equity," Baldus used two definitions, which he called "generic'" and "specific" equity (aequitas in genre and aequitas in species).[80] He defined "generic equity" as reaching a just result, that is, "correct judgment'" taking account of "both substance and circumstances."[81] This is achieved through an exchange that excludes enrichment at the expense of others. In discussing its remedy, Baldus maintained that generic equity or equality is to be served in contracts both when interpreting them and in justifying them.[82] In contrast, "specific equity" meant deviating from the law when the circumstances required it.[83] As Thomas Aquinas reflected, since laws are framed generally, circumstances can always arise in which the lawmaker himself would not wish the law to be followed. Equity means that the law should not be applied under such circumstances.[84]

At the same time, when violating equity by breaking one's word and through causal fraud, the violator does not always benefit from the victim's expense.[85] Therefore, Baldus distinguished several kinds of

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[67] Ibid. at 105
[68] Ibid. at 103
[69] Ibid. at 104
[70] Ibid. at 105
[71] Ibid. at 103
[72] Ibid. at 106
[73] De Ubaldis, 1595. to X (*Liber Extra – Corpus Juris Canonici*) 1, 29, 3; De Ubaldis, 1577 to D. 16, 3, 31
[74] De Ubaldis, 1595 to X 1, 29, 3
[75] Aristotle, 1999, at 73-75
[76] Aquinas, 2012, II-II. gv.77
[77] Aristotle, 1999, at 73-75
[78] Ibid. at 77-81
[79] "*Regula regularum in via conscientie est, non locupletari cum aliena iactura*" (De Ubaldis, 1595 to X 1, 2, 8 no.1)
[80] Gordley, 2000, at 108
[81] De Ubaldis, 1577 to D. 1, 1, 1 pr. no. 5.
[82] Ibid. to C. 4, 44, 2 no. 48
[83] Gordley, 2000, at 108
[84] De Ubaldis, 1577 to D. 1, 1, 1 pr. no. 5
[85] Gordley, 2000, at 109

good contractual faith by the judge for two purposes: first, to know whether contracts are binding or not, and second, to know what the parties' obligations are and whether they have been fulfilled. For this second purpose, good faith had two meanings: it means the absence of *dolus*, and also the observation of that to which the parties are committed according to generic equity and the ordination of the law. Attention is to be paid to natural equity when doubt arises for those things that are not expressed in the law, and attention is to be paid to the law's ordination in things that it does express.[86]

Thus, according to Baldus, generic (natural) equity is a type of good faith distinct from faithfulness to one's promises and the mere absence of *dolus*.[87] This allowed for the limiting of one's duty to keep one's word, only in a situation when there was a contractual causa to do it.[88] This causa could be only either 'liberality' or the receipt of something in return for what one gave.[89]

As Aristotle said, liberality meant not merely giving wealth away, but giving "to the right people, the right amounts, and at the right time."[90] Indeed, Baldus presumes that if one gives wealth away, either it is an act of liberality or it is foolishness. It means the contract could be made from 'foolishness' rather than "liberality."[91] For example, if an ignorant person has renounced the remedy for *laesio enormis*, the judge should assume he did so "more from stupidity than from liberality."[92] Therefore, such a contractual word might not be kept for reasons of equity.

4. Settling to Latvia

Although until today, researchers have not directly touched upon the issue of the genesis and development of good faith in the Latvian legal system before the civil law codification of the Baltic Provinces in the second half of the 19th century (see below). Yet, a piece of general historical information invites one to draw some conclusions about this. As far as the Catholic church's Canon Law regulated Livonian clergy life in the 13th to 15th centuries,[93] the relations between the church, its servants, and laymen should have been influenced by the above medieval doctrine of good faith, including its development by Baldus under Aristotle's and Thomas Aquinas' philosophical ideas.

A somewhat more complicated discussion concerns the Town law (Stadtrecht) of Livonian towns, which was formed in the 13th century due to the reception of the law of northern German cities.[94] It is known that Riga adopted Hamburg laws, but from the 14th century, it had its independent law that later extended to other towns in the Latvian territory.[95]. While some German towns' Stadtrecht was familiar to Treu und Glauben[96] (literally: fidelity and faith used in the context of commercial relations as a synonym for *bona fides*[97]), we have no exact data on how this principle was applied by Hamburg Stadtrecht in 1270 and 1497. Riga's Stadtrecht also makes no direct reference to the "Treu und Glauben."[98] At the same time, since *bona fides* and *aequitas* dominated relations between merchants and became a fundamental principle of the medieval and early modern *lex mercatoria,*[99] there is no

[86] De Ubaldis, 1577 to C. 4, 10, 4 nos. 1-2; Gordley, 2000, at 109
[87] Gordley, 2000, at 110
[88] De Ubaldis, 1595 to X 1, 4, 11 no. 30.
[89] Gordley, 2000, at 114
[90] Aristotle, 1999, at 53-57
[91] Gordley, 2000, at 113
[92] De Ubaldis, 1577 to C. 4, 44, 2 no. 21.
[93] Blūzma, 2015, at 12
[94] Ibid.
[95] Ibid.
[96] For example, with respect to Augsburg (Ofenbrüggen, 1860, at 329); regarding Nuremberg (Schultheiß, 1939, at x)
[97] Strätz, 1974
[98] Napiersky, 1876
[99] Meyer, 1994, at 61

reason to doubt that Hamburg's and Riga's merchants did not required the flexibility, convenience, and informality of this "prime mover and life-giving spirit of commerce"[100] (as *Casaregis* put it).

Conversely, there can be no doubt about the honoured place of *bona fides* in the Livonian knighthood law, which, during the 15th –18th centuries, was influenced by the reception of Roman law. Notably, the Livonian code of Knighthood law was called "Systematic or Revised Livonian Knighthood Law," which, in the 15th century, directly stated that when the rules of this code are not applicable, the Roman law must be applied.[101] Besides, as a prominent researcher of Latvian legal history, Valdis Blūzma rightly noted[102] that the prestige of Roman law had contributed and was declared an imperial law on which all civil cases must be appealed to the Imperial Chamber Court (Reichskammergericht). This court was established in the Holy Roman Empire in 1495. In its archive, 19th-century researchers opened 29 legal cases from Livonia during 1530 - 1564, confirming Roman law's use to govern legal relations that arose in the Livonian territory. Therefore, Livonia's civil turnover could not avoid the *bona fides* requirements to be implemented with legal regulation in the spirit described above.

Livonian War (1558 – 1583) and the Polish-Lithuanian Commonwealth's expansion somewhat weakened the systemic invocation of good faith rules in state formations on modern Latvia's territory, but did not eradicate it. While a legal source of both the 1611 Pilten Statutes and the 1617 Statutes of Courland was Roman Law[103] promoting *bona fides* in civil circulation, this principle has ceased to exist for all contractual relationships. The Statutes of Courland condensed it down to listing a few specific legal situations where good faith was still at the forefront. Particularly, *bona fides* was mentioned as a behaviour standard for the repayment of loans (§89)[104] and using another's property when lenting (§92)[105]. Perhaps the most important rule dealt with the obligations of the seller, who must, in good faith, reveal all the defects of the thing sold and may not conceal anything that the buyer would never attempt to buy if he knew at the beginning (§100).[106]

The Swedish dominion of Livonia had quite an excellent potency to restore good faith to its former glory. Since the 17th century, Swedish-Finnish contract law[107] was deeply influenced by the European *ius commune.*[108] Their legal system was permeated by the Roman principle of *bona fides,*[109] in that most contracts under the old medieval codes were taken to be *contractus bonae fidei.*[110] After the strengthening of the Swedish administration in Livonian province (now southern Estonia and central region of Latvia) in the twenties of 17th century, Swedish law was prescribed as a subsidiary source of law in Swedish Livonia.[111] However, as Finnish legal historian Heikki Pihlajamaki argued, because of the discrepancy between procedural law regulations of Swedish Livonia and the judicial practice of local courts, "Swedish statutory law gained only limited influence in Livonia."[112] Besides, both Livonia's nobility and its Landtag deputies tried to prevent the replacement of local law by the Swedish one.[113] The last attempt at the unification of the law of the Livonian province with the law of Sweden was unsuccessful as well. During the Great Northern War, Charles XII issued a unique

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[100] "*Bona fides est primum mobile ac spiritus vivificans commercii*", and in the same vein, Baldus stated, "*Bonam fidem valde requiri in his, qui plurimum negotiantur*" (good faith is much required of those who trade most). Both citations were taken from Meyer, 1994, at 62

[101] Von Rahden, 1845, at 133

[102] Blūzma, 2015, at 13

[103] Ibid. at 16

[104] Statuta Curlandica, 1804, at 70-02

[105] Ibid. at 74

[106] Ibid. at 80

[107] Finland and Sweden formed a union before 1809, so Swedish law prevailed in Finland.

[108] Whittaker and Zimmermann, 2000, at 55

[109] *Per contra*, a direct influence of Roman law and culture in Sweden for other issues was weak because historically, Romans were not interested in the expansion into the regions of northern Europe (Blūzma, 2015, at 18)

[110] Whittaker and Zimmermann, 2000, at 56

[111] Blūzma, 2020, at 21

[112] Pihlajamäki, 2017, at 263

[113] Blūzma, 2020, at 21-22

document on12 June 1707 to stipulate that henceforth, only Swedish laws would be applied in Livonia. But this order could not be carried out, because almost all of Livonia's territory had been already occupied by Russian troops since 1705.[114] Thus, the European *ius commune* was unable to penetrate the Livonian legal system via Swedish law to broaden the scope of the application of good faith requirements for contractual relations in this territory.

At first, the Russian Empire's arrival did not change the rules of the game for good faith on the Baltic field of civil circulation, since Russian emperors (Peter I and Catherine II) declared in the general confirmations of the newly obtained provinces (governorates of Livonia, Estonia, and Courland) that local laws would continue to be unbreakable in these provinces.[115] It meant that *bona fides* from Justinian's *Corpus iuris civilis* kept its subsidiary administering in Latvian regions for many decades.[116] However, no matter how surprising it may sound, the stalk of this legal principle as a general rule for contractual behaviour was cut by the codification of Ostsee Provinces' law in 1864, which some credited to the Roman law's triumph[117] and called its second reception.[118]

In spite of the fact that almost 63% of all the rules (2882 articles of 4600) in the Code of Civil Laws of the Baltic Provinces (part III of the codification of the Baltic region's local laws) were accepted from Roman law,[119] neither their content nor their historical sources quoted or referred to the *bona fides* notion *per se*. The 1864 Code, therefore, contained no general rule that subjective rights borders should be defined by good faith.[120] There was only Article 3444, which prohibited chicanery; that is, permitted actions with the direct intention of harm. Roman law rules about *exceptio doli generalis* were mentioned as historical sources.[121]

Of course, such an approach should not be surprising because, by the 19th century, Aristotelian notions of equality for the objective good faith concept had fallen out of fashion.[122] For example, French Civil Code's commentators defined contracts in terms of only the parties' will. According to them, the judge should carefully refrain from interfering with the parties' decision in the name of equity. The will had become the source of all the parties' obligations, and there was no higher standard by which the will itself could be criticized or supplemented.[123] 19th century German jurists agreed with French colleagues, and when they placed a requirement of good faith in 1900 in § 242 of the German Civil Code (an obligor has a duty to perform according to the requirements of good faith, taking the customary practice into consideration), it seemed innocuous. They kept insisting that "Good faith no longer meant there were obligations of substantive fairness which the parties must respect.[124]" Yet, the genie had already been out of the bottle.

While Latvia remained under the yoke of the Russian Empire, its academic legal circles, were not isolated from the law-making processes taking place in Europe. Apparently, this can account for the fact that in 1914, the judge of the Riga district court Vladimirs Bukovskis turned again to good faith to explain the Code of Civil Laws of the Baltic Provinces. His fundamental commentary collection on this codification of the Baltic region's local laws used references to good faith, among others, to clarify rules about unallowed acts of a borrower (Art.3760)[125] and a seller upon passing goods (Art.3861).[126] It was a yardstick for the contractor's obligation to consider the customer's interests

[114] Ibid. at 23
[115] Blūzma, 2015, at 19
[116] Luts-Sootak, 2012, at 273
[117] Ylander, 1918, at 441
[118] Jegorov, 1989, at 104
[119] Kalniņš, 1972, at 304
[120] Krons, 1937, at 286
[121] Bukovskis, 1914, at 1398
[122] Gordley, 2020, at 115
[123] Laurent 1878, §178 at 208 and §182 at 212
[124] Gordley, 2020, at 116
[125] Bukovskis, 1914, at 1607
[126] Ibid. at 1646

when executing the construction plan (Art.4228)[127] and for the holder's title concerning bearer securities (Art.3129).[128] The fundamentals of contractual good faith were to explain to the performer the non-existence of the obligation - otherwise, it is deception (Art.3689),[129] but *bona fides* accepted in commercial life were analysed in the context of consent in silence (Art.2941),[130] and so on (Arts.3016, 3290, 3854, 4220).

After proclaiming the independent Republic of Latvia on 18 November 1918, the Code of Civil Laws of the Baltic Provinces was retained in force on the grounds of legal continuity under the Law "On retaining in effect the former laws of Russia in Latvia" adopted on 5 December 1919 by the Pre-Parliament of the Republic of Latvia – People's Council.[131] Therefore, the Latvian Senate (Supreme Court) was only able to resume practicing the prohibition of chicanery in the context of the above Article 3444, but could not test disputed contractual relationships from the viewpoint of good faith. However, the Senate's judgments started to observe that the narrow wording of Article 3444 turned out to be insufficient. As a result, in addition to the harmful purpose, the Senate mentioned a protected interest or a lack of legitimate interest as a characteristic of the chicanery. In one case, the Senate even acknowledged the liability under Article 3444, although the purpose of the chicanery was not established, but it was recognized that the defendant, although he had acted within the limits of the law, had infringed on the plaintiff's interests.[132] Indeed, it was a forerunner for the restitution of good faith as a general legal principle.

5. Triumph and oblivion

While 1937 Latvian Civil Law was, to a greater extent, a creative revision of the Code of Civil Laws of the Baltic Provinces where the previous system of legal material was retained, but the number of articles was reduced from 4600 to 2400 by excluding certain rules,[133] there was one systemic breakthrough designed to change the civil circulation. It was our "bona fides," which had been unacknowledged by G.F. von Bunge,[134] but climbed the pedestal of new codification and took a prominent place. Of course, the number of articles in codification should not be a strict criterion to determine the hierarchical force of legal rules. Nevertheless, no one will forbid us from noting that the good faith principle became the first article of civil law to overtake its progenitor - Article 2 of the Swiss Civil Code (ZGB).[135] The well-known sworn advocate of the interwar period Mīrons Krons noted that "the legislator had given this rule great importance by placing it at the forefront of the other norms of the new law."[136]

On the contrary, the substance of its wording is more significant since good faith (in Latvian: "laba ticība") has become a general requirement both for the exercise of any civil rights and for the performance of any civil duties ("Rights shall be exercised and duties performed in good faith"). As Bernhards Berents, former Latvian Minister of Justice, formulated, this principle should govern the entire application of the law and form the guide for the interpretation of the law as "the limit of all legal exercise." "It is a general requirement concerning the content of legal relationships. The reference to good faith is from thoroughly objective content and contains a supreme norm of conduct and the application of the law."[137] It assists with reconciling the law with justice as "the ultimate goal

[127] Ibid. at 1845-1846
[128] Ibid. at 1220-1224
[129] Ibid. at 1580
[130] Ibid. at 1117
[131] Blūzma, 2015, at 22
[132] Krons, 1937, at 287
[133] Blūzma, 2015, at 22
[134] Dr. jur. Friedrich Georg von Bunge was a codifier of the Code of Civil Laws of the Baltic Provinces (ibid. at 20).
[135] Krons, 1937, at 281
[136] Ibid. at 270.
[137] Berent, 1938, at 38-39

of all law" and should be used to combat the unfair use of formal rights when such rights are exercised according to the letter of the law or legal transaction, but contrary to their true goals.[138]

At the same time, the boldness of the legislator's innovation so frightened the law enforcers during the very first days of the new Civil Law, that they attempted not only to limit the scope of its application, but also to distort the very essence of the good faith principle per se. Chairman of the Senate Civil Cassation Department Osvalds Ozoliņš gently hinted that Article 1 only commends or recommends that persons perform their duties and use their rights in good faith.[139] This assumed that there were no strict obligations of good faith behaviours in civil circulation. However, the wording of this article gave rise to such doubts, since unlike its original Swiss source ("In exercising his rights and in performing his duties everyone has to act by the good faith"), it did not verbatim indicate the person's obligation to conduct in good faith but described general behavioural standards. Mr. Krons identified this rule as dangerous from the viewpoint of its application and warned others against its wide invoking. It should not become a general cure for all diseases but could only offer solutions to the most common conflicts of interest.[140] Thus, contrary to the original idea of Civil Law, de facto, it was proposed to return to the above lists of Fallgruppen. Mr. Berents seemed the most vegetarian when he only argued that Article 1 should not form an independent legal source and not lead to an interpretation of *contra legem*[141].

Indubitably, by then, Latvian jurists had a frightening illustration of using the good faith rules as a positivistic peg by their German counterparts that, of course, could explain their anxiety. When in November 1923, German inflation had reached hitherto unimaginable dimensions (one gold mark was traded for 522 billion paper marks), the Imperial Supreme Court judged that currency laws had to be disregarded, insofar as they could not be reconciled with the precepts of good faith. With reference to § 242 BGB, the Court refused to allow debtors to discharge obligations incurred before the First World War by paying the nominal value of the debts in paper marks. Moreover, the Court considered itself entitled to fix a new exchange rate.[142] This gave rise to the thesis that the good faith provision could be "the source of the baneful plague gnawing in a most sinister manner at the inner core of our legal culture.[143] These misgivings were fully confirmed by what happened after 1933. The "unlimited interpretation" was an essential key to the insidious perversion of the legal system to imbue it with the spirit of the new, 'national' (volkisch) legal ideology.[144] The Latvian legal system was not exposed to such risks. Yet, the limited interpretation of its Civil Law Article 1 by its first commentators remains the ancestral curse for invoking the good faith requirements.

At that time, subsequent tragic historical events did not allow this collision to develop. From 26 November 1940, the Latvian legal system plunged into the occupation of Soviet law. The communist regime refused the Roman private law principles as individualistic, cosmopolitan, and selfish. Socialist legal theory tied the ancient principles with the “bourgeoisie” and its aim to oppress the working class. Along with those above, the concept of *aequitas* or *ius naturale* was also rejected, which was replaced by a “higher” form of justice: class justice.[145] The legal orders of occupied Latvia influenced by communist legal theory were therefore based on the principle of inequality before the law for several groups of people - enemies of the communist ideology.

6. Renaissance and growing pains

[138] Krons, 1937, at 270
[139] Ozoliņš, 1938, at 51
[140] Krons, 1937, at 298
[141] Berent, 1938, at 40
[142] Whittaker and Zimmermann, 2000, at 20-22
[143] Henle, 1912, at 3
[144] Rüthers, 2022, at 64
[145] Ivančík, 2020, at 60

After the fall of the communist regime, Latvia wanted to re-establish its legal order by the tradition of Western legal culture. Turning back to Roman legal principles was required for these efforts to succeed.[146] Justice was the baseline, and good faith followed.[147] Unlike other Eastern European states, Latvia chose a more straightforward path to return to Western private legal values. The legal technique for this was the restoration of the 1937 Civil Law, including the first article, *ex altera parte*. Yet, our neighbours had a different approach that created new codifications of civil law after their independence restoration. The 2000 Civil Code of Lithuania literally exacts the subjects of civil relationships to act according to the good-faith principle (Art. 1.5(1)).[148] Moreover, it refers to the good-faith requirements a total of 103 times regarding various aspects of civil regulation. While Article 138(1) of the General Part of the 2002 Civil Code Act contains the same wording of the good faith as its Latvian sister, and Article 139 presumes it for all legal relations, the 2001 Estonian Law of Obligations Act's Article 6(1) directly requires that everyone act in good faith in their relations with one another. Moreover, the second part of this article prohibits applying legal rules, usages, and contractual provisions if they are contrary to good faith.[149]

Indeed, the laconic brevity of the Latvian good faith rule's wording did not allow it to restart its own volition. It waited for the scientific doctrinal impulse, which came in the face of Prof. Kaspars Balodis, Dean of the Faculty of Law at the University of Latvia and later Latvian Constitutional and Supreme Courts judge. In 2002 he wrote a paper, "Labas ticības principa loma mūsdienu Latvijas civiltiesībās" (Role of the principle of good faith in modern Latvian civil law), published in the legal journal "Likums un Tiesības."[150] Subsequently, this research became a part of his textbook "Ievads civiltiesībās" (Introduction to Civil Law) in 2007.[151] Even though there were several other studies and publications on the topic of good faith, Balodis' definition of this legal principle - "Everyone should exploit their subjective rights and fulfil their subjective duties by observing the lawful interests of others"[152] - has become the most cited reference in the modern practice of Latvian courts concerning this issue.[153] Along with it, to motivate their legal conclusions regarding an application of good faith requirements, the judges also often refer to the above interwar jurists, notably, Mīrons Krons.

The Latvian case law usually deals with issues of good faith when disputes arise over excessive penalties, foreseeability of damages, excessive claims for damages in the lease or rent contracts, or cancellation of work performance contracts if the original calculation was too low,[154] as well as if they concern abuse during the process of insolvency and consumers rights' protection. As of today (14 April 2023), the database of the Supreme Court's judgments indicate 74 cases subjected to CL Article 1, which is significantly higher than this average for other legal rules.[155] A cursory analysis of court practice shows that, over the past two decades, judges have changed their approach to invoking the good faith principle from reasonably liberal to strictly positivist. For example, the Supreme Court's judgment of 9 February 2005 in case No.SKC-75 stated that the first CL Article dealt with all civil rights to limit formally exploiting these rights when they are used unjustly. Conversely, on 16 December 2020 for case No.SKC-231/2020, the Supreme Court already argued that this rule is not a

[146] Stein, 1999, at 129
[147] Ivančík, 2020, at 60
[148] Astromskis, 2017, at 486–492.
[149] Poola, 2017, at 116
[150] Balodis, 2002, at 279-286
[151] Balodis, 2007, at 140-150
[152] Ibid. at. 141
[153] For example, Latvian Supreme Court's judgments: SKC-5/2004 of 14 January 2004; SKC 292/2017 of 11 December 2017; SKC-1782/2018 of 18 December 2018; SKC-272/2019 of 31 October 2019; SKC-189/2020 of 12 March 2020; and others.
[154] Torgāns, Kārkliņš, Mantrovs and Rasnačs, 2020, §117
[155] https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs

general remedy and does not allow the judge to determine what constitutes "good faith" for each specific case.

7. Conclusions

Summarizing the above, inferring that good faith moves along a historical sinusoid in civil circulation is justified. It is both progressing to require total equity for legal relations, and also regressing due to a complete denial as a legally binding principle. As of today, the Latvian legal practice seems to be sliding into strict positivism, which turns good faith into a formal declaration without any practical meaning.

The laconic wording of Latvian CL Article 1 fuels such aspirations to not seek a clear rule of good faith but should be content only with listing various typical situations where it may be invoked. However, the given system-historical analysis shows that this is the wrong way. Per contra, we must look for a clear definition of good faith, including researching its genesis and development in time and space.

In the view of legal technic, there should be a system-historical interpretation of the good faith rule - that is, Article 1 of Latvian Civil Law - to identify the target essence of subjective rights and duties under each legal rule governing specific legal relationships. A worthy alternative to Fallgruppen would allow for the creation of objective criteria without undermining legal certainty.

In the context of de-banking, this should mean that adequate consumer protection requires limiting the literal interpretation of legal and contractual rules authorizing banks to unilaterally withdraw from payment account contracts in favour of clarifying the true purpose and mission of their subjective right through the good faith principle in order to respect the justified consumer's interests to retain payment services. In other words, courts should definitively abandon the excessive focus on *ius positivum* and put *aequitas* at the forefront. This could be effectively resolved by using *ius naturale* in the form of *bona fides*.

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