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Abstract: The Good Faith Principle in Interdisciplinary Perspective

Before the Corona crisis is over and life will have returned to normal, individuals and companies all over the world will be finding themselves in court, pleading that they have been unable to fulfil their contracts during this unprecedented crisis – asking for a modification of their contractual obligations. They will argue that the pandemic and its harsh effects could not have been foreseen by someone in their position. They had entered that contract in the firm and reasoned belief that their circumstances, that the economy would stay largely the same; that changes would be minor and manageable. Never would they have entered that contract if they had known what was coming, and no reasonable person would hold them to it. Explicitly or not, they will be relying on one of the oldest legal principles regulating human transactions, the good faith principle.

The observation of the principle of good faith and fair dealing (*Treu und Glauben, bonne foi, bona fide*) is considered a legal obligation in many countries' legal systems, including those of (continental) civil law origin. In French Law, Articles 1134 and 1135 of the Civil Code specify that agreements must be executed in good faith. In German Law, Section 242 of the German Civil Code establishes the general obligation to execute contracts in good faith. Chinese contract law acknowledges a related principle. The *Quran* and the *Sharia* contain refined provisions regarding a merchants' law governed by sincerity, truthfulness, straightforwardness, fair dealings, and fulfilling promises. Common law courts have been traditionally reluctant to imply a general duty of good faith, though synonymous descriptions such as "playing fair", "coming clean" or "fair and open dealing" abound in English case law; and the "implied covenant of good faith and fair dealing" was incorporated into the US Uniform Commercial Code as part of Section 1-304.

As the good faith principle has been incorporated in multiple international instruments, the 1969 *Vienna Convention on the Law of Treaties* made it an overarching international principle with its Article 26 "Pacta sunt servanda": "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." The International Court of Justice has applied this principle to every stage of a treaty, from its formation to its termination, and even extended it to court proceedings.

It seems counterintuitive that at a time of ever-increasing regulation and codification, the concept of faith and trust would continue to gain traction in international law. Good faith, the "implied covenant", seems to harken back to pre-modern times of simple trading unregulated by law. All the while, many scholars regard the good faith principle with suspicion, claiming it defies definition; or that definition would render it useless. Yet the International Court of Justice above all, building on rich domestic experience, has given the principle clear definitional contours. It has identified recurrent cases where a good faith interpretation leads to a determined outcome: abuse of a right; contradictory behaviour; intransparent or misleading actions; failure to negotiate with the other party in search of a balance of interest.

The good faith principle has frequently been misunderstood and grouped as a purely ethical principle. While it does have that element of "do unto others", it is also transactional, placing it on quite a different footing than justice, equity, *ubuntu*, or solidarity. It considers the Other, but only in its relation with the Self. It is not altruistic and does not serve the common good or higher purposes; its benefits stay strictly between defined individuals.

Its application requires a bilateral relationship of legal equals – a certain balance that would not, for example, exist under criminal law where faith is replaced by the power of the state. Only in a reciprocal connection characterized by a perceived balance of power, the partners may place legitimate expectations in each other.

Importantly, there is also a cognitive element. Expectations replace knowledge: the knowledge of all the eventualities that may occur in the execution of an agreement. The more complex the world, the longer the time a contract runs its course, the more eventualities there are. The good faith principle allows the partners to forego the consideration of any and all eventualities. Legitimate expectation (of events not to occur; of things to remain the same; of people behaving as they have always done) replaces knowledge. In turn, this presupposes the truthfulness of the Other, since expectations can only be formed on the basis of correct knowledge.

The true purpose of the good faith principle in law is to safeguard the individual's will/consent. The individual places its faith in the Other to realize the contract in a manner that would have been covered by the individual's will, even if circumstances change or situations arise that were not considered at the time of negotiation. I trust the Other to respect my (hypothetical) will and invite him to put his or her trust in me to do the same.

It is clear from the above that sociology and psychology have a lot to contribute to the clarification of the functions and purposes of the good faith principle. Systems theory for example, with its focus on the functioning, maintenance and interaction of systems, is able to shed light on the precarious reciprocity described above. In his seminal 1968 study *Vertrauen: ein Mechanismus der Reduktion sozialer Komplexität*, Niklas Luhmann identified *Vertrauen* (trust, confidence, faith) as a social mechanism that reduces complexity and thus expands the realm of action and experience, like law and order: "Without trust we would not be able to leave the house." Faith in the Other allows us to disregard certain contingencies and plan for the future in the light of incomplete knowledge. It replaces full control with a certain amount of risk. Yet how much risk can we take without rattling the system?

In this Salon, I would like to discuss with you the principle of good faith from the angle of various disciplines. Instructive examples from psychology, sociology, literature etc. are very welcome.