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## Chapter 27

# The Concept of Good Faith\*

*Martijn W. Hesselink\*\**

### 1. INTRODUCTION

Most European civil codes contain a general good faith provision.<sup>1</sup> In addition, some codes contain specific rules in which reference is also made to the concept of good faith. Moreover, many specific rules in the codes are said to be special applications of good faith.

Most systems make a distinction between subjective good faith and objective good faith. Subjective good faith is usually defined as a subjective state of mind: not knowing nor having to know of a certain fact or event. It is of relevance particularly in property law (bona fide acquisition). Objective good faith, the concept that the general good faith clauses refer to, is usually regarded as a

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1. See Art. 1134, s. 3 French Civil Code; § 242 German Civil Code; Art. 2 Swiss Civil Code; Arts 1175 and 1375 Italian Civil Code; Art. 288 Greek Civil Code; Art. 762, s. 2, Portuguese Civil Code; Arts 6:2 and 6:248 Dutch Civil Code. See also Art. 1.7 UP and Art. 1.201 PECL.

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norm for the conduct of contracting parties: 'acting in accordance with or contrary to good faith'. Some systems have even emphasized this distinction by introducing separate terminology for objective good faith (*Treu und Glauben, correttezza, redelijkheid en billijkheid*). In France, however, such a distinction is not usually made.<sup>2</sup> The English common law traditionally does not recognize a concept of objective good faith. However, the concept has recently been introduced into English law by statute.<sup>3</sup>

In this paper I will discuss whether a European Civil Code or a Code of Contracts, if it were to be enacted,<sup>4</sup> should contain a provision on objective good faith. Therefore I will examine first how the concept of objective good faith is understood in the various countries (II). Then I will give a brief account of how good faith is applied by the courts (III). Finally, I will raise the question whether the traditional view of good faith constitutes an adequate representation of the way in which good faith actually operates (IV). The answer to that question will determine my final conclusions (V).

## 2. GOOD FAITH IN THEORY

### 2.1. INTRODUCTION

Objective good faith is usually regarded as a normative concept (2.2). However, a general good faith clause is not an ordinary rule like most others in the code. It contains an open norm (2.3), it is said, the content of which must be established through concretisation (2.4) into functions and groups of typical cases (2.5).

### 2.2. NORMATIVE CONCEPT

In all systems objective good faith is usually regarded as a normative concept. Indeed good faith is often seen as the highest norm of contract law, or of the law of obligations or even of all private law. For that reason many provisions in the code

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2. The same holds true for observations which many English lawyers make on the concept of good faith. They often speak of 'acting in bad faith' when referring to the conduct of contracting parties where most continental European lawyers would speak of 'acting contrary to good faith'.
  3. Unfair Terms in Consumer Contracts Regulations 1994, *SI* 1994/3159, which implemented EC Council Directive 93/13/EEC. See Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *MLR* 1998, 11 ff.
  4. On the desirability of a European Civil Code or a European Code of Contracts see my *The New European Private Law*, Ch. 5 (based on 'The Politics Of European Contract Law: Who Has An Interest In What Kind Of Contract Law For Europe?', in: Stefan Grundmann & Jules Stuyck (eds), *An Academic Green Paper on European Law*, The Hague, London, New York 2002, 181–191, and Ch. 8 (based on 'The Structure Of The New European Private Law' in: Ewoud Hondius and Carla Joustra (eds), *Netherlands Reports to the Sixteenth International Congress of Comparative Law*, Antwerp, Oxford, New York, 2002, 7–23).

which make no explicit reference to good faith are nevertheless said to be based on it.

Good faith is often said to be in some way connected with moral standards. On the one hand, it is said to be a moral standard itself, a legal-ethical principle;<sup>5</sup> good faith means honesty, candour, loyalty et cetera. It is often said that the standard of good faith basically means that a party should take the interest of the other party into account.<sup>6</sup> On the other hand, good faith is said to be the gateway through which moral values enter the law.<sup>7</sup>

Reference is thereby sometimes made to the Aristotelian concept of equity.<sup>8</sup> Actually, some systems do not distinguish between equity and good faith; they regard them as the same objective standard.<sup>9</sup> It is then said that abstract rules may lead to an unjust result in a specific case, and that good faith may provide the basis for an exception on the facts of that particular case. For that reason it is sometimes argued (as it was for early Equity in England)<sup>10</sup> that a decision based on good faith cannot serve as a precedent, as it is only meant to prevent injustice in a particular case, and that therefore no effort should be made to determine the content of the good faith norm in more general terms. However, this view is not generally accepted and the next Section will show that it does not correspond with the way in which good faith operates in practice.

Finally, in some systems good faith is regarded – and actually used by the courts – as a means through which the values of the Constitution enter into private law.<sup>11</sup>

5. See, e.g., Barbara Grunewald, *Bürgerliches Recht; Ein systematisches Repertorium*, 8th ed., München, 2009, 126 (*grundlegendes rechtsethisches Prinzip*); Giorgio Cian & Alberto Trabucchi, *Commentario breve al codice civile*, 9th ed., Padova 2009, Art. 1175, I, 1 (*principio etico-giuridico*).
6. See, e.g., Arndt Teichmann, in: *Soergel Bürgerliches Gesetzbuch mit Einführungsgesetz und Neben-gesetzen*, vol. 2 *Schuldrecht I* (§§ 241–610), 12th ed., Stuttgart, Berlin and Köln 1990, § 242, No. 4; C. Massimo Bianca, *Diritto Civile*, III, *Il contratto*, 2nd ed, Milano 2000, No. 254; A.S. Hartkamp, *Verbintenissenrecht* (in: *Asser series*), vol. II, *Algemene leer der overeenkomsten*, 11th ed., Deventer 2001, No. 300; Michael P. Stathopoulos, *Contract law in Hellas*, The Hague, London and Boston, Athens 1995, No. 51.
7. See, e.g., Christian Grüneberg, in: *Palandt Bürgerliches Gesetzbuch*, 69th ed., München 2010, § 242, No. 3; François Terré & Philippe Simler & Yves Lequette, *Droit civil, Les obligations*, 6th ed, Paris 1996, No. 414; Art. 1.106 PECL, Comment, A.
8. Aristotle, *Nicomachean Ethics*, V, x.
9. In France, accessory duties like the duty to inform or the duty of care, are founded by the courts on Art. 1134, s. 3 (*bonne foi*) and Art. 1135 (*équité*) alternatively, and sometimes on both. In the Netherlands the new Civil Code merged the concepts of *goede trouw* (Art. 1374, s. 3 old BW) and *billijkheid* (Art. 1375 old BW) into the new concept of *redelijkheid en billijkheid* (objective good faith) (Arts 6:2; 6:248 BW).
10. See J.H. Baker, *An Introduction to English Legal History*, 4th ed., London 2002, 106; S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed., London 1981, 90.
11. For Germany see, e.g., Herbert Roth, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 5th ed., München 2007, § 242, Nos. 46 ff.; for Italy see, e.g., M. Cantillo, *Le Obbligazioni*, in: *Giurisprudenza sistematica di diritto civile e commerciale* (founded by Walter Bigiavi), vol. I, Torino 1992, 207. See further my *The New European Private Law*, Ch. 6 (published as ‘The Horizontal Effect Of Social Rights In European Contract Law’, in: Martijn W. Hesselink,

2.3. OPEN NORM

At first sight, the theoretical status of good faith may seem quite unclear to an outsider since the terminology used by legal authors is far from unitary. Good faith is said to be a norm,<sup>12</sup> a (very important)<sup>13</sup> principle,<sup>14</sup> a rule,<sup>15</sup> a maxim,<sup>16</sup> a duty,<sup>17</sup> a rule or standard for conduct,<sup>18</sup> a source of unwritten law,<sup>19</sup> a general clause.<sup>20</sup> To an English lawyer – often accused by his continental European colleagues of making inconsistent use of terminology – this may seem rather confusing.

However, on closer inspection, the picture is less confused than it seems. It is generally agreed that a general good faith clause does not contain a rule, at least not one like most other rules in the code. It is not, like other rules, susceptible to subsumption since neither the facts to which it applies nor the legal effect that it stipulates can be established *a priori*. Good faith is therefore usually said to be an open norm, a norm the content of which cannot be established in an abstract way but which depends on the circumstances of the case in which it must be applied, and which must be established through concretisation.<sup>21</sup> Most lawyers from a system

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Edgar du Perron, Arthur Salomons (eds), *Privaatrecht tussen autonomie en solidariteit*, The Hague 2003, 119–131, and in *Europe e diritto privato* 2003, 1–18.

12. See, e.g., Karl Larenz, *Lehrbuch des Schuldrechts*, vol. I *Allgemeiner Teil*, 14th ed., München 1987, 129 (Norm); Jacques Herbots, *Contract Law in Belgium*, Deventer, Boston and Bruxelles 1995, No. 109 ('norm').
13. See, e.g., Art. 1.106 PECL, Comment, A ('a basic principle running throughout the Principles'), see for the role of good faith in the PECL: H. Beale, 'General Clauses and Specific Rules in the Principles of European Contract Law: The "Good Faith" Clause', in: S. Grundman & D. Mazeaud (eds), *General Clauses and standards in European Contract Law*, Den Haag: Kluwer Law International, 2006; Dieter Medicus & Stephan Lorenz, *Schuldrecht I; Allgemeiner Teil*, 18th ed., München 2008, No. 139 ('ein den einzelnen Rechtsvorschriften übergeordnetes Prinzip'); C. Massimo Bianca, *Il contratto*, No. 253 ('un principio di ordine pubblico che supera anche la legge').
14. See, e.g., A.S. Hartkamp, *Verbintenissenrecht II* (in: *Asser series*), Nos. 300, 301, 304 (*begin-sel*); Michael P. Stathopoulos, *Contract law in Hellas*, No. 50 (*principle*).
15. See, e.g., A. Menezes-Cordeiro, 'Rapport portugais', *Travaux de l'association Henri Capitant, Tome XLIII, année 1992. Journées louisianaises de Baton-Rouge et La Nouvelle Orléans, 'La bonne foi'*, Paris 1994, 338 (*règle*); Art. 1.106 PECL, Comment, A (*rule*).
16. See Jean Carbonnier, *Droit Civil*, vol. IV *Les Obligations*, 22nd ed., Paris 2000, No. 113: *maxime*.
17. See, e.g., Philippe Malaurie & Laurent Aynès, *Cours de droit civil*, part IV, *Les obligations*, 10th, Paris 1999, No. 622 (*devoir*); C. Massimo Bianca, *Il contratto*, No. 253 (*obbligo giuridico*).
18. See, e.g., C. Massimo Bianca, *Il contratto*, No. 253 (*regola di condotta*); A. Menezes-Cordeiro, 'Rapport portugais', 337 (*règle de conduite*); Michael P. Stathopoulos, *Contract law in Hellas*, No. 52 ('criterion of conduct').
19. See, e.g., A.S. Hartkamp, *Verbintenissenrecht II* (in: *Asser series*), No. 305.
20. See, e.g., Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung*, 3rd ed., Tübingen 1996, 149 (*Generalklausel*); Massimo Bianca, *Il contratto*, No. 253 (*clausola generale*); Michael P. Stathopoulos, *Contract law in Hellas*, No. 50 ('general clause').
21. See, e.g., Christian Grüneberg, in: *Palandt Bürgerliches Gesetzbuch*, § 242, No. 13, and Giorgio Cian & Alberto Trabucchi, *Commentario breve al codice civile*, Art. 1175, II, 1.

where good faith plays an important role, will therefore agree that these differences in theoretical conception do not matter very much. Indeed, many authors are themselves not very consistent in their indication of the status of good faith. What really matters is the way in which good faith is applied by the courts: the character of good faith is best shown by the way in which it operates.

#### 2.4. CONCRETISATION

As said, the abstract standard of good faith must be concretised in order to be able to be applied. The court determines what good faith requires in the circumstances of the specific case (*Einzelfallgerechtigkeit*).<sup>22</sup> However, the judge is not allowed to simply decide the way which seems most equitable to himself. He has to determine the requirements of good faith in such an objective way as possible.<sup>23</sup> In the Netherlands the code therefore provides in a specific provision what should be taken into account in determining what good faith requires in a particular case.<sup>24</sup> In addition to that, in most systems, particularly in Germany, scholars both in private law and in jurisprudence have developed methods for rationalising and objectivating the decisions of the court. The purpose of these *Methodenlehren* is to render the application of the law in general, and of general clauses like good faith in particular, as rational and objective (and thereby predictable) as possible, instead of leaving it to the subjective judgment of the individual judge. The generally agreed method for rationalising is that of distinguishing functions and developing groups of cases in which good faith has previously been applied (*Fallgruppen*). In doing so legal doctrine has developed an 'inner system' of good faith,<sup>25</sup> which is regarded as the content of that norm.

In Germany this operation has already been accomplished to a large extent. Compare Palandt/Grüneberg:<sup>26</sup> 'In einer mehr als 100jähriger Rechtsentwicklung haben Rechtsprechung und Lehre den Inhalt des § 242 aber durch Herausarbeitung von Funktionskreisen und Fallgruppen präzisiert.' The effort of concretisation has made the content of the good faith norm quite comprehensible. The result is a system of sometimes quite specific duties, prohibitions,

22. See, e.g., Arndt Teichmann, in: *Soergel Bürgerliches Gesetzbuch*, § 242, No. 6.

23. See, e.g., Karl Larenz, *Lehrbuch des Schuldrechts I*, 126 ff; P. Schlechtriem, 'The Functions of General Clauses, Exemplified by regarding Germanic Laws and Dutch Law', in: S. Grundman & D. Mazeaud (eds), *General Clauses and standards in European Contract Law*, Den Haag: Kluwer Law International, 2006, 48–55.

24. Article 3:12 BW: 'In determining what reasonableness and equity require, reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to the particular societal and private interests involved'. (Translation P.P.C. Haanappel & E. Mackaay, *New Netherlands Civil Code Patrimonial Law*, Deventer and Boston 1990).

25. The term inner system (*Binnensystem*) is taken from Jürgen Schmidt, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen; Zweites Buch Recht der Schuldverhältnisse; Einleitung zu §§ 241 ff.; §§ 241–243*, 12th ed., Berlin 1995, § 242, No. 87.

26. Christian Grüneberg, in: *Palandt Bürgerliches Gesetzbuch*, § 242, No. 2.

(sub)rules and doctrines which are all part of the content of good faith. It is said to have made decisions on the basis of § 242 BGB agreeably predictable (legal certainty) and rational.<sup>27</sup>

It is often emphasized, however, that concretisation will not and indeed should not lead to the fossilisation of good faith. First of all, it would be an illusion to think that concretisation will ever lead to a limited set of clearly distinguishable rules. But, it is said, more importantly good faith should remain an open norm in order to be able to continue to play its important role of making the law flexible. The inner system of good faith should not become a straitjacket.<sup>28</sup>

It should be added that the process of concretisation has not been totally identical in all countries. Whereas in Germany and in the Netherlands legal doctrine rather reacts to court decisions and tries to regroup them, and thus they build up a system (a rather more inductive approach), French and Italian legal doctrine seem to follow the more deductive approach of asking themselves what, in theory, the content of the duty of good faith, or the good faith standard could be, and thus they build up a system of sub-duties et cetera, in which the legal decisions are given their place at a later stage, the Italian authors thereby relying heavily on the achievements of German courts and legal doctrine.

## 2.5. FUNCTIONS AND FALLGRUPPEN

Most systems distinguish between several functions of good faith. Here again French law takes a somewhat different position since there the approach seems to be rather one of distilling sub-duties from the general duty of good faith.<sup>29</sup> But, as said, in most other systems legal doctrine has distinguished several functions of good faith. It is interesting to see that the number of functions attributed is usually three.

In Germany a distinction made by Siebert has been *grundlegend*. He distinguished three functions of § 242 BGB:<sup>30</sup> (1) supplementation of duties; (2) limitation of rights; (3) *Wegfall der Geschäftsgrundlage*. In addition to these three functions there is good faith interpretation which is based on § 157 BGB. This

27. See Arndt Teichmann, in: *Soergel Bürgerliches Gesetzbuch*, § 242, No. 7.

28. See Herbert Roth, in: *Münchener Kommentar*, § 242, Nos. 29 ff.

29. The subduties most often mentioned are the duty of loyalty (*obligation de loyauté*) and the duty to cooperate (*obligation de coopération*). See, e.g., Y. Picod, *Le devoir de loyauté dans l'exécution du contrat*, Paris 1989, *passim*; François Terré & Philippe Simler & Yves Lequette, *Les obligations*, nos. 415–416; A. Rieg, 'Articles 1134 et 1135' in: *Jurisclasseur, Contrats et obligations* (1989), nos. 86–104; B. Starck & H. Roland & L. Boyer, *Droit civil, Les obligations*, 2. *Le Contrat*, 3rd ed., Paris, 1989, nos. 1140–1146. The (important!) duty to inform (*obligation de renseignement*) is usually regarded as a subduty to the duty to cooperate. See, e.g., François Terré & Philippe Simler & Yves Lequette, *Les obligations*, No. 430). See on these duties, *infra*, III, A, 4.

30. See W. Knopp & W. Siebert, in: *Soergel Bürgerliches Gesetzbuch*, 10th ed., Stuttgart, Berlin, Köln and Mainz 1967, § 242, Nos. 34 ff.



distinction has essentially been followed by most scholars.<sup>31</sup> Some authors have defined one or more of the functions differently, while others have split the first function into two functions, thus arriving at a quadripartition.

In Italy scholars distinguish between a supplementing function (*funzione integrativa*) and an evaluating function (*funzione valutativa*) of good faith. However, not both are recognized by all scholars. As a matter of fact, a fierce debate has taken place between scholars who regarded a *funzione valutativa* as the exclusive role of good faith,<sup>32</sup> and those who wished that a *funzione integrativa* be recognized.<sup>33</sup> However, today both functions seem to have been recognized by the courts.<sup>34</sup> In addition the code provides for good faith interpretation (Article 1366).

In the Netherlands good faith has a supplementing function (or effect, as it is usually called: *aanvullende werking*)<sup>35</sup> and a limiting function (*beperkende werking*).<sup>36</sup> In addition, good faith plays a role in interpretation.<sup>37</sup> Before the adoption of the 1992 Civil Code the limiting effect was the object of a lively debate amongst legal scholars, somewhat similar to the debate in Italy. Some authors favoured a broad concept of good faith interpretation and held the *beperkende werking* to be superfluous;<sup>38</sup> others upheld the necessity of a separate limiting or correcting function.<sup>39</sup> The *Hoge Raad* took the latter view, just like the legislator who explicitly recognized the *beperkende werking* in the new code.<sup>40</sup>

Also in Belgium good faith is usually said to have three functions:<sup>41</sup> an interpretative function (*fonction interprétative*), a supplementing function (*fonction*

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31. See explicitly F. Wieacker, *Zur Rechtstheoretischen Präzisierung des § 242*, in: *Recht und Staat in Geschichte und Gegenwart; Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, 193/194, Tübingen 1956, 22; Barbara Grunewald, *Bürgerliches Recht*, No. 20; Dieter Medicus & Stephan Lorenz, *Schuldrecht I*, No. 142.
  32. See in particular U. Natoli, *L'attuazione del rapporto obbligatorio*, in: *Trattato di diritto civile e commerciale diretto dai professori Antonio Cicu e Francesco Messineo*, vol. XVI, t. 1, Milano 1974, 14 ff. See also, e.g., L. Bigliuzzi Geri, 'Buona fede nel diritto civile', in: *Digesto delle discipline privatistiche: sezione civile*, vol. II, 4th ed., 1988, 171–172; U. Breccia, *Le obbligazioni*, in: *Trattato di diritto Privato a cura di Giovanni Iudica e Paolo Zatti*, Milano 1992, 3.
  33. See, in particular, Stefano Rodotà, *Le fonti di integrazione del contratto*, Milano 1969 (reprinted in 2004), *passim*, especially Ch. 2 (111 ff.). See also, e.g., A. Di Majo, *Delle Obbligazioni in Generale, arts. 1173–1176*, in: *Commentario del codice civile Scialoja-Branca*, Bologna/Roma 1988, 322; C. Massimo Bianca, *Il contratto*, No. 253.
  34. See, e.g., Cass., 18 July 1989, n. 3362, Foro it., 1989, I, 2750, notes Di Majo and Mariconda. See, e.g., Giorgio Cian & Alberto Trabucchi, *Commentario breve al codice civile*, I, 2; M. Cantillo, *Le Obbligazioni*, 210.
  35. See A.S. Hartkamp, *Verbintenissenrecht II* (in: *Asser series*), Nos. 307 ff.
  36. See A.S. Hartkamp, *Verbintenissenrecht II* (in: *Asser series*), Nos. 312 ff.
  37. See A.S. Hartkamp, *Verbintenissenrecht II* (in: *Asser series*), Nos. 280 ff.
  38. J.M. Van Dunné, *Normatieve uitleg van rechtshandelingen; Een onderzoek naar de grondslagen van het geldende verbintenissenrecht*, Deventer 1971, *passim*; H.C.F. Schoordijk, *Het algemeen gedeelte van het verbintenissenrecht naar het Nieuw Burgerlijk Wetboek*, Deventer 1979, 21 ff.
  39. See in particular P. Abas, *Beperkende werking van de goede trouw*, Deventer 1972, *passim*.
  40. See Art. 6:2, s. 2, and Art. 6:248, s. 2 BW. See *Parl. Gesch. Boek 6*, 43 ff.
  41. See, e.g., Jacques Herbots, *Contract Law in Belgium*, No. 272; Jacques Périlleux, 'Rapport belge', in: *Travaux de l'association Henri Capitant, Tome XLIII, année 1992. Journées louisianaises de Baton-Rouge et La Nouvelle Orléans, 'La bonne foi'*, Paris 1994, 250.



*com-plétive*) and a restricting or limiting or mitigating function (*fonction restrictive, limitative, modératrice*). Sometimes a fourth function is distinguished that would allow the courts in certain circumstances to change the content of the contract, but this function, just as the *imprévision* theory, has not been accepted by the majority of authors and the courts.<sup>42</sup>

In a famous lecture published in 1956 Wieacker made an effort to specify the theoretical status of § 242 BGB.<sup>43</sup> That lecture is usually regarded as the theoretical foundation for Siebert's trichotomy. What Wieacker did was to assimilate the functions of good faith to those which Papinian had attributed to the praetorian law.<sup>44</sup> In a well-known passage Papinian had said:<sup>45</sup> 'Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam (...)'.

Wieacker stated: 'Auch § 242 BGB wirkt *iuris civilis iuvandi, supplendi* oder *corrigendi gratia*.' Similar to the *ius praetorium*, Wieacker said, good faith has three functions: (1) 'die sinngemäße Verwirklichung des gesetzgeberischen Wertungsplanes durch den Richter' (*officium iudicis*); (2) 'alle Maximen richterlicher Anforderung an das persönliche rechtsethische Verhalten einer Prozeßpartei' (*praeter legem*); (3) 'rechtsethische Durchbrüche durch das Gesetzesrecht' (*contra legem*). That trichotomy looks very similar to the distinctions made in Italy, the Netherlands, and Belgium: interpretation, supplementation, correction. In Greece and in Portugal good faith does have an interpretative, a supplementing and a correcting role, although legal authors do not seem to think so explicitly in terms of three functions of good faith. Therefore, ignoring the subtleties, one could regard this trichotomy as the European common core.<sup>46</sup>

It should be remarked, however, that the way in which Wieacker elaborates the assimilation of the functions of good faith to the three functions distinguished by Papinian as he continues his lecture is somewhat surprising. He regards the supplementation of duties as *iuvare*, whereas under Roman law and under contemporary law in Italy, the Netherlands, Greece, and Belgium this is regarded as *supplere*. Accordingly, he regards the *exceptio doli* (abuse of right) as *supplere*, whereas under Roman law and under contemporary law in Italy, the Netherlands and Belgium this is seen as *corrigere*. Several explanations may be given for this choice, which is followed by most German scholars: one being that the *exceptio doli* actually supplements a norm ('you must not abuse your right'), another that a distinction should be made between abuse of right and correction, because in the latter case (e.g., unforeseen circumstances) no reproach is made to the conduct of

42. See Jacques Périlleux, 'Rapport belge', 248.

43. F. Wieacker, 'Zur Rechtstheoretischen Präzisierung des § 242, especially 20 ff.

44. See, previously, *RG*, 26 May 1914, *RGZ* 85, 108.

45. D. 1, 1, 7.

46. P. Schlechtriem has suggested Wieacker's distinction of functions as a tentative understanding of how good faith might work under the UNIDROIT Principles or CISG: P. Schlechtriem, *Good Faith in German Law and in International Uniform Law*, in: *Centro di studi e ricerche di diritto comparato e straniero* (diretto da M.J. Bonell), *Saggi, conferenze e seminari*, 24, Roma 1997, 8.

the party who requests performance. However, the most likely reason seems to lie in the fact that Wieacke was determining the functions of § 242 BGB, and not those of good faith. Therefore he did not regard concretisation (interpretation), which is not based on § 242 but on § 157 BGB, as the first function (*iuvare*), thus making the others move down one place, and creating space for (and actually adding) another (fourth) function.<sup>47</sup>

In most systems good faith is said to have three functions. Between the systems, and within each system, there is some difference of opinion about the exact definition of each of the functions. But it seems fair to say that in Europe usually three functions of good faith are distinguished, each of which correspond to one of the functions Papinian attributed to the *ius honorarium* with respect to the *ius civile*: (1) concretisation/interpretation (*adiuvare*); (2) supplementation (*supplere*) (mainly of duties, e.g., duties to be loyal, to protect, to cooperate, to inform); (3) correction/limitation (*corrigerere*) (prohibition of abuse of right; *Fallgruppen* include: *venire contra factum proprium non valet*,<sup>48</sup> *dolo agit qui petit quod statim redditurus est, tu quoque*, prohibition of excessive disproportion). In addition, sometimes (in Germany and by some Belgian authors) a fourth function is added<sup>49</sup> in order to distinguish between the correction/limitation of a right for one's own (present or past) improper behaviour (*exceptio doli generalis (praesentis)* and *exceptio doli specialis (praeteriti)* respectively) and the correction/limitation of the right of an 'innocent' party (mainly when there is a change of circumstances or other *Unzumutbarkeit*).

### 3. GOOD FAITH IN PRACTICE

Good faith has had great success in many European legal systems during the twentieth century. In most countries the number of cases where the good faith

47. Siebert actually regarded *Wegfall der Geschäftsgrundlage* merely as a sub-group of the cases on abuse of right (W. Knopp & W. Siebert, in: *Soergel Bürgerliches Gesetzbuch*, No. 40).

48. This *Fallgruppe* has been accepted in many jurisdictions. For Germany see, e.g., Herbert Roth, in: *Münchener Kommentar*, § 242, Nos. 287 ff.; for the Netherlands ('*rechtsverwerking*') see, e.g., A.S. Hartkamp, *Verbintenissenrecht II* (in: *Asser* series), Nos. 320 ff.; for Italy see, e.g., A. Di Majo, *Delle Obligazioni in Generale*, Arts 1173–1176, 341; for Spain ('*prohibición de ir contra los actos propios*') see, e.g., L. Díez-Picazo & A. Gullón, *Sistema de Derecho Civil*, vol. I, 9th ed., Madrid 2001, 425 and 429 ff; for Portugal see, e.g., A. Menezes-Cordeiro, 'Rapport portugais', 341; for Switzerland see, e.g., Theo Mayer-Maly, in: Heinrich Honsell, Nedim Peter Vogt and Thomas Geiser (eds), *Kommentar zum Schweizerischen Zivilgesetzbuch I*, Basel and Frankfurt am Main 1996, Art. 2, Nos. 48 ff. Compare for Greece Michael P. Stathopoulos, *Contract law in Hellas*, No. 50. In France the principle has been recently discovered. See Martine Behar-Touchais (ed.), *L'interdiction de se contredire au détriment d'autrui*, Paris 2001.

49. See the four functions distinguished by Christian Grüneberg, in: *Palandt Bürgerliches Gesetzbuch*, § 242, Nos. 13–14 (who, however, in addition to these functions of § 242 BGB, distinguishes a separate role for § 157 BGB, regarding § 157 BGB as a provision dealing with *Wollen* and § 242 BGB as dealing with *Sollen* (see No. 19)): (1) *Konkretisierungsfunktion*; (2) *Ergänzungsfunktion*; (3) *Schrankenfunktion*; (4) *Korrekturfunktion*.

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clause has been applied has grown explosively over the last few decades. Also the field of application has been growing considerably in many systems. In the various systems good faith has been applied in virtually all fields of contract law (A), and sometimes even far outside it (B). In the following a few examples will be given of the way in which good faith has been applied. It is clear that this account will be nowhere near exhaustive.<sup>50</sup>

### 3.1. CONTRACT LAW

#### 3.1.1. Formation

Many systems recognize a general duty of precontractual good faith.<sup>51</sup> Some codes contain a specific provision on precontractual good faith,<sup>52</sup> in other systems the duty of precontractual good faith has been established by the courts.<sup>53</sup> On the basis of this general duty they usually recognize a precontractual duty to inform.<sup>54</sup> Moreover, they hold that a party may be liable if it breaks off negotiations in a manner contrary to precontractual good faith.<sup>55</sup> In some systems it is held to be contrary to good faith under certain circumstances to invoke the non- receipt of the acceptance of an offer (*exceptio doli specialis (praeteriti)*).<sup>56</sup>

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50. The same is true for references. See for more details M.W. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht*, Deventer 1999, 65–397 with references to many cases from various European jurisdictions.

51. See M.W. Hesselink, 'Precontractual Good Faith', in: Hugh Beale *et al.* (eds) *Cases, Materials and Text on Contract Law*, Oxford and Portland, Oregon 2002, Ch. 2, s. 2 (237–293).

52. See Art. 1337 Italian Civil Code; Art. 197 Greek Civil Code; Art. 227 Portuguese Civil Code; Art. 2:15 UP; Art. 2:301 PECL. The German doctrine of *culpa in contrahendo*, which was frequently said to be based on good faith, has now been codified in § 311 (2) (*new*) BGB.

53. See for France, e.g. Com., 20 March 1972, *Bull. civ.* IV, No. 93; *J.C.P.* 1973, 17534, note Schmidt; *R.T.D. civ.* 1972, 722, observation Durry; for the Netherlands, e.g. HR 15 November 1957, *NJ* 1958, 67, note Rutten; for Spain L. Díez-Picazo & A. Gullón, *Sistema de Derecho Civil*, vol. II, 68.

54. For France, e.g., Cass. com., 8 Nov. 1983, *Bull. civ.* IV, No. 298, 260; for the Netherlands e.g. HR 30 Nov. 1973, *NJ* 1974, 97, note GJS (under the new code good faith is no longer necessary as a basis; see now Art. 6:228(1)(b)); for Italy Rodolfo Sacco & G. De Nova, *Il contratto*, vol. I, 434 ff.; for Greece Michael P. Stathopoulos, *Contract law in Hellas*, No. 86; for Portugal J. De Matos Antunes Varela, *Das Obrigações em geral*, vol. I, 10th ed., Coimbra 2000, No. 69.

55. See for France, e.g., Civ. I, 12 April 1976, *Bull. Civ.*, I, No. 122, *Def.*, 1976, a. 31434, No.5, 389, note Aubert; for Italy, e.g., Cass., 17 June, 1974, 1781, *Foro padano* 1975, I, 80, note Prandi, Temi, 175, 408, note Fajella; for the Netherlands, e.g., HR 18 June 1982, *NJ* 1983, No. 723, note Brunner; *AA* 32 (1983), 758, note Van Schilfgaarde; for Spain L. Díez-Picazo & A. Gullón, *Sistema de Derecho Civil*, vol. II, 68 ff; for Greece, Michael P. Stathopoulos, *Contract law in Hellas*, No. 86; for Portugal J. De Matos Antunes Varela, *Das Obrigações em geral*, vol. I, No. 69.

56. See for Germany, *RG*, 13 July 1904, *RGZ* 58, 406; for the UP, Art. 1.7, Illustration 1.

### 3.1.2. Validity

A violation of the duty of good faith may lead to invalidity. For example, in many systems, before the introduction of statutory rules, standard terms could be held void on the basis of the general good faith clause,<sup>57</sup> and today in these statutes the test for the unfairness of a term often lies in good faith.<sup>58</sup> Further, a violation of a pre-contractual duty to inform, based on good faith, may lead to invalidity for mistake or fraud (see above).<sup>59</sup> On the other hand, good faith may limit invalidity. The right to offer an adaptation in order to avoid invalidity is often based on good faith.<sup>60</sup> In the Netherlands under the old code conversion was based on the general good faith clause.<sup>61</sup>

### 3.1.3. Interpretation

In most systems good faith plays a role in interpretation. Many systems contain a statutory provision on good faith interpretation;<sup>62</sup> in other systems the role of good faith in interpretation has been established by the courts.<sup>63</sup> Particularly the objective method of interpretation is often based on good faith. In addition to 'objective' interpretation in some systems there is a concept of supplementing interpretation (*ergän-zende Vertragsauslegung*), also based on good faith.<sup>64</sup> It amounts to what could be called 'gap filling'. If a contract does not contain any specific provision for a question that arises, the gap in the contract is filled by way of supplementing interpretation. Some authors have suggested a doctrine of good faith interpretation that is even broader, operating not only in case of gaps.<sup>65</sup>

57. See for Germany e.g., *BGH*, 29 Oct. 1956, *BGHZ* 22, 90 = *NJW* 1957, 17; for the Netherlands e.g., HR 20 Feb. 1976, *NJ* 1976, 486, note G.J. Scholten, *AA* 1976, 476, note Van der Grinten; for Greece, Michael P. Stathopoulos, *Contract law in Hellas*, No. 34.

58. See in Germany Art. 9 *AGBG*; in Portugal Arts 16 and 17 statute 1985 (see A. Menezes-Cordeiro, 'Rapport portugais', 349). For consumer contracts see also EC Council Directive 93/13/EEC, Art. 3, s. 1, which has been implemented in all EU jurisdictions.

59. In Greece, the test for mistake is (partially) based on good faith (Art. 142 CC; Michael P. Stathopoulos, *Contract law in Hellas*, Nos. 114 ff.).

60. Article 144 Greek Civil Code explicitly says so (see Michael P. Stathopoulos, *Contract law in Hellas*, No. 121). See on Art. 1432 Italian Civil Code e.g. Guido Alpa & M. Bessone, *I contratti in generale; Effetti, Invalidità e risoluzione del contratto*, vol. II, Torino 1992, No. 36; on Art. 6:230 Dutch Civil Code e.g., J.B.M. Vranken, 'Nietige overeenkomsten binden tot wat de goede trouw meebrengt', *NJB* 1990, 489.

61. See, e.g., HR 8 July 1987, *NJ* 1981, 284. Art. 3:42 of the new code is said to be based on good faith. See *Parl. Gesch. Boek 3*, 199 (M.v.A. II).

62. See § 157 German Civil Code; Art. 1366 Italian Civil Code; Art. 200 Greek Civil Code.

63. See for the Netherlands e.g. HR 20 May 1994, *NJ* 1995, 691, note Brunner.

64. For Germany see, e.g., *BGH*, 25 Jun. 1980, *BGHZ* 277, 301; for Greece, see Michael P. Stathopoulos, *Contract law in Hellas*, No. 154; for the UNIDROIT Principles see Art. 4.8 UP. The PECL do not contain a similar provision.

65. See in the Netherlands J.M. Van Dunné, *Verbindtenissenrecht I*, 137 ff.

### 3.1.4. Content

English textbooks on contract law usually contain a chapter entitled 'Content' that deals with the express and implied terms of the contract.<sup>66</sup> The UP have followed this example.<sup>67</sup> Legal systems in the French tradition speak of the effects of the contract.<sup>68</sup> Both for common law and civil law a distinction can be made between autonomous and heteronomous terms or effects of the contract. In Italian textbooks the determination of the heteronomous effects is usually called *integrazione* (supplementation or completion),<sup>69</sup> the term *interpretazione* being reserved for the determination of the autonomous effects.

In many systems good faith is regarded as one of the most important sources of heteronomous effects, or implied obligations as the Principles call them. The good faith duties most often incurred in the various legal systems are a duty of loyalty,<sup>70</sup> a duty of care,<sup>71</sup> a duty to cooperate<sup>72</sup> and a duty to inform.<sup>73</sup> The duty of loyalty protects the expectation interest. It obliges a party to secure performance or, more broadly, to ensure that the other party will have the use of the contract that he could reasonably expect from it. The contractual duty of care protects the negative interest. It obliges a party to take care that the person and the property of the

66. See, e.g., G.H. Treitel, *The Law of Contract*, 12th ed., London 2007, Ch. 6; M.P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, 15th ed., London, Edinburgh and Dublin 2006, Ch. 6; Ewan McKendrick, *Contract Law*, 8th ed., London 2009, Part II.

67. Chapter 5 is called 'Content'.

68. The PECL have not made a choice: see Ch. 6 which is entitled 'Content and Effects'.

69. See C. Massimo Bianca, *Il contratto*, Ch. 9; Rodolfo Sacco & G. De Nova, *Il contratto*, vol. I, Part 5, II.

70. See for Germany e.g. *BGH*, 28 April 1982, *NJW* 83, 998 (*Leistungstreuepflicht*); for France e.g. *Cass. soc.*, 30 Apr. 1987, *Bull. civ.* V, No. 237, 152; *R.T.D. Civ.* 1988, 531, obs. Mestre (*devoir de loyauté*); for Italy e.g. *Cass.*, 18 Jul. 1989, n. 3362, *Foro it.*, 1989, I, 2750, notes Di Majo and Mariconda (*obbligo di salvaguardia*); for Portugal A. Menezes-Cordeiro, 'Rapport portugais', 344; for Greece Michael P. Stathopoulos, *Contract law in Hellas*, No. 155; for Denmark Ole Lando, 'Each contracting party must act in accordance with good faith and fair dealing', in: *Festschrift till Jan Ramberg*, Stockholm 1996, 351.

71. See for Germany e.g. *BGH*, 10 March 1983, *NJW* 83, 2813 = *MDR* 1982, 1000 = *LM BGB* § 242 (Be), No. 47 (*Schutzpflicht*) and since Jan., 2002, § 241(2) *BGB (new)* (*Pflichten aus dem Schuldverhältnis*): 'Das Schuldverhältnis kann nach seinem Inhalt jeden Teil zur Rücksicht auf die Rechte, Rechtsgüter und Interessen des anderen Teils verpflichten.' See for France e.g. *Civ. I*, 17 Jan. 1995, *D.* 1995, 350, note Jourdain; *D.* 1996, *Somm.* 15, obs. Paisant; *R.T.D. civ.* 1995, 631, obs. Jourdain (*obligation de sécurité*). See for Greece Michael P. Stathopoulos, *Contract law in Hellas*, No. 155; for Portugal, A. Menezes-Cordeiro, 'Rapport portugais', 344. In Italy the *obbligo di protezione* only plays a very limited role; see for an example where such a duty is said to have been adopted *Cass.*, 11 May 1973, n. 1269, *Giust. civ.*, 1973, I, 1306.

72. See for Germany e.g. *BGH*, 25 Jun. 1976, *BGHZ* 67, 35; for France e.g., Paris, 26 Jun. 1985, *R.T.D. civ.* 1986, 100, n. 2, obs. J. Mestre; for Italy *Cass.*, 9 Mar. 1991, n. 2503, *Foro it.*, 1991, I, 2077, note Bellantuono.

73. See for France e.g. *Cass. I*, 18 Dec. 1985, *Bull. civ.* I, No. 357; for Germany e.g. *BGH*, 7 Dec. 1989, *LM BGB* § 242 (Be), No. 71 = *NJW* 1990, 1906 = *MDR* 1990, 690; for Italy e.g. *Cass.*, 8 Aug. 1985, n. 4394, *Giur. it.* 1987, I, 1, 1136, note Romano; for Portugal see A. Menezes-Cordeiro, 'Rapport portugais', 344.

other party do not suffer any damage during the performance. The adoption of a contractual duty of care is usually determined by the wish of the courts to provide victims (particularly when they are injured) with the protection tort liability (e.g., limited vicarious liability) or ordinary contractual liability (limited to impossible or late performance) does not provide or which is inaccessible (*non cumul*). In Germany there are even some who favour the adoption of a third track of liability (*dritte Spur*), which lies between contractual liability and tort liability, for a violation of a *Schutzpflicht* which arises whenever there is a special relationship (*Sonderverbindung*) between two or more persons.<sup>74</sup> The duty to cooperate was first proposed by Demogue, in a famous formula:<sup>75</sup> ‘Les contractants forment une sorte de microcosme; c’est une petite société où chacun doit travailler pour un but commun qui est la somme des buts individuels poursuivis par chacun, absolument comme dans la société civile ou commerciale’, and it was first ‘codified’ by the Principles.<sup>76</sup> It follows from the nature of this duty that it is more important in relational, long-term contracts, in particular long-term commercial contracts,<sup>77</sup> than in simple exchange contracts. Finally, the duty to inform does not only operate during the pre-contractual stage, but also during performance.<sup>78</sup>

### 3.1.5. Privity

In Germany the doctrine of *Vertrag mit Schutzwirkung zugunsten Dritten*, which was adopted on the basis of good faith,<sup>79</sup> considerably relaxed the privity of

74. Claus-Wilhelm Canaris, ‘Ansprüche wegen “positiver Vertragsverletzung” und “Schutzwirkung für Dritte” bei nichtigen Verträgen, zugleich ein Beitrag zur Vereinheitlichung der Regeln über die Schutzpflichtverletzungen’, *JZ* 1965, 475–482, 479, proposed a theory of an *einheitliches gesetzliches Schutzverhältnis*, based on good faith: ‘Alle Schutzpflichten finden ihre Grundlage in einem einheitlichen Schutzverhältnis, das mit der Aufnahme des geschäftlichen Kontaktes beginnt und sich über mehrere Stufen – Beginn der Vertragsverhandlungen, Vertragsschluß, Eintritt in das Erfüllungsstadium – verdichtet; es entsteht unabhängig vom Willen der Parteien, ist also “gesetzlicher” Natur, und findet seine Rechtfertigung im Vertrauensgedanken und seine positiv-rechtliche Grundlage in § 242 BGB’.

75. R. Demogue, *Traité des obligations en général, II Effets des obligations*, Part VI, Paris, 1931, No. 3 (9). Compare however, the reaction by Jean Carbonnier, *Droit Civil*, vol. IV *Les Obligations*, 22nd ed., Paris 2000, No. 114 (227): ‘L’outrance peut perdre une idée juste. On s’étonnera qu’à une époque où le mariage s’était peut-être trop transformé en contrat, d’aucuns aient rêvé de transformer tout contrat en mariage.’

76. Articles 5.3 UP and 1:202 PECL.

77. See Nagla Nassar, *Sanctity of Contract Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions*, Dordrecht, Boston and London 1995, 156 ff. See, generally, Ian Macneil, ‘Contract Adjustment of long-term economic relations under classical, neoclassical and relational contract law’, (1978) 72 *Northwestern University LR*, 854.

78. More precisely: in addition to a duty to give the other party information that may determine his consent, there may also be a duty to inform the other party in order to assure that a party obtains what he could expect from the performance. See M. Fabre-Magnan, *De l’obligation d’information dans les contrats; Essai d’une théorie*, Paris 1992, 281.

79. The courts have based it on § 157 *BGB* (*ergänzende Vertragsauslegung*), but the majority of legal doctrine, maintaining that there cannot be said to be a gap in the contract, regards § 242 *BGB* as the real foundation (see, e.g., Karl Larenz, *Lehrbuch des Schuldrechts I*, 227).



contract by broadening the possibility of a third party to profit from a contract between two other parties.<sup>80</sup> Under this doctrine certain third parties are included in the protection which a party to a contract has to provide for his partner and which makes full vicarious liability possible (*Schutzpflicht*; see above).<sup>81</sup> In the Netherlands, under certain conditions a party may invoke a limitation clause against a third party.<sup>82</sup>

### 3.1.6. Performance

In most systems if the parties have not made adequate provisions regarding the time and place of performance et cetera, and if the code does not provide for any specific regulations either, such rules are usually based on good faith or equity. However, one may ask whether a separate heading 'performance' is necessary in addition to 'content'. The (rules on) rights and duties which the code adds to what the parties have agreed upon may be spelled out under the heading 'content'.

In the UP the second section of the chapter on performance deals with hardship. However, since the effect of hardship may not only be that a party is no longer under a duty to perform a still existing obligation, but also that the obligations are changed or even the contract terminated, it seems more appropriate to distinguish hardship as a separate doctrine.

### 3.1.7. Hardship

During the course of the twentieth century a doctrine of hardship was adopted in most European systems. Often it was based on good faith, either because the courts based their doctrine on the general good faith clause<sup>83</sup> or because a specific code

80. See, for Portugal, A. Menezes-Cordeiro, 'Rapport portugais', 337.

81. A well-known example is the vegetable leaf case (*BGH*, 28 Jan. 1976, *BGHZ* 66, 51), where the doctrines of *culpa in contrahendo* and *Vertrag mit Schutzwirkung für Dritte* were combined in order to find liability against a supermarket, where the child of a (potential) customer was injured because it had slipped on a vegetable leaf that an employee of the supermarket had dropped.

82. See, e.g., HR 12 Jan. 1979, *NJ* 1979, 36, note Bloembergen; AA 1979, 556. Exceptions to the privity principle like this one are said to be based on good faith (see A.S. Hartkamp, *Verbintenissen-recht II* (in: *Asser* series), No. 386).

83. See for German law, e.g. *BGH*, 8 Feb. 1984, *NJW* 1984, 1746 = *MDR* 1985, 47 = *LM BGB* § 242 (Bb), No. 108. See now § 313 *BGB* (new) (Störung der Geschäftsgrundlage): '(1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann. (2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen. (3) Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung.'



provision referred to the concept of good faith<sup>84</sup> and is regarded as a *lex specialis* of the general good faith clause.<sup>85</sup> Indeed, the problem of unforeseen circumstances is often cited as the paradigm example of the operation of the concept of good faith and of the need for such a concept.

### 3.1.8. Remedies for Non-Performance

On the one hand, in many systems some of the remedies for non-performance are based on good faith. The right to withhold performance forms the most significant example. Most systems recognize an *exceptio non adimpleti contractus*. In some systems this remedy (which is actually a defence) is or was based on good faith.<sup>86</sup> In addition, Germany and the Netherlands recognize a more general right to withhold performance which is said to be a *lex specialis* of the general good faith clause.<sup>87</sup> Further, the German doctrine of *positive Vertragsverletzung* is often said to be (ultimately) based on good faith.<sup>88</sup>

On the other hand, the exercise of a remedy may be limited by good faith. In many systems a party is not allowed to terminate the contract or withhold its own performance for a merely minor non-performance. In some systems this is conceived as an exception to the general right to terminate or to withhold, based on good faith.<sup>89</sup> Moreover, the right to request specific performance may be limited by good faith.<sup>90</sup> Furthermore, in France the invocation of a *clause résolutoire* is limited by good faith.<sup>91</sup> Finally, in some systems the right (and its modalities)

84. See Art. 388 Greek Civil Code; Art. 437 Portuguese Civil Code; Art. 6:258 Dutch Civil Code.

85. See for the Netherlands *Parl. Gesch. Boek 6*, 974 (M.v.A. II); for Greece Michael P. Stathopoulos, *Contract law in Hellas*, No. 60, No. 292.

86. For both German and Dutch law the reason for this lies in the fact that the relevant provisions (§ 320 *BGB* and Art. 6:262 *BW* respectively) are seen as *leges speciales* of the general right to withhold (§ 273 *BGB* and Art. 6:52 *BW* respectively), which in turn is regarded as a *lex specialis* of the general good faith clause (see *infra*). Under the old code the Dutch *Hoge Raad* based the *e.n.a.c.* on the general good faith clause (see HR 30 Jun. 1978, *NJ* 1978, 693, note G.J. Scholten). Also in France the *e.n.a.c.* is sometimes based on good faith (see Philippe Malaurie & Laurent Aynes, *Les obligations*, No. 722).

87. For Art. 273 German Civil Code, see Christian Grüneberg, in: *Palandt Bürgerliches Gesetzbuch*, § 273, No. 1; for Art. 6:52 Dutch Civil Code, see *Parl. Gesch. Boek 6*, 205 (T.M.).

88. See, e.g., *BGH*, 13 Nov. 1953, *BGHZ* 11, 80 = *NJW* 1954, 229; Claus-Wilhelm Canaris, 'Ansprüche wegen "positiver Vertragsverletzung" und "Schutzwirkung für Dritte" bei nichtigen Verträgen', 475–482, 479; E. Kramer, in: *Münchener Kommentar*, 'Einleitung Band 2', No. 83. See now § 280 (*new BGB*). See for Portugal A. Menezes-Cordeiro, 'Rapport portugais', 340.

89. See for the Netherlands e.g., HR 10 August 1992, *NJ* 1992, 715; A.S. Hartkamp, *Verbintenissenrecht II* (in: *Asser* series), No. 516. See for Germany e.g. Herbert Roth, in: *Münchener Kommentar*, § 242, Nos. 438 ff. See explicitly § 320 *BGB* (*e.n.a.c.*).

90. See for the Netherlands HR 5 January 2001, *NJ* 2001, 79 (Multi Vastgoed/Nethou); A.S. Hartkamp, *Verbintenissenrecht I* (in: *Asser* series), no 639.

91. See, e.g., *Cass. Civ. III*, 15 Dec. 1976, *Bull. Civ. III*, No. 465, *R.T.D. Civ.* 1977, 340, obs. Cornu.

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to end a contract which was concluded for an indeterminate period – not a remedy for *non-performance*, of course – is based on good faith.<sup>92</sup>

### 3.2. OUTSIDE CONTRACT LAW

It is often thought, particularly by common law lawyers, that good faith typically operates in contract law. Good faith is often seen, partly due to its collocation in codes of the French legal family, as a counterbalance to the rigour of the *pacta sunt servanda* rule. Although this may be an important role, in most systems the field of application of good faith is far from limited to contract law. First, many codes already themselves indicate that the obligor and obligee to *any* obligation have to meet the standard of good faith in their conduct.<sup>93</sup> This means that a person who is liable in tort towards another person (e.g., because he has injured him or damaged his property) or who has been unjustifiably enriched at the expense of another person has to act in accordance with good faith. However, in addition to that, in some systems the field of application is even broader.<sup>94</sup> In the Netherlands good faith has been applied in, for example,<sup>95</sup> the law of succession, company law, bankruptcy law, property law and private international law. Hartkamp concludes that good faith must be held to be applicable in the whole of patrimonial law.<sup>96</sup> German law goes even further. There good faith operates not only in the whole of private law (e.g., family law, labour law, commercial law, copyright law),<sup>97</sup> but even outside it, in administrative law, tax law, procedural law (not only civil procedure) et cetera.<sup>98</sup>

92. For Germany see, e.g., *BGH*, 15 June 1951, *LM*, § 242 (Bc) BGB, No. 1; for the Netherlands see, e.g., HR 21 April 1995, *NJ* 1995, 437.

93. See § 242 German Civil Code, in the Section on the content of obligations in general; Art. 1175 Italian Civil Code, in the title on obligations in general; Art. 288 Greek Civil Code, in the Section on the law of obligations in general; Art. 762, s. 2, Portuguese Civil Code, in the Section on performance of obligations in general; Art. 6:2 Dutch Civil Code, in the title on obligations in general.

94. See Martijn W. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht*, 382 ff, where I give examples from various European jurisdictions of applications of good faith in property law, family law, company law, procedural law, public law, international law.

95. See, for more examples, A.S. Hartkamp, *Verbintenissenrecht II* (in: *Asser* series), No. 304.

96. A.S. Hartkamp, *Verbintenissenrecht II* (in: *Asser* series), No. 304.

97. See already *Reichsgericht*, 26 May 1914, *RGZ* 85, 108 (117): ‘Das System des Bürgerlichen Gesetzbuchs wird durchdrungen von dem Grundsatz von Treu und Glauben mit Rücksicht auf die Verkehrssitte und von dem Grundsatz der Zurückweisung jeder Arglist im weitesten Sinne. Die §§ 157, 226, 242, 826 erscheinen nur als besondere Ausprägungen eines allgemeinen Prinzips. (...) das allgemeine Prinzip beherrscht alle Einzelbestimmungen und muß gerade in ihnen lebendige Wirkung üben, zur Klärung, Erweiterung, Ergänzung oder Beschränkung des vereinzelt Wortlauts’. Compare the Swiss Civil Code which has put the general good faith clause right at the beginning (Art. 2).

98. See, e.g., Arndt Teichmann, in: *Soergel Bürgerliches Gesetzbuch*, § 242, nos. 65–106; Herbert Roth, in: *Münchener Kommentar*, § 242, Nos. 93 ff. Compare the *Travaux de l’association Henri Capitant, Tome XLIII, année 1992. Journées louisianaises de Baton-Rouge et La Nouvelle Orléans, ‘La bonne foi’*, Paris 1994, that discuss good faith in contract law, penal law, fiscal law, administrative law, and international law, in several systems.

In other words: it is applicable in all fields of the law, except maybe in penal law.<sup>99</sup>

In Germany an effort has been made to limit the field of application of good faith in a rational way. The solution was found in the *Sonderverbindung* (special relationship). It was said that only in the case of a 'special connection' between two or more persons, which is defined as a relationship of mutual trust similar to a contractual relationship, does their conduct have to meet the standard of good faith.<sup>100</sup> That standard being higher than the one generally prevailing in society (i.e., between 'strangers'), the *gute Sitten* (*boni mores*), the violation of which leads to tort liability. The *Sonderverbindung* concept was adopted by the courts. However, in their wish to apply the good faith standard (and all the duties, doctrines, and rules that come with it!) in many situations, they have broadened the concept considerably. As a result now not only neighbours, but also, e.g., plaintiff and defendant, competitors in a market, and a citizen and the State are said to have a special relationship.<sup>101</sup> It is therefore held that the concept of the *Sonderverbindung* has failed to limit the field of application of good faith and that its field of application must therefore be regarded as being unlimited.<sup>102</sup>

#### 4. AN ALTERNATIVE VIEW

##### 4.1. INTRODUCTION

Section 3 shows that in all systems the courts have developed many – often very important – new rules and doctrines on the basis of the general good faith clause, in contract law and far outside it. These rules at first sight do not seem to have very much in common. In particular there seems to be nothing else that distinguishes them from other rules than the fact that the courts, when adopting them, have mentioned a general good faith clause as their basis. However, in the traditional view, as shown in Section 2, all these rules are regarded as concretisations of good

99. See, e.g., Christian Grüneberg, in: *Palandt Bürgerliches Gesetzbuch*, § 242, No. 1 ('eine das gesamte Rechtsleben beherrschenden Grundsatz'). It is often said that only (substantive) penal law seems to be excluded from the application of good faith, as a result of the *nulla poena sine lege* principle. See, e.g., *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen; Zweites Buch Recht der Schuldverhältnisse; Einleitung zu §§ 241 ff.; §§ 241–243*, 13th ed., Berlin 2005, § 242, No. 1059, and Y. Loussouarn, 'Rapport de synthèse', in: *Travaux de l'association Henri Capitant, Tome XLIII, année 1992. Journées louisianaises de Baton-Rouge et La Nouvelle Orléans, 'La bonne foi'*, Paris 1994, 18.

100. See, e.g., Christian Grüneberg, in: *Palandt Bürgerliches Gesetzbuch*, § 242, No. 3; Karl Larenz, *Lehrbuch des Schuldrechts I*, 128.

101. See for other examples e.g. *J. von Staudingers Kommentar*, § 242, Nos. 127 ff.

102. Dieter Medicus & Stephan Lorenz, *Schuldrecht I*, No. 144. In *BGH*, 22 October 1987, *BGHZ*, 102, 95 (102), the *BGH* explicitly left open the question whether a *Sonderverbindung* is required for the application of § 242 *BGB*.

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faith, as the content of the open good faith norm. Here I will argue that good faith as it has developed cannot be regarded as a norm and that it does not make sense to regard rules like those mentioned in Section 3 as the content of an open good faith norm. What are usually called the three functions of good faith are in reality the normal tasks of the judge. There is no inner coherence between so-called good faith rules and doctrines. Instead of trying to develop an inner system of good faith that is supposed to concretise the open norm, legal doctrine should try to give the rules and doctrines that the courts have developed while invoking good faith their proper place in the system of the code.

#### 4.2. THE JUDGE AND THE CODE

Immediately after the enactment of the codes in Europe it was thought that the only thing the courts had to do was to apply the law, which they could find in the codes. This led to the traditional civil law view that the courts do not create the law, they merely apply it. Today, however, it is broadly accepted that this traditional view may be in conformity with the ideals of Enlightenment (separation of powers), but not with reality: also in civil law systems the courts do not only apply the law, they also create it.

As a matter of fact, in civil law as in common law systems, applying the law necessarily implies creating it. This follows from the simple fact that a court has to make a decision in every case that comes before it. In continental European legal systems the courts have to resolve cases by applying the rules from the code. This means that they have to apply abstract rules to concrete cases. A rule may be conceived as an abstract formula that links certain legal consequences to certain facts: if facts *a*, *b* and *c* occur the legal effect will be *x* (e.g., 'a person who promises to do something but then breaks his promise must repair the damage'). In applying a rule to a certain factual situation the judge may have to face three major problems. First, it may occur that he has some doubts as to whether the facts presented before him correspond to the facts as defined in the rule (e.g., does silence constitute a promise?), or whether the remedy which the plaintiff requests corresponds to the legal effect as defined in the rule (e.g., is lost profit part of the damage that must be repaired?). Secondly, it may be that not all the facts mentioned in the rule have occurred, but some others have, which he regards as equivalent, so that he finds it suitable that the same legal effect should follow in this case (or he regards the remedy requested as equivalent to the remedy mentioned in the rule). Thirdly, it may occur that all the facts mentioned in the rule have indeed occurred, but also some other facts which, in the eyes of the judge, mean that the legal effect indicated in the rule should not follow. Thus the court may find it necessary to interpret (concretise), to supplement and to correct the abstract rule in order to reach an acceptable result. This necessarily follows from the fact that it has to apply a system of abstract rules to a concrete case.

If a judge decides in a certain case to concretise, supplement or correct the law in a certain way, would he be doing justice if he refused to do so in a following

similar case? The answer is no, in most systems it is thought that justice requires like cases to be treated alike.<sup>103</sup> Therefore a court in civil law countries is bound by *stare decisis* just as much as a common law court. But if a court should decide in the same way as it decided in a precedent similar case, this means nothing less than that the court with its earlier decision has established a new rule, a rule which is a concretisation, a supplementation or a correction of an existing rule.<sup>104</sup> Thus the concretisation, supplementation, and correction of the law has become part of the law. Therefore the conclusion must be that the application of the law necessarily implies the creation of law.<sup>105</sup>

The same wish to treat like cases alike and different cases differently in accordance with the differences, also means that the law – be it common law or civil law – has to be a system:<sup>106</sup> rules are related to each other, according to the similarities and differences of the cases to which they apply.<sup>107</sup> The difference between civil law and common law is that most civil law systems have (temporarily) fixed their system of rules in a code in which the system is made more explicit; in most codes, particularly the German BGB and the new Dutch BW, as a result of a higher degree of abstraction. The creation of new rules (concretisations, supplementations, and corrections of existing rules) leads to new ramifications of the system. What has been said with regard to rules applies accordingly to the system. Clearly, the need to treat like cases alike may mean that as a result of the concretisation, supplementation, and correction of a rule other rules, located in other places within the system, are also adapted accordingly. Moreover, just like

103. In most systems the right to equal treatment is even constitutionally protected. See, e.g., in the Netherlands Art. 1 *GW*. For the EU see Ch. III (Equality) (Arts 20–26) Charter of Fundamental Rights of the European Union (Nice, 2000), especially Art. 20 (Equality before the Law): ‘everyone is equal before the law’. See also Art. 14 ECHR.

104. The rule is new in the sense that its existence was not known before. Unless one believes in natural law there seems to be no reason to take the view that the judge discovers a pre-existing concretisation, supplementation, or a correction to or of the rule. In that latter (rather fictitious) view all three problems could be regarded as questions of interpretation. For a debate on this issue (and on other related issues) see M.J. Borgers & I. Giesen & C.E.C. Jansen & F.G.H. Kristen & F.W.J. Meijer & T.H.D. Struycken & F.M.J. Verstijlen & J.B.M. Vranken, ‘Vragen aan Hesselink over zijn alternatieve visie op de functies van de redelijkheid en billijkheid en de taak van de rechter’, *NJB* 2000, 2029–2031 and M.W. Hesselink, ‘“Wat is recht etc.?”; Antwoorden op vragen van Tilburgers over rechtsregels, rechtspraak en rechtsvorming’, *NJB* 2000, 2032–2040.

105. For this reason it is important that the judge indicates the facts that were decisive in persuading him to adopt a certain interpretation, supplementation, or correction of the law. Legal certainty depends on the extent to which the judge makes it explicit which facts are decisive (i.e., which facts constitute elements of the new (sub-)rule) (and on consistency of course: *stare decisis*). A summary justification of a legal decision fits in with the idea that the courts merely apply the law, but is no longer justified when it is recognized that the courts create the law when applying it.

106. This is not a factual but a normative statement, based on the (fundamental) idea of equality.

107. In the same sense David Howarth, ‘The General Conditions of Unlawfulness’, in: A.S. Hartkamp et al. (eds) *Towards a European Civil Code*, 3rd ed., Nijmegen and The Hague, London, Boston 2004, 607 ff. See also J.H. Baker, *An Introduction to English Legal History*, 106, who says that in England the law has been regarded as a system since Tudor times.

rules, the system as such (which is, as said, nothing more than the formalisation of the wish to treat like cases alike) may be concretised, supplemented and corrected. Again, this is equally true for civil law as it is for common law. The fact that in civil law systems the legislator at a certain point in time has fixed the system does not mean that it will remain unchanged and closed. Just as the legislator cannot make rules that will remain unchanged in their application neither can it make a system that does not change when it is applied.

From the time when it was discovered that the courts (occasionally, it was thought) do create rules, civil lawyers have been trying, on the one hand, to determine why and when a judge is allowed to create law, and, on the other, to find a way by which to render the court's judgment as rational and as objective as possible, by developing – sometimes descriptive, but usually prescriptive – analyses of the decision-making by the judge. However, both these efforts presuppose that judge-made law is an anomaly. But, as we have just seen, that presumption is incorrect. Therefore there is no need for a justification that goes any further than the (constitutional) attribution to the judge of the power to resolve disputes on the basis of the law in the code. Also, there is no need to develop a prescriptive method for guaranteeing the objectivity and rationality of the court's judgment. We should merely recognize that we have confidence in the subjective judgment of our judges – in particular those in our Supreme Courts – with regard to the interpretation, supplementation and correction of the law, and in the way our judicial system is organized (e.g., the selection and training, the career system, the plurality of judges, the duty to provide the grounds for the decision in question, and the appeal system).<sup>108</sup>

#### 4.3. FUNCTIONS OF GOOD FAITH OR TASKS OF THE COURT?

It is interesting to see that these three activities with regard to the law – concretising (or interpreting), supplementing, and correcting – which follow from the normal task of the judge (i.e., to apply the law), correspond to the three tasks that Papinian attributed to the *praetor* with regard to the written law in Rome. The *praetor* (and other magistrates) had to help (concretise), supplement and correct the *ius civile*,

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108. This latter point has been the subject of criticism. See especially M.J. Borgers & I. Giesen & C.E.C. Jansen & F.G.H. Kristen & F.W.J. Meijer & T.H.D. Struycken & F.M.J. Verstijlen & J.B.M. Vranken, 'Vragen aan Hesselink over zijn alternatieve visie op de functies van de redelijkheid en billijkheid en de taak van de rechter' (see also Oliver Remien, *ZeUP* 2001, 420). In reply to those critics I have further developed this point in my article '“Wat is recht etc.?”; Antwoorden op vragen van Tilburgers over rechtsregels, rechtspraak en rechtsvorming'. I will not pursue this point any further here since the questions of how a judge must operate when he creates new rules and whether in doing so he has discretion, are not specific to judge-made law 'on the basis of good faith' (they arise in all cases where judges make new rules), and since my main claims regarding the nature of good faith, which I will make in the remainder of this s. IV and in the Conclusions (V), do not depend on this point. One may very well accept these claims without accepting that courts, when creating new rules, have discretion and/or do actually decide according to their own subjective views.



and the results of these three operations were regarded as new law which was called *ius honorarium*.

As I said before, Wieacker transplanted the Papinian trichotomy into modern German law. However, he did not do so in order to indicate the tasks of the judge with regard to the law in the code, or to show the relationship between German judge-made law and the law in the code, but rather in order to indicate the functions of modern good faith. Good faith, Wieacker said, concretises, supplements and corrects the law. And, as shown above, this view has not only been followed by most German legal scholars, it is also the common view in most European legal systems, albeit that there the contract (and not the law) is often regarded as the object of interpretation, supplementation and correction by good faith.<sup>109</sup>

However, if the functions of good faith are the same as the tasks of the judge, i.e., interpreting, supplementing or correcting the law, does it then still make sense to regard good faith as a specific norm?

#### 4.4. GOOD FAITH IS NOT A NORM

Good faith is usually said to be an open rule or open norm (see above, Section 2).<sup>110</sup> From the use of the term ‘open norm’ one could conclude that there must be a category of open norms which can be distinguished from other norms which are not open. However, such a conclusion would not be correct: all norms are more or less open. Every norm could be placed on a scale which ranges from totally open to totally closed: a norm is more open when fewer situations are excluded from its applicability.<sup>111</sup> The closer a rule gets to one of both extremes, the less it makes sense to speak of a rule: a totally closed rule (all cases but one are excluded) is an order, a totally open rule (no case excluded) is equivalent to the (potential) law. Although all norms are more or less open there are some norms which are usually explicitly called ‘open’, like *gute Sitten* in Germany, the *zorgvuldigheidsnorm* in the Netherlands, ‘a reasonable time’ in the Unidroit Principles, ‘unfair term’ in the European Directive. Often the legislator has deliberately formulated them in an open manner, usually because it was not yet able to determine which cases should be covered by the rule. The content of more open (or abstract) rules becomes clearer by their concretisation.<sup>112</sup> Through application, sub-rules are developed

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109. I will come back on this later.

110. A norm is only part of a rule, the other part being the effect of non-compliance with the norm. The term ‘general clause’ reflects openness on both sides.

111. In the same sense e.g. S. Whittaker, ‘Theory and Practice of the “General Clause” in English Law’, in: S. Grundman & D. Mazeaud (eds), *General Clauses and standards in European Contract Law*, Den Haag: Kluwer Law International, 2006, 70–75.

112. This is true for any rule (since all rules are more or less open) and accounts for the fact that after a certain period of time during which it is applied a code becomes unworkable: the system of the code has developed huge subsystems with ramifications that often reach a degree of abstraction that is so low that they nearly touch the ground of the facts. Hence the call for recodification.



which are interconnected. Thus a subsystem of the rule is developed. Therefore, as a result of its application, every rule will become the top of a subsystem.<sup>113</sup> Thus through a process of concretisation it becomes more and more clear what the content of the norm is.

However, the particularity of the general good faith clause as it has developed in many European legal systems is that – unlike other ‘general clauses’ – it does not contain (or no longer contains) a rule, because it is completely open: with regard to the premises (the norm) as well as with regard to the effects it is totally open.<sup>114</sup> Section 3 has given an impression of the variety of norms and legal effects that have been based on good faith by the courts. Statements, which are sometimes uttered to the effect that a general good faith clause makes the whole of contract law superfluous, or that the concept of equity could replace the whole law, are correct to the extent that in its field of application (see *infra*) good faith may be applied in *any* factual situation to establish *any* legal effect. In other words: any rule could be based on it. There is no difference between saying ‘good faith requires’ and ‘justice requires’ or ‘the law requires’.<sup>115</sup>

The cause of good faith having become a completely open norm, and therefore having ceased to be a norm at all, probably lies in the fact that the content of good faith is said to consist of three functions which in reality are the tasks of the judge with regard to the law. Had the courts given real content to the good faith norm (e.g., leaving it a norm for the way in which an obligor has to perform), instead of calling the three main tasks of the judge its content, it would have been a real (open) norm. However, the assimilation of the functions of good faith with the tasks of the judge has resulted in good faith becoming a completely open norm. In every system where the content of good faith is said to consist of these three functions good faith is a completely open norm, i.e., no norm at all.<sup>116</sup>

Therefore, it seems, because of the way in which good faith has developed in most European legal systems (see above), it can no longer be regarded as a norm.

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113. See as an illustration the commentaries on the various Civil Codes: the text of each article effectively serves as a heading for a very detailed account of a particular branch of the law, each of which may discuss hundreds of cases and cover dozens of pages of fine print.

114. The fact that good faith is not a norm may explain why its formulation or its place in the code of the general good faith clause does not seem to have been of any importance for its ‘application’ in most systems.

115. If, for example in a case of application of good faith in its corrective function, Parliament had allowed the same exception in the code, that would have been the result of a debate among MPs, who had all expressed their opinion about what would be most just, and then voted, whereas, if the need for this exception is ‘discovered’ by a judge in a concrete case lying before him, the judge has to state that the objective standard of good faith requires the exception instead of frankly admitting that in his view justice so requires.

116. The content of no other norm has been said to consist of functions which in reality are the tasks of the judge. This may explain why no other norm has become a totally open norm. Very broad concepts like *boni mores* and *zorgvuldigheidnorm* are not completely open: not only is the norm not completely open, also their effect (in terms of remedies) is limited. As a result, the inner systems of provisions like § 826 BGB and Art. 6:162 BW do not ‘compete’ (see *infra*, s. F) with the system of the code. See further my *De redelijkheid en billijkheid in het Europese privaatrecht* 423f.

In reality, good faith is not a norm but a mouthpiece (a *porte parole*) for new rules (see for a few examples Section 3).<sup>117</sup> However, if the general good faith clause is not a rule, it does not make sense to say that a decision is based on it. In reality such a decision is based on the new rule. Therefore the court should mention the new rule, and formulate it as explicitly as possible.

#### 4.5. FIELD OF APPLICATION UNLIMITED

It is clear that good faith, as is the case with the judge, should fulfil these three tasks with regard to the whole of private law, not only with regard to contract law. The assimilation of the functions of good faith with the normal tasks of the judge therefore explains why it has proved to be impossible in most countries to limit the field of application of good faith. The idea that the field of application of good faith should be limited follows from the conception of good faith as a standard for conduct which is higher than the one prevailing between strangers, and which should therefore be limited to contractual and similar situations. If, however, concretisation, supplementation, and correction of the law are regarded as the functions of good faith, there is no reason why good faith should only operate in a limited field of the law. Any rule is subject to interpretation, supplementation, correction, or, to put it in terms of rights and obligations: rights and obligations are never abstract, but always subject to concretisation, supplementation and limitation. To give an example, it is clear that not only a contractual right but any right should not be abused (i.e., any abstract right has certain limits).<sup>118</sup>

117. In the same sense Christian E.C. Jansen, 'Good Faith in Construction Law: the Inaugural King's College Construction Law Lecture' (1999) 15 *Const. L.J.*, 347 ff, on 358; H.J. de Kluiver, 'Goede trouw en rechtspersonenrecht', in: *A-T-D; Opstellen aangeboden aan Prof. mr van Schilfgaarde*, Deventer 2000, 225 ff.; W. Snijders, *WPNR* 6376 (1999), 792 ff, see on 793, who agrees in principle, but regards the present version as being too radical; Duncan Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law', 10 *ERPL* (2002), 7–28, on 19 ('the phrase good faith has no content at all'); Simon Whittaker & Reinhard Zimmermann, 'Good faith in European contract law: surveying the legal landscape', in: Reinhard Zimmermann & Simon Whittaker (eds), *Good Faith in European Contract Law*, Cambridge 2000, 7–62, 32: 'All in all, therefore, § 242 BGB is often needed merely for a transitory phase until a new rule is sufficiently well established to be able to stand on its own legs: so that "figuratively speaking, the statutory foundation of § 242 could be withdrawn without any risk of having the judge-made edifice collapse" [reference to Hein Kötz]. All in all, therefore, § 242 BGB is neither "queen of rules" nor "baneful plague" but an invitation, or reminder, for courts to do what they do anyway and have always done [reference to the present essay]: to specify, supplement and modify the law, i.e., to develop it in accordance with the perceived needs of their time.' See also H. Merz, *Berner Kommentar, Einleitungsband*, Bern 1966, Art. 2 *ZGB*, No. 42 (*Durchgangsfunktion*). Critical are P. van Schilfgaarde, 'Deel 4 van Hesselink', *WPNR* 6377 (1999), 811 ff; J.H. Dalhuisen, *RM Themis* 1999, 332 ff, Oliver Remien, *ZeUP* 2001, 418ff; M.J. van Laarhoven & W.M. Nieskens-Ispording, *NTBR* 2001.

118. In some systems the prohibition of the abuse of a right is seen as one of the rules contained in good faith. In some others it is seen as a separate doctrine. It is clear, however, that it is simply equivalent to the third task of the judge: in certain circumstances he has to make an exception

4.6. REJECTION OF AN INNER SYSTEM OF GOOD FAITH

Section 3 has shown that the courts have developed many new rules and doctrines on the basis of good faith, which for an outsider at first sight do not seem to have much in common. Section 2 has shown that all these rules are usually regarded as sub-rules of good faith, as part of the content of the good faith norm. However, if, as maintained here, good faith is not a norm, and if the functions of good faith in reality are the normal tasks of the judge, it does not make any sense to regard these new rules as the content of the good faith norm.

This also means that it does not make much sense to develop a sub-system of good faith either.<sup>119</sup> As said, the content of more open rules becomes clearer by their concretisation into a subsystem of rules, et cetera. However, the sub-system of a completely open rule inevitably turns out to be a parallel system of the law, which covers the whole field of law in which it applies, but in an alternative manner. The result of the concretisation of good faith would be just another system of law, parallel to the system of the code, but not self-sufficient.<sup>120</sup>

‘Good faith rules’ have nothing more in common that distinguishes them from other rules than that the courts, when adopting them, have mentioned the general good faith clause as their legal basis. In particular, good faith rules are not fairer or more equitable or more moral than other rules. Therefore, the sum of good faith rules and doctrines has no inner coherence. It is frequently assumed that good faith rules are necessarily or normally altruistic rules which impose solidarity and counterbalance party autonomy.<sup>121</sup> However, this is not necessarily the case. Indeed, it is more a question of which is the rule and which is the exception.<sup>122</sup> Most civil codes, especially those which were enacted in the nineteenth century,

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to the right. Of course, the question in which circumstances a right should be limited (‘the test for abuse’) depends entirely on the right involved. Usually, a property right is thought to be more sovereign than a contractual right. But the mechanism is the same: an abstract right does not exist in certain concrete circumstances. It is sometimes said that an existing right may not be invoked in certain circumstances. That terminology, however, reflects the idea of a higher norm (‘you should not abuse your right’) setting aside the lower norm (‘you have a right’). This difference in terminology reflects the debates in Germany (*Innentheorie/Außentheorie*) and in France (Planiol/Josserand). In Germany one approach won the debate, in France it was the other.

119. For this reason the rules in s. 3 were not presented in the shape of a tentative three functions plus *Fallgruppen* subsystem of European good faith but according to the structure of a possible European contract law. This approach is not correct, of course, in the sense that these rules must be seen in their own system.

120. Compare for equity F.W. Maitland, *Equity; also The Forms of Action at Common Law; Two Courses of Lectures*, Cambridge 1920, 18–19, and for *ius honorarium*, M. Kaser, ‘“Ius honorarium” und “ius civile”’, *SZRA* 101 (1984), 1–114, 4.

121. See especially Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’, *Harvard Law Review* 1976, 1685–1778 and, more recently, Marietta Auer, ‘Good Faith: A Semiotic Approach’, 10 *ERPL* (2002), 279–301.

122. Simon Whittaker & Reinhard Zimmermann, ‘Coming to terms with good faith’, in: Reinhard Zimmermann & Simon Whittaker (eds), *Good Faith in European Contract Law*, Cambridge 2000, 699.

were almost exclusively based on the idea of party autonomy. As a result, most concretisations, supplementations and corrections were inspired by concerns of solidarity. However, to the extent that contemporary private law is increasingly based on solidarity courts may well decide to concretise, supplement and correct those rules, on the basis of good faith, in a more autonomy-oriented way.<sup>123</sup>

Good faith shows the perceived weak spots of a legal system which the courts felt they had to repair by supplementation and correction on the basis of good faith.<sup>124</sup> In this respect ‘the content of good faith’ is very similar to equity in old English law and *ius honorarium* in Roman law.<sup>125</sup> And it is striking to see how much of what has been said on equity and on the *ius honorarium* is equally true for good faith in many civil law systems today. See, for example, Maitland on equity:<sup>126</sup> ‘we ought to think of equity as supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code. (. . .) Equity without common law would have been a castle in the air, an impossibility. For this reason I do not think that anyone has expounded equity as a single consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connection. (. . .) To have acknowledged the existence of equity as a system distinct from law would in my opinion have been a belated, a reactionary measure. (. . .) I think, for example, that you ought to learn the many equitable modifications of the law of contract, not as part of equity, but as part, and a very important part, of our modern English law of contract’, and Kaser on *ius honorarium*:<sup>127</sup> ‘Das *ius honorarium* ist stofflich kein geschlossenes Ganzes, kein System. (. . .) Während man dem *ius civile* zwar das Merkmal einer gewissen Kohärenz, wenn auch, wie der notwendig gewordenen Hinzutritt des *ius honorarium* beweist, nicht das der Vollständigkeit zuerkennen darf, bleibt das *ius honorarium* eine bloße Summe von miteinander nicht, jedenfalls zumeist nicht notwendig, zusammenhängenden Einzelercheinungen.’ The ‘content’ of present-day good faith could be regarded as a new *ius honorarium* or as civil law’s equity.<sup>128</sup> As

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123. See, as a Dutch example, HR 1 Oct. 1999, *NJ* 2000, 207 (Geurtzen/ Kampstaal) where the concept of good faith was used to limit the effect of a (protective) statutory rule, thus reinforcing party autonomy. See further my *The New European Private Law*, Ch. 3 (previously published as ‘The Principles of European Contract Law: Some Choices Made by the Lando Commission’, in: Martijn W. Hesselink, Gerard de Vries, *Principles of European Contract Law*, Deventer 2001, 5–95, and in *Global Jurist Frontiers*: vol. 1: No. 1, Art. 4), s. VI, B, 3.
124. Compare Simon Whittaker & Reinhard Zimmermann, ‘Coming to terms with good faith’, 677 (with a focus on contract law, the subject of their study): ‘a legal system which is generally at ease with its own legal rules for the creation and regulation of contracts will have much less of a need to have a recourse to a general legal principle such as good faith; if the legal rules are seen as generally good (however this is conceived), there will be no need to correct or to supplement them.’
125. In the same sense with regard to equity now also Simon Whittaker & Reinhard Zimmermann, ‘Coming to terms with good faith’, 675.
126. F.W. Maitland, *Equity*, 18–21.
127. M. Kaser, ‘“Ius honorarium” und “ius civile”’, 4, 72.
128. Of course, it is hardly surprising that the *ius honorarium* should be comparable to the good faith rules, since ‘the functions of good faith’ are parallel to those of the *ius honorarium* (see

said, it shows the perceived weak spots of a legal system which the courts felt had to be repaired by supplementation and correction on the basis of good faith.

Legal doctrine, instead of bringing the new rules developed on the basis of good faith in connection with each other, and becoming involved in discussions on whether a decision may be based on good faith and, if yes, on which good faith article or on which function et al., should relate them to the rules or doctrines that are concretised, supplemented or corrected by them.<sup>129</sup>

In addition to these theoretical objections, in many countries there will soon be a practical need for abolishing the inner system of good faith. As a result of the enormous number of cases 'based on good faith' it will no longer be manageable. However, this number will inevitably continue to rise in all systems where the tasks of the judge with regard to the law are regarded as the functions of good faith. More and more lawyers will question the sense of a distinction between the rules of the code and the rules that are said to be the content of the good faith norm.<sup>130</sup> Therefore it seems likely (and indeed desirable) that the same will happen to good faith as happened to equity and *ius honorarium*: when the distinction is no longer held to be justified and in addition will prove to be impractical, it will be abolished.<sup>131</sup> German law may already have reached that point.

However, the rejection of an inner system of good faith does not mean that the efforts made by legal doctrine over the last century have been useless. First of all, it has been of great importance that scholars have formulated the rules or even doctrines which were adopted in cases where the general good faith clause was 'applied'. Secondly, many parts of the inner system of good faith may be directly transferred into the system of the code, particularly to its general provisions (e.g., the *Fallgruppe* of *venire contra factum proprium*),<sup>132</sup> and, for contract law, into the chapter on content (e.g., the obligations to be loyal, to protect, to cooperate, to

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*supra*, s. C). However, there are differences as well. The most important one seems to be that the *ius honorarium* in principle contained all the law created by the magistrates, whereas today the courts do not base all their new rules on good faith (*see infra*, s. G).

129. On this approach *see* Simon Whittaker & Reinhard Zimmermann, 'Good faith in European contract law: surveying the legal landscape', 32: 'Whilst a radical adoption of this approach would probably go too far, and might also be impractical, the development is heading, in some respects, in this direction.' In Germany, the commentator to § 242 *BGB* of the prestigious Staudinger commentary had come to the same conclusion (*See* Jürgen Schmidt, in: *J. von Staudingers Kommentar*, 12th ed., Berlin 1995, § 242, no. 241). The 11th ed. (1961) of that commentary, by Weber, counted 1553 pages. In the 12th ed. J. Schmidt rightly pointed out that ideally the commentary to § 242 *BGB* should be limited to a few phrases explaining that good faith is not a norm, and should then refer, for a discussion of rules which the courts have adopted mentioning § 242 *BGB*, to the commentary to the rules that were changed by them. However, the current commentators Dirk Looschelder and Dirk Olzen have largely reversed that radical position and have re-established a more conventional commentary.

130. Compare once again, on equity, F.W. Maitland, *Equity*, 20.

131. It should be submitted, however, that in this respect good faith is closer to the *ius honorarium* than to equity, since the practical need for the abolition of the distinction is less urgent because good faith rules are not, like equity was until the Judicature Acts of 1873 and 1875, administered by a separate jurisdiction.

132. Compare Dieter Medicus & Stephan Lorenz, *Schuldrecht I*, No. 149.

inform). That is not only true for rules, but also for entire doctrines. This is shown where countries have adopted a new code: many doctrines that were adopted on the basis of good faith under the old code have been given their proper place in the new code, e.g., *culpa in contrahendo*,<sup>133</sup> *e.n.a.c.*,<sup>134</sup> hardship,<sup>135</sup> *Schutzpflicht*,<sup>136</sup> the duty to cooperate,<sup>137</sup> *Vertrag mit Schutzwirkung für Dritte*.<sup>138</sup> Incidentally, if good faith really were a norm it would have been much more logical for these legal systems to have placed all the good faith sub-rules in one section under a heading like ‘Good faith concretisations’.

#### 4.7. GOOD FAITH IS A COVER

Good faith is not the highest norm of contract law or even of private law, but no norm at all, and is merely the mouthpiece through which new rules speak, or the cradle where new rules are born. What the judge really does when he applies good faith is to create new rules. These new rules are concretisations, supplementations and corrections to the rules and system of the code. One may ask why the courts mention the good faith clause when they develop these new rules and doctrines. Why did the courts say – and are still saying – that they apply good faith instead of openly saying that they are interpreting, supplementing and correcting the law? Several reasons can be given. They all show that good faith has not only been a mouthpiece but also a cover.<sup>139</sup> Judges in continental European systems have felt uncomfortable with their role as creators of law. First, there is the traditional civil law view with regard to the role of the judge: the judge’s task is to apply the law (*trias politica*). Therefore, the courts may have felt uncomfortable in creating law instead of merely applying it, and they were encouraged to feel this way by legal doctrine.<sup>140</sup> Secondly, civil law judges may have felt somewhat at fault when they changed or created new rules because the law created by them was not democratically legitimised. Therefore, it was much easier for them, instead of openly declaring that they changed the law, to state that they merely applied it, invoking the general good faith clause in the code which had been adopted by the democratically elected legislator, and attributing to it the functions of concretising, supplementing

133. See § 311 (2) (new) BGB.

134. See Art. 6:262 Dutch Civil Code.

135. See Art. 6:258 Dutch Civil Code, § 313 (new) BGB, Art. 6:111 PECL, Art. 6.2.1 UP.

136. See § 241(2) (new) BGB.

137. See Art. 5.3 UP and Art. 1.202 PECL.

138. See § 311 (3) (new) BGB.

139. See Herbert Roth, in: *Münchener Kommentar*, § 242, No. 28. In the same sense Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, Wien, New York, 2002, 383: ‘Deckmantel für einen immensen Bestand an richterlicher heteronomer Rechtsetzung’.

140. The same ideals of the Enlightenment also explain why the *Methodenlehre* has been developed. It was clearly aimed at rendering the judgment as objective as possible, as close as possible to the mere application of the law. See, e.g., the efforts made by Karl Larenz, *Lehrbuch des Schuldrechts I*, 126 ff.



and correcting the law. A third reason why the judge felt uncomfortable, and probably the most significant one, lies in the sanctity of contract. In many of the cases where the courts have ‘applied’ good faith (particularly those in the first period) they have more or less radically interfered with the binding force of what parties had freely agreed to (the most typical example: unforeseen circumstances).<sup>141</sup> They therefore preferred to say that the highest norm of contract law required that in the given case the contractual right could not be exercised rather than to bluntly state that in their view it would be just to accept an exception to the abstract rule *pacta sunt servanda*. Then there is the argument of convenience. It is much easier for a judge to just mention the general good faith clause as the rule he applies than to formulate the new rule (*Die Flucht in die Generalklauseln*).<sup>142</sup> Finally, it should not be forgotten that many judges actually believed that good faith is a truly existing supreme norm, a belief that fitted perfectly in a European tradition of Aristotelian and Christian belief in natural law.

On the other hand, the question arises why the courts did not invoke the general good faith clause in all the cases where they interpreted, supplemented and corrected the law. Firstly, the courts only invoked good faith when they thought that the new rule could not realistically be based on another provision in the code.<sup>143</sup> That is why good faith interpretation of the law is fairly rare. The courts usually only invoke good faith when they want to supplement or correct it. Secondly, if one looks at the (often explosive) expansion of the field of application and the number of applications of the general good faith clause over the last few decades it seems that the courts themselves have been asking the same question: why not also use good faith as a foundation for change in fields of law other than contracts?

The discussion as to whether good faith has a supplementing and correcting function has served as a facade for the question whether the judge may supplement and correct the law (first: the contract). In other words, the emancipation of the judge has taken place under the cover of the emancipation of good faith and equity. The judge as a creator of new rules which supplement or correct the law has entered the scene behind the mask of good faith. Today all European code systems have accepted a supplementative and a corrective function of good faith;<sup>144</sup> the pretensions of the Enlightenment have been overcome. It seems that in this post-modern

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141. In all systems the emancipation of good faith occurred together with the decline of party autonomy.

142. J.W. Hedemann, *Die Flucht in die Generalklauseln; Eine Gefahr für Recht und Staat*, Tübingen 1933, 60, 66.

143. See Herbert Roth, in: *Münchener Kommentar*, § 242, Nos. 21 ff Jan Smits, *Het vertrouwensbeginsel en de contractuele gebondenheid*, Arnhem 1995, 101.

144. Including France. See, e.g., the cases on *clauses résolutoires* mentioned *supra* which date from the 1970s. Since then the increase in the application of Art. 1134 (3) Cc, which had been dormant for almost two centuries, has been explosive. See Christophe Jamin, ‘Une brève histoire politique des interprétations de l’Art. 1134 du CC’, *D.* 2002, 901–907, and M.W. Hesselink, ‘De opmars van de goede trouw in het Franse contractenrecht’, *WPNR*. 6154 (1994), 694–698. In addition French law recognizes the concept of *abus de droit*.



age the time has come to recognize that what the judge is doing is nothing to be ashamed of and that he can remove his good faith mask.

Rightly, in some systems it has been pointed out that if there had been no general good faith clause the courts would have adopted the same new rules.<sup>145</sup> Indeed, most of these new rules have been adopted in other systems without the use of the doctrine of good faith.<sup>146</sup> On the other hand, still other systems with a general good faith clause did not adopt the same rule.<sup>147</sup> This shows that the real question is whether the new rule should be adopted. In resolving this question the general good faith clause is of no assistance.<sup>148</sup>

## 5. CONCLUSION

The main conclusion must be that if the role of the judge as a creator of rules is fully recognized, there is no need for a general good faith clause in a code or restatement

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145. Michael P. Stathopoulos, *Contract law in Hellas*, No. 50.

146. To give only a few examples among the 'good faith applications' discussed *supra*, in s. III: in some systems including present Dutch law the precontractual duty to inform is based directly on the mistake provision; in several countries including Germany liability for breaking off negotiations is based on a specific doctrine (*culpa in contrahendo*) or on tort; in many systems objective interpretation is not based on good faith; English law has developed the doctrine of implied terms without the concept of good faith; in some countries statutory provisions on unfair terms were adopted without making any reference to good faith; in most systems the relaxations of privity are not based on good faith; in various countries including Italy a rule on hardship was adopted by the legislator or the courts without basing it on good faith; in several countries including England the availability of remedies (for English law particularly: specific performance) may be limited but on a different basis than good faith (for English law: the discretionary character of an equitable remedy).

147. These observations, which as said are based on comparative research (see my *De redelijkheid en billijkheid in het Europese privaatrecht, passim*), have now also been confirmed by the results of the Trento project. See especially Simon Whittaker & Reinhard Zimmermann, 'Coming to terms with good faith', especially 653 ff.

148. Neither is a provision like Art. 3:12 BW: 'In determining what reasonableness and equity require, reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to the particular societal and private interests involved'. (Translation P.P.C. Haanappel & E. Mackaay, *New Netherlands Civil Code Patrimonial Law*; 'reasonableness and equity' is the term which the new code uses for 'objective good faith'). Quite apart from whether these factors are specific for law making 'on the basis of good faith' (should they not always play a role when courts create new rules?), these factors can hardly be said to provide any guidance. 'Principles of law' (e.g. in the sense in which Ronald Dworkin understands them) either do not exist or cannot be known or are usually in conflict with each other (e.g. the principles of autonomy and solidarity). 'Current juridical views in the Netherlands' are manifold: we have quite a broad spectrum of political parties and we live in a strongly individualized and multicultural society. And 'private interests involved' (i.e., especially the interest of the parties) are usually diametrically opposed (that is why they have gone to court in the first place). And even if all these factors could be determined and weighed objectively, does a judge really have enough time to study the programmes of the political parties, hold opinion polls, visit various communities et cetera?

of European private law.<sup>149</sup> It may even do harm because it gives the courts an excuse for not formulating the rule which they apply. If, however, there is still some doubt as to the power of the courts, a good faith clause could be useful in order to assure that the judge may create new rules. This may be of particular importance for a new code for Europe where the European Court of Justice and the other courts may need extensive powers right from the beginning. It would then be logical not to put the article in the chapter on contract law, but right at the beginning as one of the first preliminary provisions of the code, just like in Switzerland. The wording would not matter much; experience shows that any phrase containing the words 'good faith' will suffice. However, if good faith were to have only such an *Ermächtigungsfunktion*,<sup>150</sup> it could be argued that it would be more straightforward instead of using good faith terminology to provide expressly that the courts may interpret, supplement and correct the code where necessary. It may be argued that for the sake of tradition the term 'good faith' should be used. However, since this term may lead to hostile reactions from common law lawyers (however unjustified) 'equity' may be an acceptable compromise, since it is part of both the civil law and the common law traditions. It is submitted, however, that this term has the disadvantage of having a strong natural law connotation.

Secondly, this paper shows that the concept of good faith in itself should not keep common law and civil law lawyers divided. On the one hand, common law lawyers should not fear the concept of good faith. The adoption of a general good faith clause in itself does not say anything about which rules will speak through its mouth.<sup>151</sup> Good faith does not differ much from what the English lawyers have experienced with equity. The real question is whether the rules adopted by the courts mentioning good faith should be included in a European code or restatement. It does not make any more sense for a common law lawyer to fight the concept of good faith than it would have been to fight the whole of equity. Rather, good faith serves as a guarantee against the rigidity that the English fear from a code. On the other hand, civil law lawyers should not insist too much on including a good faith provision in a code or restatement of European private law. If they fully recognize what the courts do when they 'apply' good faith they should acknowledge that it should not be necessary that a court mentions the words 'good faith'

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149. However, it may be worthwhile to anchor a general principle of solidarity in the most general part of the code next to the principle of autonomy. In the same sense see Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, 385. Such a principle, although admittedly quite broad and open, would nevertheless retain some distinct normative coherence especially if conceived in opposition to party autonomy. See further my *The New European Private Law*, Ch. 3, s. VI, B, 2.

150. The term is taken from H. Merz, *Berner Kommentar, Einleitungsband*, Art. 2 ZGB, No. 22.

151. In the same sense now Whittaker & Reinhard Zimmermann, 'Coming to terms with good faith', 687: 'the recognition of a principle of good faith does not require a particular result in the circumstances, it merely allows the possibility of a particular result, leaving the court to decide whether or not it should be brought about. From this perspective, it could indeed be argued there would be no *substantive* legal change were English or Scots law to accept a general principle of contractual good faith (...).'

### *The Concept of Good Faith*

when it creates a new rule which supplements or corrects the law.<sup>152</sup> Common law lawyers do not believe that the law should be exclusively made by the legislator, nor do they consider it necessary that all the law should be democratically legitimated. This may largely explain why English law has not needed the concept of good faith.

Finally, it has become clear that it is not possible to say anything on the 'content' of European good faith without knowing the system that it will be operating in.<sup>153</sup> Ideally it should be empty. All the rules mentioned in Section III, for example, if accepted, could (and indeed should) be given their proper place in a code or restatement of European private law.<sup>154</sup>

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152. The same is true for a (separate) doctrine of abuse of right: if the courts are only prepared to limit a right if they can say that the right is set aside by a higher norm (the prohibition of abuse), such a doctrine should be maintained. If, however, a court is prepared to say that the right given in abstract terms by the code is limited in certain situations, then such a doctrine is not necessary.

153. On the question whether the 'content' of good faith necessarily consists of altruistic rules which impose solidarity and counterbalance party autonomy see my *The New European Private Law*, Ch. 3, s. VI, B, 3.

154. In the same sense see Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, 384.