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The Flexibility of Good Faith Concept

Camelia IGNĂTESCU ¹

Abstract

Concerned with the analysis of the good faith concept, as flexible concept, there are some people who have considered that law compels the judge to look at good faith and justice and usually to reconsider the contractual background in order to discover new commitment susceptible of variations and multiplications during time. In the circumstances that, good faith is an instrument of interpreting contracts, and the judge wonders what it is that the parties, of good faith, could have desired to hire, we understand here the demands of a behavior rule in performing the convention.

Keywords:

good faith, flexible concept, rule of law

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The rule of law must answer some opposing demands, namely, on the one hand to be firm and rigid meaning to assure order and peace in security, and on the other hand, to lead economic and social relation which imply certain flexibility from the applicable standards. There are flexible concepts with variable meaning and standards which answer this opposition specific to the law, the judicial security and the mobility necessary to the law, “concepts whose formulation and meaning remain constant, but whose area, field and meaning are in the same time dynamic and progress especially depending on the spatial-temporal factors” (Fortier, 1991:756).

In order to judge the social behavior related to what is done or should be done, the reference criterion is given by the standard concept, for instance we have the standard of good father of the family.

Together with standards, weighing instruments, there are also “due standards with a sort of transcendence related to a behavioral model” (Fortier, 1991). This case is about an extension of the standard area for certain concepts which belong to the flexible concept domain with variable content. The standard is a model of behavior effectively practiced in social life, and the judicial standard is a veritable model of behavior where find the idea of necessity, of a proper behavior, without relation to the purpose (for instance, without anything to do with obtaining something useful) or the reason (for instance without the fear of a sanction).

The necessity and proper behavior is an attribute of ethics, so that, the judicial standard is influenced within ethics. There is a difference of intensity and not of character between the flexible concept and the standard.

The term flexible concept appears as a global name, in order to designate the following concepts which provoke the judge: to pronounce a value judgment; to apply directly on the social behaviors; by relating to a normative, judicial or not, available or on-going system, in order to reach a decision or establish a standard. There is a difference of intensity and not of character between the flexible concept and the standard.

Thus understood, the flexible concept and the standard may be studied within their function without discerning between them, because the two of them belong to the same area.

The flexible concept has two functions and one of them is associated to the flexibility which is granted to the standards of justice where it is integrated, and the second one is associated with the fact that it constitutes a hidden source of normativity (Pattaro, 1984:816).

Deliberately, the law maker introduces in some texts the flexible concept with a variable content, adjusting the constant reality of human being and the variable ones of historical background.

The standard application by integrating the particular cases and adjusting at new needs, is permitted by the flexible concept from one age to another. Depending on the circumstances, the flexible concept has a variable content. There are illustrations of the flexible concept: good faith, law and order, good father of the family, acuity, child's advantage.

Once applied by the judge, the flexible concept seems to reach multiple meanings depending on the particular case, aspect illustrated also by good faith.

For the moral standard to penetrate the positive law, the law-maker and the trial courts make use of some means, and one of those means is good faith, thus, in order to value the contractual good faith, one has to take into consideration the involvement of ethics in law.

Good faith is one of the means used by the law-maker and the judge which generate the penetration of the moral standard in positive law. During the activity of the contractual good faith one has to take into account the involvement of ethics in law; "if good faith is an instrument of interpreting contracts, the judge wonders: what it is that the parties of good faith could have desired to hire" (Fortier, 1991).

Although it is a consequence of the involvement of moral and psychological data in law, connected to the introduction of a flexible concept in the standard, there cannot be one definition for good faith, existing only particular applications of the concepts taken into consideration.

Therefore, related to the introduction of a flexible concept in standards, because of the immixture of moral and psychological data in law, there is not a unique definition of good faith.

Depending on the particular case and the facts of the concrete case, whether applied by the judge, the flexible concept seems to have multiple meanings, situation illustrated by the good faith too, in the following examples extracted from the judiciary practice (Fortier, 1991):

- The example of an exclusive concession contract for the sale of a vehicle, when the judge decided that: it is wrong to reproach the grantor, who had not had the obligation to consult his concessionaires before merging with other brand, that he did not accomplish his good faith obligation and that he granted the activity to other concessionaire which proved a lack of dynamism by refusing to sign “the agent contract he was proposed”.
- In other resembling contract, when the grantor authorizes an adversary to transfer his equipment close to other concessionaire, for whom the place where the equipment was transferred was very important, that grantor proved a lack of good faith. The grantor which authorized created the conditions of a disloyal competence for the concessionaire which put up with a commercial discomfort, susceptible of compensation.
- The borrower which keeps silence about the non fulfillment of a sale agreement and which repays the loan in many installments does not fulfill the loan agreement in good faith.
- Whether applying a clause, good faith is requested.

Thus, the flexible concept of good faith gives the possibility to the judge to adjust the standard in force depending on the social reality.

The judge in charge with the application of the flexible concept of good faith makes that this one accomplishes a determinacy activity of the deed content (being necessarily connected to the deed) and of the standard content for each and every case, too. Thus related to the good faith mentioned in article 1170 Romanian Civil Code, the judge whose function is to adjudicate, establishes the existence, the nature and the lengths of respective rights of parties (Turcu, 2011).

It is obvious the moral resonance which results from the depositions “The parties shall act in good faith both throughout negotiating and concluding the contract and throughout its execution. They can not eliminate or limit the liability” and the question that arises is that of transposition from the ethical plan into the judicial plan.

So, what includes the idea of good faith?

Gheorghe Mihai considers that “the good faith is a general law principle that interdicts the state and the citizens, in all their activities, in any field, to proceed dishonestly in order to turn to advantage one of their rights” (Mihai, 2003).

There is a subjective dishonesty in case of a fraudulent or a treacherous conduct that could produce a prejudice to a third person or to a part deliberately, having nothing in common with the objective good faith. The dishonesty stands under the general law principle *fraus omnia corrumpit* (a fraud corrupts everything). The presumption that the dishonesty can be completely absent in the human conduct is not allowed by the social reality.

We also must not ignore that there is a risk that should be taken into consideration the subjective good faith could permit some intentions less noble as soon as the material or personal interest about the effects of a juridical paper becomes the most important.

The order that should rule the legal proceedings is brought into danger by the dishonesty; this dishonesty should be combated with the justice rules (Jaluzot, 2001).

The justice rule and the social reality are not synonyms, this is explained through the fact that even if there are juridical precepts which forbid someone to produce a prejudice by treacherous or fraudulent means to a third, it doesn't mean that all the law subjects are adapted to these. We can say when, analyzing the human conduct, it was influenced by the good faith or by the dishonesty, only after a meticulous analysis of the circumstances *de facto*, under the reservation of probation difficulty. If the spirit standing for that conduct cannot be determined it is better that reasoning should be given up and exclude the rules that require the proof of dishonesty, but the conclusion shouldn't be that the subject acted with good faith (Romain, 2000).

If we consider this position from the moral and religious perspective, every human conduct benefit by the presumption of good faith, this can be conceived as the expression of a conviction in a good nature, a human natural gift.

Flexibility generates a diversity of the good faith concept leading to the question whether we know that there is a unitary and homogenous concept of good faith (Constant, 1990).

It is possible to discover managing lines, beyond the diversity of concrete cases, which implies the implementation of good faith concept in jurisprudence in order to allow the formulation of a definition. The good faith performance of a contract contains an obligation of loyalty and a cooperation duty between the contracting parties. The faithful

performance of the convention and the respect of the given word represent the significance of loyalty, which can be seen as a standard carried out by the judge.

The faithfulness of the contract performance risks being as flexible as the concept it expresses and establishing itself only in case of application, but it is allowed to define some boundaries, namely: under the performance faithfulness the creditor cannot impose the debtor financial sacrifices of a disproportionate importance against the utility of the reachable purpose, but even if some difficulties arise against the performance, the faithfulness obligation implies the contract fulfillment.

As far as the contract of association is concerned, the cooperation obligation allows us to consider a contract as a small company where each has to work for a common purpose, representing the sum of individual purpose of each; the judge discovers the positive obligation of cooperation and mutual assistance more frequently.

In a contract for services the assistance companies are retained, whether there are not specific stipulations, by the diligence obligation towards their clients whom they have to help through an effective cooperation, but the diligence obligation does not exonerate the debtor to accomplish the services which the creditor is entitled to receive. The good faith concept illustrates the judge's creative power which charges the parties with obligations unmentioned by this one, but implicitly contained in the contract (Zamșa, 2013).

The jurisprudence gives life to the text, according to which the conventions have to be fulfilled in good faith, and by this it receives its own judicial value, whose autonomy was denied for a long time.

Carrying out the flexibility concepts necessitates a value judgment which is accomplished over the facts and not imposed by these ones; among the case data the judge makes a choice and selects those which answer his vision about the judicial content of the flexible concept.

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