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Laureano F. Gutierrez Falla

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Good Faith in Commercial Law and the UNIDROIT Principles of International Commercial Contracts

Dr. Laureano F. Gutiérrez Falla*

I. Introduction

The meaning of the words “good faith” have eluded law students since their original conception. Good faith is an ancient ethical concept that has influenced philosophical, moral, and juridical institutions throughout their continuing evolution. Today, it serves as a basic principle of legislative and judicial decision-making that tries to join, as much as possible, the cold terms of a given law with what is just and equitable under the social-political circumstances of the moment. Good faith is a dynamic concept, and though it maintains its own idiosyncrasy, this has not prevented it from evolving within the political and social fabric of nations.¹

II. What Do the Words “Good Faith” Mean?

The first problem that confronts a law student or lawyer is defining the very concept: what is good faith? Though commentators such as Italy’s Natoli maintain that it is impossible to conceive a precise definition of the rules of good faith,² it is possible to find several concepts of good faith in the variety of interpretations adopted by authors who have analyzed this principle. For example, Atienza believes good faith consists of the “conviction of acting in accordance with the law.”³ A broad concept

* Professor of Law, Universidad Nacional Autónoma de Honduras and the Universidad Tecnológica Centroamericana.

1. Arrubla Paucar & Jaime Alberto, *Contratos Mercantiles* [Mercantile Contracts], in Editorial Biblioteca Jurídica “Dike” [Dike Editorial Law Library] Volume 1, 91 (8th ed. 1998).

2. See Natoli U., *L’attuazione del rapporto obbligatorio: Il comportamento del debitore* [The Performance of the Obligatory Relationship: The Behavior of the Debtor] (2d ed. 1984).

3. See Humberto Podetti, *Deberes de las partes al momento de extinguirse el contrato de trabajo* [The Duties of the Parties at the Time of Performing a Work Contract] R.D.C.O., 76 (1977).

unifies good faith's diverse aspects: the pursuit of one's own rights coupled with the ethical will to act honestly. Similarly, Escriche defines good faith as "the sincere and just conduct with which one executes contracts, without trying to deceive the person with whom agreement is reached."⁴ This concept is incorporated into Article 1.7 of the UNIDROIT Principles of International Commercial Contracts [hereinafter "Principles"], which states:

Good faith and fair dealing

- (1) Each party must act in accordance with good faith and fair dealing in international trade.
- (2) The parties may not exclude or limit this duty.⁵

Notwithstanding this foundational spirit of goodwill, applying the concept of good faith incurs a double risk. It may: (1) allow for the application of charitable sentimentality that demerits the certainty of contracts (especially those in which similar characteristics of the contracting parties exclude all ideas of "favor debitoris"); (2) permit the exercise of interpreting the contract under individual judge's subjective ideologies. This threat is compounded when the theory of good faith requires judges to apply static concepts like the ethics of the period. Thus, good faith is a slippery expression that reflects the changing points of view of generations and succeeding societies. Especially in a time when change occurs with rapidity, we do not have the luxury of stating "that the laws of Medes and Persians will not be altered."⁶

As America's Farnsworth stated:

In recent years, courts have often supplied a term requiring both parties to a contract to exercise what is called *good faith* or sometimes *good faith and fair dealing*. This duty is based on fundamental notions of fairness, and its scope necessarily varies according to the nature of the agreement. Some conduct, such as subterfuge and evasion, clearly violates the duty. However, the duty may not only proscribe undesirable conduct, but may require affirmative action as well. A party may thus be under a duty not only to refrain from hindering or preventing the performance of the other party's duty, but also to take some affirmative steps to cooperate by

4. See Franz Wieacker, *El Principio General de la Buena Fe [The General Principle of Good Faith]*, translated by José Luis Carro, Editorial Civitas, R.D.C.O., 652 (2d ed. 1986).

5. UNIDROIT Principles of International Commercial Law [hereinafter Principles] art. 1.7, available at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf> (last visited Feb. 22, 2005).

6. E. Allan Farnsworth, *The Return of Good Faith: This Time to Stay?* presented at the Ninth Congress of the International Academy of Commercial and Consumer Law, Bond University, Australia., Aug. 1998.

helping the other party perform. Courts have often supplied a term requiring a party to exercise good faith when that party has been given a discretionary power over one of the terms of the contract. Output and requirements contracts are leading examples of this.⁷

Analyzing the issue in the legislative field, we find different ideals and concepts of good faith within the majority of legal jurisdictions. For example, Article 723 of the Honduran Civil Code states:

Good faith is the awareness of having acquired the dominion of the thing by legitimate means, exempt from fraud and all other vices. . . .⁸

The Uniform Commercial Code of the United States defines good faith in Section 1-201(19):

Good faith . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing.⁹

Finally, Article 1.8 of the Principles has a similar provision regarding contractually inconsistent behavior:

A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.¹⁰

III. Functions of Good Faith

How does good faith function in legal application? In addition to being a rule of conduct guiding all legal matters, one of good faith's basic functions is the so-called "integrative function." As Italy's Nanni stated, "majority doctrine grants good faith the function of integrating contractual obligations as a source of the 'lex contractus' at the same level as the consent of the parties, the law, and the uses and customs."¹¹ Thus, in addition to the limits of contractual law, good faith constitutes a discipline that is equal to the contract terms themselves, necessary to fill the inevitable legal gaps that occur and create other prohibitions and obligations not imposed by the law, thus completing the contractual system.¹² As Article

7. E. ALLAN FARNSWORTH, UNITED STATES CONTRACT LAW 137 (Revised Ed. 1999).

8. CIVIL CODE [C. CIV] art. 723 (Hond).

9. Uniform Commercial Code [hereinafter UCC] § 1-201(19), available at <http://www.law.cornell.edu/ucc/1/article1.htm#s1-201> (last visited Feb. 22, 2005).

10. Principles. *supra* note 5, at art. 1.8.

11. NANNI, LA BUONA FEDE CONTRATTUALE [THE GOOD FAITH CONTRACT] 501 (1986).

12. Galgano Francesco, quoted by D'Angelo in "La Tipizzazione," *Giurisprudenziale delle Buona Fede Contrattuale.-Contrato Civile e Commerciale*, Cedam, Padua No.2, p.702 ss p.703.

4.8 of the Principles states:

Supplying an Omitted Term

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what is an appropriate term regard shall be had, among other factors, to:

- a) the intention of the parties;
- b) the nature and purpose of the contract;
- c) good faith and fair dealing;
- d) reasonableness.¹³

In addition to this important integrative function, good faith serves as a principle that should guide judges in the resolution of cases. This is the reason for Articles such as 1546 of the Honduran Civil Code which states:

Contracts must be executed in good faith. They therefore obligate not only that which is expressed therein, but all other things that arise precisely from the nature of the obligation or those things which by law or customs form part of the same.¹⁴

Also, Article 1337 of the Italian Civil Code (the equivalent of Article 1546 of the Honduran Civil Code)¹⁵ describes a rule of conduct formulated in general terms that leaves to the court the analysis of concrete cases in accordance with good faith.¹⁶ This decision, according to Wieaker, is applied by the judge in three different capacities:

- a) As executor of the law by applying the principles of good faith to the issues not covered by the law.
- b) Reestablishing the “medium behavior” in the exercise of subjective rights; and

13. Principles *supra* note 5, at art. 4.8.

14. C. CIV art. 1546 (Hond).

15. *Revista del Derecho Comercial y de las Obligaciones* [Review of Commercial Rights and Obligations] (1979), available at <http://cisg.tij.uia.mx/ambito05.html> (last visited Feb. 22, 2005).

16. NANNI, *supra* note 11.

c) As tutor of the just behavior of both parties, following a rule, not necessarily written, that can signify in certain cases, the creation of a new rule of law of judicial nature.¹⁷

Through these means, the traditional legal order is complemented by the judge's discretion to evaluate the situation and apply standards of good faith to the law within parameters based on modern behavior or social values present in the sphere in which the decision is to take place. Thus, in contract law, conduct contrary to good faith is elevated to the equivalent of a breach of contract.¹⁸ A perfect example of this principle may be found in the 1992 Dutch Civil Code that states:

Article 6:248(2): A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity.¹⁹

Ewoud Hondius²⁰ elaborated that "according to the legislative history, the article should be used with restraint and this indeed has been the practice."²¹

IV. Kinds of Good Faith

Good faith is composed of two factors: 1) objective good faith, which corresponds to the rules of behavior, and 2) subjective good faith, which corresponds to the actor's state of mind.

Objective good faith is exemplified by Article 752 of the Honduran Commercial Code which permits one of the contracting parties to refuse to comply with his obligation in a bilateral contract if the other party to the contract does not fulfill his.²² The principle of objective good faith represents a modern rule that the reciprocal loyalty of conduct must inspire the execution of the contract (i.e. good faith should inspire its formation and interpretation, and should accompany the contract in each of its phases).²³

17. Wieacker, *supra* note 4.

18. D'Angelo, *supra* note 12, at 707 quoting Mario Rotonda.

19. CIVIL CODE [C. CIV] art. 6:248 (Dutch).

20. Ewoud Hondius is a professor at the Law School of the Universiteit Utrecht. His educational background includes a Master of Comparative Law, Columbia University and Ph. D., Universiteit Leiden. Hondius is a member of several organizations, including the Commission on European Contract Law (Lando-Commission) and the Royal Dutch Academy of Sciences, and is member titulaire of the Académie Internationale de Droit Comparé. Ghent University Law School Website, at <http://www.law.ugent.be/llm/documents/Curriculum%20Hondius.htm> (last visited Feb. 22, 2005).

21. Letter from Ewoud Hondius to WHO (Aug. 16, 2004) (on file with author).

22. COM. CODE [C. COM] art. 752 (Hond.).

23. FRANCESCO MESSINEO, *DOCTRINA GENERAL DEL CONTRATO*, Volume II, 206 (Eur. ed. 1952).

For example, the compliance of objective good faith (loyalty) by the contracting parties (creditor and debtor) signifies that a creditor may not demand more, in enforcing his credit, nor can the debtor offer less, in complying with his obligations, than that which is required by honesty and the objective of the contract. Objective good faith constitutes, therefore, a required form of conduct, the manner in which the parties should conduct themselves being one of the basic principles of all contractual doctrine.

Subjective good faith, on the contrary, is the belief or psychological state of the person under which he is convinced that he is acting legitimately to complete his part of the contract.²⁴ According to Ferreyra subjective good faith is "the firm conviction of the legitimacy with which a certain juridical situation is acquired and maintained."²⁵ A typical example of subjective good faith is codified in Article 723 of the Honduran Civil Code:

Good faith is the awareness of having acquired the dominion of a thing by legitimate means, exempt from fraud and all other vices.²⁶

V. Good Faith and the Contract

It is undeniable that the influence of good faith is most apparent in the contractual field of law. However, in analyzing the influence of good faith in contractual matters it is necessary to observe the different phases of the contract. We must address not only its enforcement but also its preparation.

A. *Culpa In Contrahendo*

The application of the principle of good faith in the preparatory phase of the contract, i.e. "culpa in contrahendo," is specifically regulated by legislation, such as the Italian Civil Code, which states in Article 1337:

Negotiation and precontractual responsibility. The parties, in the negotiation and formation of the contract must behave in accordance with good faith.²⁷

Article 2.1.15 of the Principles presents an additional example:

Negotiation in bad faith

24. *Id.*

25. EDGARD A. FERREYRA, PRINCIPALES EFECTOS DE LA CONTRATACION CIVIL 184 (1972).

26. C. CIV art. 723 (Hond.).

27. CIV. CODE [C. CIV] art. 1338 (Italy).

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is in bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.²⁸

According to Benatti, “[t]o respond to the demands of substantial justice all modern legal systems accept the principle that the conduct of he who acts incorrectly in the precontractual phase should be reprehended.”²⁹ Benatti states that in regulating said principle two systems exist: the system that expressly recognizes that right (as in Article 1337 of the Italian Civil Code), and those systems that accept that right, based on the principles of extracontractual liability, as occurs in France and Switzerland. The second system is also found in jurisdictions that follow Spanish “jurisprudente” of Article 1902 of the Spanish Civil Code.³⁰ This approach is the direct and textual precedent of Article 2236 of the Honduran Civil Code and jurisdictions that apply the principle of Article 41 of the Swiss Code of Obligations, which states that he who antijuridically causes damage to another, either intentionally or by negligence, is obligated to indemnify the aggrieved party.³¹ The same obligation is incurred by he who intentionally causes damage to another by violating public mores. The reasoning behind this conclusion is that although there is no express norm that so states, the principle of good faith is not only one of the fundamental rules of all obligations, but of the juridical order *in totum*.

The same concept is maintained by Larenz who stated:

The liability for violating a precontractual duty is ruled by the same principles as those of the liability for breach of contractual conduct. However, the precontractual duties (negotiations) are not, in the sense here analyzed, those derived from a precontract, but rather those resulting from an obligatory relation analogous to the contractual one that arises due to the existence of contractual negotiations that exist independent of whether the contract is or is not executed. These precontractual negotiations are not yet an obligatory relationship as such, (as is a precontract that creates, at least, for one of the parties, a duty of execution) because they do not create a

28. Principles, *supra* note 5, at art. 2.1.15.

29. Benatti, *Culpa in Contrahendo*, *Contratto e Impresa* 287 (1987).

30. *Id.*

31. Swiss Code of Obligations, art. 41, available at <http://www.admin.ch/ch/i/rs/220/a41.html> (last visited Feb. 22, 2005).

judicially claimable obligation, but only a duty of conduct (in the measure demanded by good faith).³²

The requirements for application of the principle of *culpa in contrahendo* to precontractual negotiations are as follows:

- a) That one of the parties believed that the contract would be executed, including the cases of mental reservation or lack of a serious intention by the breaching party.
- b) That the breaching party refused to conclude the contract without just cause.
- c) That the breach caused a damage to the party *in bono*.³³

If said requirements are met, the rules of Article 2236 of the Honduran Civil Code would apply. This Article states:

He who by action or omission causes damage to another intentionally or negligently, is obliged to repair the damage caused.³⁴

B. *Why Is the Contract Obligatory?*

There are various doctrines that try to explain the obligatory nature of contract. One of the first applies the doctrine of "pacta sunt servanda" which affirms that the contract and its terms are binding due to the will of the contracting parties and within the limits of this intention (i.e., the content of the intention of the parties, must be analyzed to determine the extent to which one of the parties has declared to the other that he is obligated to comply with his obligations).³⁵ An example of the application of this doctrine may be found in Article 1348 of the Honduran Civil Code:

Obligations that arise from contracts have force of law between the contracting parties and must be complied with in accordance with its terms.³⁶

Similarly Article 1.3 of the Principles reads:

Binding character of contracts

32. KARL LARENZ, DERECHO DE LAS OBLIGACIONES [LAW OF OBLIGATIONS] 110 (1958).

33. *Id.*

34. C. CIV art. 2236 (Hond.).

35. PUIG BRUTAU, MANUAL DE DERECHO CIVIL [MANUAL OF CIVIL RIGHTS], Volume II, 229 (2d. ed. 1978).

36. C. CIV art. 1348 (Hond.).

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these principles.³⁷

An alternative doctrine maintains that the contract is obligatory based on the fact that the manifested consent of one of the parties has influenced the sphere of interest of the other party, who would suffer damages if the first party were not bound. Under this doctrine, the obligatory nature of the contract is based on an ethical consideration derived from good faith that requires protecting the reliance that the promise or conduct of one of the parties may have been the reason for the execution of the contract by the other.

Defending this position, Puig Brutau maintains that to try to allege the will of one of the parties as the only basis for the contractual obligation can only be partially maintained when his compliance is conflicted.³⁸ The idea that the obligatory nature of the contract is based on the will of one of the parties is both insufficient and excessive. It is insufficient because frequently the will of one of the parties is incapable of creating valid and effective obligations. On the other hand it is excessive because many times the solution to a contractual problem may only be reached if what has really been agreed to by the parties is not taken into account.

Two of the major problems in contractual matters revolve around what requirements should be met for a declared intention to be binding and what effects it produces in addition to or apart from those really desired by the parties. The existence of these problems proves that the spheres of liability for contractual obligations are not radically separated, i.e., those that result from the factual situations created by acts of the parties in the formation of the contract and factual situations that later appear in the relations between them.

In analyzing cases of breach of contract the doctrine that maintains that the contract is obligatory due to the principle of good faith states:

[G]ood faith may be characterized as a criterion of conduct based on the fidelity of the contractual relationship, and on the obligation to comply with a legitimate expectation of the other party; the obligation to use all of one's efforts in the service of the interests of the other party in the measure required for the kind of obligatory relationship entered into; the obligation to satisfy the interests of the creditor of the obligation.³⁹

Based on this principle, Article 1364 of the Honduran Civil Code may be

37. Principles *supra* note 5, at art. 1.3.

38. BRUTAU, *supra* note 35.

39. EMILIO BETTI, *TEORIA GENERALE DELLE OBLIGAZIONI*, Volume I, 103 (1953).

interpreted in conformity with the fidelity and obligation imposed by good faith when it states:

Damages must be indemnified from the moment in which the debtor is constituted in default or, if the obligation is of a negative nature, from the moment of its breach.⁴⁰

As Bianca has well stated, "the contractual nature of the debtor's liability is recognized for its harmful intervention in the juridical sphere of the creditor."⁴¹ Applying this principle to Honduran legislation, the debtor's obligation to indemnify the damages caused is, by its own nature, a different and accessory obligation to that of complying with the contract. It is based on the obligation of security or protection of the creditor's "violated interest" in the performance of the contract. That is the reason why Nanni maintains that in contracts with correlative obligations, the exception of non-compliance is based on conserving the substantial equilibrium between the opposing obligations. The party alleging the exception may only be considered to be acting in good faith if his refusal to comply with the contract constitutes a behavior that is objectively reasonable and logical in the sense that the refusal to comply may be justified as an unenforceable obligation in the context of the economic function of the contract.⁴²

Applying such reasoning, Article 752 of the Honduran Commercial Code states:

In bilateral contracts, each contracting party may refuse to comply with his obligation if the other party does not comply or does not offer to comply simultaneously with his obligation, unless the non-simultaneity of the obligations has been agreed in the contract or these result from the nature of the contract itself.⁴³

Therefore, if one of the parties breaches his obligation in a bilateral contract, the other party only has the right not to comply with his obligation if said breach is objective, reasonable, and logical, and his concrete justification being based on the relationship between the non-requested obligation and the denied obligation, taking into account the economic function of the breached contract. As stated in Articles 7.1.2 of the Principles:

Interference by the other party

40. C. CIV art. 1364 (Hond.).

41. MASSIMO BIANCA, *DELL'INADEMPIMENTO DELLE OBLIGAZIONI* 34 (1967).

42. NANNI, *supra* note 11.

43. C. CIV art. 752 (Hond.).

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk.⁴⁴

Additionally, Article 7.1.3 of the Principles states:

Withholding performance

(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.⁴⁵

The preceding principles are in accord with the modern juridical position which considers the breach as a specific legal event that has its own substance and autonomy.⁴⁶ This explains why part of the good faith doctrine considers it as included within the field of the "theory of the unjust," which requires "the culpability" that involves a subjective presupposition of the party in breach for acting in an illegal form, violating the principle of good faith.

VI. Some Special Cases of Application to the Doctrine of Good Faith

Honduran legislation recognizes three institutions that are based on the principle of good faith.

A. *The Rescission of the Contract Due to Hardship*

It is undeniable that the "ratio" of the rescission of contracts due to hardship regulated by Articles 753⁴⁷ and 754⁴⁸ of the Honduran Commercial Code violates the principle of good faith that must rule all juridical relations. The right to claim rescission of the contract by the party

44. Principles, *supra* note 5 at art. 7.1.2.

45. *Id.* at art. 7.1.3.

46. FUEYO L. FERNANDO, CUMPLIMENTO E INCUMPLIMENTO DELLA OBLIGAZIONI, EDITORIAL JURÍDICA DE CHILE 250 (2d. ed. 1992).

47. Article 753 states, "When somebody impelled by extreme need, executes a contract in iniquitous conditions, he may rescind it if he so requests. The judge, upon declaring the rescission, may determine an equitable compensation to the other contracting party." C. COM. art. 753 (Hond.).

48. Article 754 states:

If an enormous disproportion exists between the obligations of each of the contracting parties due to ignorance, penury or need of one of them, which was taken advantage of by the other party, the injured party may request the rescission of the contract if same was not aleatory.

The action will not be admissible if the injury did not exceed half of the value of the obligation that was made or promised at the time of executing the contract.

The lesion must exist at the time the rescission of the contract was requested.

Id. at art. 754.

who, due to extreme need, ignorance or penury, executed an iniquitous contract, is based on the lack of objective good faith of the party who seeks to execute said contract while violating the limits of probity in the agreement.

Following Mosco-Luigi the basis of the aforesaid norm is found in the generic interrelationship of the obligations of the parties where the equilibrium that should exist between parties that put them on an equal ethical basis to agree on the terms of contract does not exist.⁴⁹

Therefore, a problem is created when one of the parties subjected to a situation of ignorance or penury is unable to freely express his desire or lack of desire to enter into the contract and a situation known to the other party who, abusing said situation, demands the execution of the contract. The result is that the contractual relationship is tainted by the fact that the injured party may refuse to comply with his contractual obligations.

An obvious example would be that of a doctor, taking into account that the injured party is bleeding to death due to a traffic accident, requiring the injured party to sign a \$100,000 contract to control the hemorrhage. This contract obviously violates the principle of good faith which must be the foundation of all contractual obligations.

B. The Resolution of the Contract Due to Excessive Supervening Onerosity

The rule contained in Article 757 of the Honduran Commercial Code permits the resolution of the contract if, as a consequence of extraordinary or unforeseeable circumstances, its execution becomes excessively onerous for one of the parties. This rule is based on the principles of good faith which find their origin in the Roman "rebus sic stantibus" doctrine.

The Principles maintain this rule in Articles 6.2.4 and 6.2.2, which define hardship:

Article 6.2.2. (Definition of hardship)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and

49. MOSCO-LUIGI, LA RESOLUCIÓN DE LOS CONTRATOS POR INCUMPLIMIENTO, CON NOTAS DE JOSÉ SALAMERO ARADO CAPÍTULO III, p.1. (Colección Meleo, Barcelona, 1962).

(d) the risk of the events was not assumed by the disadvantaged party.⁵⁰

C. *The Resolution of the Contract Due to Frustration of Its End*

If the reason for which a contract was executed is frustrated (the fundamental reason for the signing of the contract disappears), the principle of good faith would step in. The principle would prohibit the interests of the debtor to be unjustly affected by the creditor who, acting in bad faith, requires the compliance with an obligation lacking all foundation. Perfect examples of this doctrine may be found in the English “Coronation cases.”⁵⁰

D. *Good Faith and Negotiable Instruments*

All the regulations on negotiable instruments in Honduran commercial law are based on the principle of good faith, following the “theory of appearances,” that maintains that the actions of a party who, acting in good faith, relied on the “appearance” of the document must be protected.

If the chapter on “General Rules on Negotiable Instruments” of the Honduran Commercial Code is analyzed, it may easily be ascertained that many of its norms are based on the principles of good faith. Likewise, Article 455 requires that the holder in due course of a negotiable instrument exhibit the same in order to be able to demand the compliance of the obligation therein incorporated. This obligation results from the application of the “theory of appearances” as, for a third party in good faith, the only person who has the right to require the compliance of a negotiable instrument is its legitimate holder in due course presentation.

Article 459 of the Honduran Commercial Code, which confirms the doctrine of “creation” in Honduras, obligates the issuer of a negotiable instrument to be bound by it, even though it entered into circulation without his will, as, the third party in good faith who acquired the document has the right to rely on the fact that he acquired a legitimately enforceable document.

Article 460 of the same Code, which contains the principle of “literality” of the instrument, clearly states the rule that “what is written is what is valid, and only what is written may be claimed,” as the holder in good faith of the document has the right to rely on the fact that what the document states is the right stated therein.

Finally, Article 462 of said Code regulates the effects of the alteration of documents following the principle that the holder in due course of a

50. Principles, *supra* note 5 at art. 6.2.2.

51. See, e.g., *Chandler v. Webster*, 1 K.B. 493 (1904); see also *Krell v. Henry*, 2 K.B. 704 (1903).

document may rely on the text of the document he receives, even though same was altered prior to his reception.

VII. Conclusion

It has been my intention to discuss one of the most debatable principles of contemporary legislation that may trace its origin to Roman law: the principle of good faith.

I accept that the opinions herein expressed are debatable nevertheless. The principle of good faith must be, one of the basic columns of all juridical reasoning. Although the judge is bound to follow the principle of "legality," said principle must be moderated, humanized and applied, in accordance with the fundamental principles of good faith, not only to fill the blank spaces that could exist in the laws or contractual agreements, but to apply the principle of social justice required by Article 331 of the Honduran Constitution. This article states:

The State recognizes, guarantees and encourages the liberties of consumption, savings, investment, occupation, initiative, commerce, industry, contracting, of enterprise and any others that derive from the principles that shape this Constitution. Notwithstanding, the exercise of said liberties may not be in violation of social interest, morals, health or public security.

I conclude by suggesting that in applying the existing laws or jurisprudence, as justice and equity are twin sisters of the same juridical order, it must entail therefore:

An honest intention to abstain from taking any unconscientious advantage of another, even though technicalities of law, together with absence of all information, notice, or benefit or belief of facts, which render transactions unconscientious.⁵²

52. *Warfield Natural Gas Co. v. Allen*, 248 Ky. 646, 655; 59 S.W.2d 534, 538 (1933).