

CONSIDERATIONS ON THE EXPRESS REGULATION OF THE BONA FIDE PRINCIPLE IN THE CONSTITUTION OF ROMANIA AND IN THE NEW ROMANIAN CIVIL CODE AFTER THE MODEL OF ENCODINGS ON THE EUROPEAN LEVEL*

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Abstract This article examines the significance of the *bona fide* concept as a particularly complex notion and timely constant on both European regulation level and the national level, both in the Constitution of Romania and in the new Romanian Civil Code. The study hereby describes the way the new Romanian Civil Code comprehends to provide an express regulation of the *bona fide* principle, as a novelty and great interest for the Romanian civil law, this analysis aiming to be an opening study that would lead to new guidelines.

Keywords *bona fides*, the new Romanian Civil Code, Constitution of Romania, general principle, constitutional principle.

1. INTRODUCTION. GENERAL CONSIDERATIONS

Bona fides is a comprehensive concept, with a deep moral content, implying as constituent factors generally recognized moral values. With this moral content, bona fides is a concept that goes beyond the sphere of civil law, being a general principle of law, applicable to the whole system of law, with echoes infiltrating also other branches of law. Beyond the constitutional dimension of the *bona fide* principle, which offers it a supreme power, generally applicable and in relation to any person, and although it was known as a principle applicable to the whole system of law even in the absence of express consecration, through this express regulation in the new Romanian Civil Code, this principle acquires applied and tangible value, achieving a tangible dimension by its raising at the level of efficient, applicable emphasizing principle a particular type of behavior, characterized by loyalty, sincerity, honesty (new Romanian Civil Code – Law no. 287/2009 was published in the Official Gazette of Romania no. 511 of 24 July 2009, it was amended by Law no. 71/2011 and rectified in the Official Gazette of Romania no.

427 of 17 June 2011 and in the Official Gazette of Romania no. 489 of 8 July 2011. Law no. 287/2009 was published in the Official Gazette of Romania no. 505 of 15 July 2011 – based on the Article 218 of Law no. 71/2011 for the enforcement of the Law no. 287/2009 regarding the Civil Code, published in the Official Gazette of Romania no. 409 of 10 June 2011 – and rectified in the Official Gazette of Romania no. 246 of 29 April 2013.)

Bona fides is seen as an apparent panacea that embodies the measuring unit of the morality in the legal framework; within the forum of justice, this meta-legal concept has the role of a benchmark to set the low and high ethical values of the behavior of the law subjects (Ruen, 2011).

2. THE CONSTITUTIONAL DIMENSION OF THE BONA FIDE PRINCIPLE

According to the provisions of Article 970 of the former Civil Code, the agreements must be executed in good faith while they force not only what is expressly provided, but all the consequences which equity, custom or the law determines.

Under the provisions of Article 1899 of the former Civil Code bona fides is always assumed, these provisions referring to the assumption of usucapio of the immovable property by possession in good faith (10-20 years). Although bona fides referred only to a particular hypothesis, the doctrine expanded the significance of the application of this principle, thus becoming a general principle.

It can be seen that good faith, traditionally analyzed as a principle specific to civil law, is elevated to the rank of constitutional principle as it finds its place in the Constitution of Romania revised in 2003, in Article 57 (respectively in Article 54 before revision), as well as in Article 11 (on the exercise in good faith of the obligations belonging to Romania of treaties to which it is a party). Note that the principle of bona fides had been enshrined in the constitutional texts even before it received specific regulation in the new Civil Code, although the principle of bona fides has always been recognized as a general principle applicable to the whole system of law.

Article 57 of the Constitution of Romania on the exercise of constitutional rights and freedoms, of the chapter referring to fundamental duties, stipulates that Romanian citizens, foreigners and stateless persons shall exercise their constitutional rights and freedoms in good faith, without any infringement of the rights and liberties of others.

This obligation is abstract and applies to everybody not just to a subject of law or a specific category or a specific area or branch of law (Gîrbovan, 2008, 62).

Good faith (*bona fides*), traditional principle of civil law and concept of a great moral value by its enshrining in the Constitution, becomes a binding constitutional rule; the principle of bona fides has a supreme legal force and an intrinsic value of moral principle which aims at the exercising of rights and freedoms per se. (Tănăsescu in Constantinescu et al, 2004, 114).

In addition to the express consecration of the principle of bona fides, Article 57 of the Constitution establishes an outward limitation regarding the exercise of rights and

constitutional freedoms by the express enshrining of the principle of respecting the rights and liberties of others.

The mechanism of bona fides involves getting over the first stage in the consciousness of the individual where it refers to the desire to act within its rights and another stage related to the relationships with others, consisting of the externalization under the form of certain attitudes or activities that do not affect the rights of others (Gîrbovan, 2008, 62).

The limitation of the right or liberty of a person is determined by the right or the freedom of the other holders and the social dynamics could not function in the absence of compliance with this principle of universal value (Tănăsescu in Constantinescu et al, 2004, 114). Article 57 requires the exercise of rights and freedoms in good faith, but also describes a pattern of conduct considered in good faith, ie that conduct that does not harm the rights and liberties of others (Gîrbovan, 2008, 63).

It may be inferred that the principle of bona fides acquires a social dimension, by relating a person's own behavior to society in general and to other individuals in particular.

3. THE EXPRESS REGULATION OF THE BONA FIDE PRINCIPLE IN THE NEW ROMANIAN CIVIL CODE. DEFINITIONS OF BONA FIDES. BONA FIDES ON THE EUROPEAN LEVEL

In terms of dictionary definitions, bona fides is the obligation to a correct behavior that the parties must follow at the conclusion and execution of contracts or, in the case of states, to comply to the treaties, respectively the belief of a person that it acts according to the law, and according to the law or what is appropriate (DEX, 2012); an act carried out in good faith is one carried out honestly and good faith is implied by law into certain contracts (Martin, 2003); good faith is synonymous with sincerity and honesty (DEX, 2012; Collin, 2004; Blackwell, 2008), lack of deceit and with a sincere intention to do what is promised (Blackwell, 2008).

A novelty brought by the new Romanian Civil Code (NCC) and of great interest for the Romanian law consists in the express regulation of the bona fide notion in Article 14, under which any natural or legal person shall exercise the rights and perform its civil duties in good faith, in accordance with the public order and morality. The provisions of Article 11 NCC are taken into consideration as they state that one cannot be derogated by agreements or unilateral acts from the law of public interest or from morality.

The legal order and the social relations stability are based on the bona fide people who behave honestly in the legal relationships, being animated by sincerity and loyalty, and the entire system of civil obligations and the exercise of the civil rights is based on trust and fairness and not on the intent to deceive; therefore, the presumption of good faith, known from the Roman law (*bona fides praesumitur*), is presented in some civil codes as a general rule, inserted in the chapter on the general principles of civil law, logical system and necessary as a legislative technique (Gherasim, 1981, 46), aspect that was taken also by the new Civil Code which regulated this institution expressly. It mentions that the former Civil Code applies the text regarding the presumption of bona

fides, which was placed on the usucapio matter on the immovable property through the short possession of bona fides, but which, due to the way it was drafted, it was considered as a standalone text and of general application to all civil obligations.

Starting from the presumption of good faith (*bona fides praesumitur* principle) already applicable in our legal system even before the implementation of the new Civil Code, following the model of the provisions set by Article 2805 of the Civil Code of Quebec according to which good faith is always presumed, unless the law expressly requires that it be proved, the new Romanian Civil Code in Article 14 paragraph (2) expressly provides that good faith is presumed until proven otherwise.

General presumption of good faith is the foundation of civil legal relationships based on the right intention in opposition to distrust or fraud, and by this regulation the new Romanian Civil Code aligns to the majority of civil laws (Civil Code of Germany, Switzerland, Portugal, Spain, Poland, etc.) which enshrines the legal presumption of good faith until proven otherwise (Uliescu, 2011, 362).

It was argued that, while bona fides is a rule of conduct, a standard and presumed abstract, not subject to probation, which envisages the ideal attitude of a reasonable and balanced person, bad faith is no longer a standard but it characterizes certain conduct, that which is specifically in the possession of the holder of right and that is why it is subject to probation (Neculăescu, 2011).

The new Civil Code defines the notion of good faith and the effects it has on a contractual level. Thus, according to Article 1170 NCC, the parties must act in good faith both regarding negotiation and conclusion of such contract and throughout its execution, without being able to remove or limit this obligation. It is noted that the new Civil Code sets these aspects within a mandatory standard, without the ability of the parties to cancel or bring amendments to it, which means that it seeks to outline a certain type of bona fide conduct prescribed or imposed by the legislature.

As an update of Article 970 of the former Civil Code (under which agreements must be performed in good faith), the new regulation of the notion of good faith in Article 1170 NCC extends the meaning of Article 970 in the old regulation both in the negotiation (information requirement) and in terms of its execution period (contractual solidarism) the rule being compulsory, without the possibility of derogation from its effects (Piperea, 2011, 240; Dimitriu in Atanasiu et al, 2011, 448).

Article 1183 NCC provides a specific application of the bona fide principle regulated in Article 14 NCC (Dimitriu in Atanasiu et al, 2011, 451). According to Article 1183 NCC parties must act in good faith regarding negotiations: the parties have the freedom to initiate, expand and terminate negotiations, without being held accountable for their failure but are held (required) to comply with the bona fide principles in negotiations.

The fact that a party who engages in a negotiation is required to comply with the requirements of good faith is a mandatory rule that can not be removed by agreement between the parties by limiting or excluding this obligation. As an argument in this regard, we must note the wording of Article 1183 paragraph (2), second thesis of the new Civil Code, which states that parties can not agree to limit or exclude observance of good faith, which gives this legal provision a mandatory feature.

Article 1183 paragraph (4) NCC refers to a situation that is contrary to the requirements of good faith, ie the hypothesis where a party initiates, continues or terminates negotiations without complying with the bona fide principle, in which case the party will be liable for the damage caused to the other party. In this case, the damages caused to the other party may consider the expenses incurred for the negotiations, any waiver by the damaged party from other offers or any other similar circumstances, which determine the existence of an injury.

The text of Article 1183 paragraph (4) NCC which refers to a situation contrary to the requirements of good faith is comprehensive because it presents all the situations with this kind of behavior contrary to good faith: when the party starts, continue or break off negotiations. Offers that are impossible to be admitted may be drafted, although this is known from the beginning, that there may be a change in the engagement or in the initial obligation execution; information necessary may be omitted when taking an informed decision in the negotiations; relevant information to negotiating can be partially presented or misleading and so on, including the violation of the duty of confidentiality imposed by pre-contractual negotiations of Article 1184 NCC.

In the pre-contractual stage, good-faith must exist so that there are no parallel negotiations, negotiations conducted without consideration or under unreasonable conditions or the parties' unaccountable refusal to conclude the final document (Noşlăcan, 2008: 282). In order to negotiate a contract in good faith, it was stated that the following rules should be observed: the correct information of the potential partner as to the relevant evaluating elements of the envisaged contract, the lack of any propositions which should be manifestly unacceptable and bring about the termination of the negotiations, the prompt communication of the decision to terminate negotiations, the observance of the deadlines established for the conclusion of the different stages of the negotiations, the parties' collaboration so that the negotiations do not exceed a reasonable duration, the non-conduction of parallel negotiation and the observance of the confidentiality of the communicated information (Noşlăcan, 2008: 282).

In what concerns bona fide negotiations it was argued that it is a concept pretty unclear being difficult to define what is acceptable, although the participating parties in the negotiations can be sanctioned for a behavior in "bad faith" used in negotiations (Reilly, 2009, 30). All situations that will invoke breach of the bona fide principle must be justified; in this regard we note the difficult role of the courts which will have to decide whether or not requirements of good faith were respected the and it remains to be seen how they would act on these highly sensitive issues.

The vision of the new Civil Code marks an evolution in the field; the direction chosen by the legislature is for the purpose of giving a practical and effective aspect of the application of these provisions as the party that used time and resources to negotiate a contract that is not concluded because of non-compliance with the requirements of good faith may reclaim the damage caused in this way.

The legal literature in United States considers that the recognition of the bona fide principle and fair conduct on a contractual level brings coherence and assures unity in the matter of contract execution (Mason, 2000, 94).

Bona fide is based on the equity of certain psychological facts of moral conscience with the external manifestations under the form of words and commitments, asserting that honesty, form of manifestation of the conscience, within moral norms, enters the structure of bona fides; there were materialized a number of four virtues (moral values) components of honesty: loyalty, prudence, order and temperance (Gherasim, 1981, 9-10). Another opinion, although it supports the author's point of view quoted above regarding the moral foundation of bona fides, specific notion of the legal language, considered that honesty cannot be a moral value totaling several virtues, its place being alongside the other four elements (Cotea, 2007, 5). It can be sustained that the components of good faith, as a notion belonging to the matter of law, is based on honesty, as a manifestation of conscience within moral norms, translated as a value that entails the compliance of individual life with the moral norms. In order to invoke bona fides all its attributes must be found both anterior and simultaneous with the moment when the agreements meet to perfect a legal act, and subsequently for its execution (Dobrilă, 2014, 231).

The opposite of good faith is bad faith, as a mood characterized by the absence of all or at least one of the attributes of good faith, it requires the existence of opposing values to the moral values (non-moral values) (Fotea, 2007, 18). Bad faith, considered to be a form of guilt, expression of deception, fraud and serious misconduct, with the common denominator of trickery, deception and obviously deliberate omission, is manifested also within criminal law (Pungă, 2000, 98). Civil bad faith is likely to acquire a criminal feature when it is able to satisfy the seriousness of social danger required by the criminal law for the deed to be an offence (Pop, 2002, 68). Where the parties have the purpose of deceiving the other party on the terms of the contract, we are no longer in the presence of good faith as the deceptive intention, manifested by cunning maneuvers and reluctance, outlines the bad faith, and these deceptive actions which are likely to mislead the reality influence in a less or greater extent the right intention, in that it vitiate the legal will of one of the parties being able to achieve even the offenses of cheating in agreements. (Dobrilă, 2014, 235).

Good faith is considered as a fundamental principle and is always presumed and protected, regardless of the legal relationship referred to, and in the legal relationships the subjects of law are always supposed to be animated by the sincere intention to behave with honesty and according to the law (Gîrbovan, 2008, 60; Pungă, 2000, 98).

Good faith was defined by Cicero as sincerity in words (*veritas*) and fidelity (*constantia*) in commitments, it can be said that the psychological acts – generators of good faith, create two conditions of concordance or compliance: on the one hand, the conformity between what a man thinks and what he says (sincerity in words), and on the other hand, the conformity between words and his acts (fidelity in commitments) (Gherasim, 1981,7).

The legal approach to the contractual good faith and bad faith during the last two and a half millennia sought a permanent interaction between law and social or religious morals which infiltrate into it; the legal rules are often a side of social vision from the moment of their implementation, requiring flexible general concepts such as good faith

and bad faith, which allow the connection of contractual law to the evolution of morals and social-economic necessities (Floare, 2013).

Types of modern encodings like Unidroit Principles, the Principles of European Contract Law (P.E.C.L.) or the Common Frame of Reference (DCFR) establish a vision with objective content to the concept of good faith in contractual matters, considered close to the classical Roman vision of *bona fides* or the German concept *Treu und Glauben* (Floare, 2013).

The program to develop a common frame of reference for European Contract Law presented as guiding principles of the European Contract Law (PECL – Principles of European Contract Law) the contractual freedom, contractual security and loyalty with respect to the contract matter (Fauvarque-Cosson, Mazeaud, 2008, 421-571). According to PECL there is a general obligation of good faith and fair behavior (Articles 0-301), in the sense that the parties must act in good faith and fairness from the beginning of the contract negotiations until all of its provisions are executed, to which the requirement of good faith during the execution of obligations is added (Articles 0-302) (Fauvarque-Cosson, Mazeaud, 2008, 572). Therefore, Contractual Fairness implies both general duty of good faith and fair dealing (Article 0-301), and Performance in good faith (Article 0-302) (Fauvarque-Cosson, Mazeaud, 2008, 515-570).

Article 0-301 on General duty of good faith and fair dealing provides that „Each party is bound to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect. The parties may neither exclude this duty, nor limit it”. Article 0-302 on Performance in good faith provides that „Every contract must be performed in good faith. The parties may avail themselves of the contractual rights and terms only in accordance with the objective that justified their inclusion in the contract. Each party is required not to do anything that prevents the performance of the contract or that infringes the rights that the other party acquires from the contract. Where one of the parties, without compromising the performance of the contract, has acted in such a way as to reduce the benefit that the other party could legitimately expect from the contract, the party is required, at the request of the other party, to renegotiate the contents of the contract”.

According to the Draft of a Common Frame of Reference (DCFR), which contains Principles, Definitions and Model Rules of European Private Law, the Study Group on a European Civil Code and the Research Group on Existing EC Private Law identified three main principles: contractual freedom (*liberté contractuelle*); contractual security (*sécurité contractuelle*); contractual loyalty (*loyauté contractuelle*), as a duty to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect, a prohibition on using contractual rights and terms in a way which does not respect the objective that justified their inclusion in the contract and a duty to co-operate so far as necessary for the performance of the contractual obligations (von Bar et al, 2009, 11-12).

According to DCFR Model Rules (Article I.-1:103 Good faith and fair dealing in Book I General Provisions) „the expression good faith and fair dealing refers to a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question” (paragraph 1)

and „it is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party’s prior statements or conduct when the other party has reasonably relied on them to that other party’s detriment” (paragraph 2).

For a good development of the contractual relationship, according to Article III. – 1:103 (Good faith and fair dealing) of the Book III (Obligations and corresponding rights) „a person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship” (paragraph 1), without the possibility to remove or limit the obligation of good faith („The duty may not be excluded or limited by contract or other legal act, according to paragraph 2). „Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have” (paragraph 3).

Also Unidroit Principles, characterized as general rules that actually contain guidelines of the contract law recognize along with contractual freedom also the binding force and the principle of *bona fides* (Macovei, 2005, 112).

The express regulation of the principle of good faith in the new Romanian Civil Code marks a novelty in our civil law, which led to the statement that the new Civil Code is both modern and European (Uliescu, 2009, 4). Thus, the *bona fide* principle is established expressly as a general title in contract law both at the negotiation and conclusion of the contract and throughout its execution. The principle of good faith experience many applications throughout the contractual procedures in that the good faith dominate negotiations (pre-contractual stage) the execution in “good faith” of the contract, followed by the parties’ duty of collaboration and obligation of consistency, requirements of the principle of contractual loyalty (Uliescu, 2009, 9).

The consequences of the express regulation regarding the principle of good faith in the new Civil Code will be relevant not only in terms of civil law, but also in terms of criminal law, for example, the offense of deception, and in terms of other branches of law, requiring the judge to take into account the definition of the new Civil Code and to determine both on the exercise of the rights within *bona fides* and on the consequences of its violation (Dobrilă, 2014, 238), regardless of the area of action, the concept of good faith is applicable as a universal principle.

4. CONCLUSIONS

Defined probably also by the modern encodings such as Unidroit Principles, the Principles of European Contract Law (PECL) or Common Frame of Reference (DCFR), the option of the Romanian legislature to expressly regulate the principle of good faith in the new Civil Code confirms, once again, the importance of the *bona fide* principle to our legal system. Beyond its consecration as a constitutional principle, *bona fides* is reaffirmed and reinforced as a general principle, aiming thereby to ensure a more effective protection of this principle.

With a deep universal feature, the bona fide concept has a versatility determined by the many-sides and meanings, depending on the angle of view, no such angle being sufficiently to embrace the whole substance or to cover its whole complex content.

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