REVISTA *ARGUMENTUM*

GOOD FAITH : SEMIOTIC APPROACH[1]

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ABSTRACT

The meaning, function and desirable scope of good faith in contractual performance is one of the most pervasive problems of European as well as American contracto law. Yet, the discussion seems to be locked into a set of inescapable dilemmas which frequently reappear as a typical, but unsatisfactory part of academic contrubutions and judicial opinions; namely, the controversies between na individualist ethics of freedom of contract and the opposing altruist value of interpersonal responsibility, between the danger of judicial arbitrariness and the demand for equitable flexibility, and, finally, between the legitimacy of judicial law making and the insistence on judical restraint. This article attempts to show a pattern behind this structure, consisting of a relatively small set of typical arguments which appear in ordered pairs of diametrical oppositions such as those mentioned above. This suggests that good faith language is much less tailored to context and much more dependent on a preexistent structure of stereotyped arguments than it usually appears in the pratice of legal discourse. This insignt implies a new assessment of the cogency of argument patterns deployed in theoretical and doctrinal statements on good faith.

KEYWORDS: General clauses; good Faith; Jurisprudence; Semiotics; Standarts; Structuralism.

RESUMÉ

La signification, la fonction et le domaine d'application du principe de la bonne foi font partie des problèmes les plus difficiles du droit privé européen et américam. Cependant, la discussion semble être prise dans plusieurs dilemmes qui apparaissent souvent comme des stéréotypes dans les études scientifiques et les décisions judiciaires sans avoir un résultat satisfaisant du point de vue de la sciente jurdique. Ces dilemmes consistent avant tout dans les conflits insurmontables entre une éthique de liberté individualiste d'une part et une éthique altruiste de reeponsabilité sociale d'autre part, entre le risque d'arbitraire judiciare par

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l'application de clauses générales vagues d'une part et leur fonction comme moyen d'établir la justice dans les cas d'espèce d'autre part ainsi qu'enfin entre la reconnaissance de la légitimité de la création jurisprudentielle de droit d'une part et la nécessité d'insister sur le respect des limites méthodologiques que le juge doit observer en appliquant une clause générale d'autre part. Le présent essai tente de ramener les structures d'argumentation typiques au sein de la discussion sur le principe de la bonne foi à um petit nombre de formes de base qui constituent um modèle de paires d'extrêmes ordonnées. L'objectif de ce mode de représentation est double: il veut démontrer d'abord qu'une partie essentielle de l'argumentation qui détermine usuellement la discussion de problèmes liés au principe de la bonne foi repose sur des arguments stéréotypes convencionnels et faire voir ensuite que ce type d'argumentation dispose en conséquence d'un rapport concret et d'une force de conviction nettement inférieus à ce que l'on pourrait em juger par les apparences.

ZUZAMMENFASSUNT

Die Bestimmung der Bedeutung, der Funktion und des Anwendungsbereichs der Generalklausel von Treu und Glaube gehört zu den schwierigsten Problemen des europäischen wie amerikanischen Privatrechts. Die Diskussion scheint jedoch in mehreren Dilemmata gefangen zu sein, die immer wieder als stereotype, aber im Ergebnis nicht weiterführende Bestandteile wissenschaftlicher Abhandlungen und richterlicher Entscheidungen erscheinen. Zu nennem sind insoweit namentlich die unlösbaren Konflikte zwischen einer individualistischen, formalen Freiheitsethik einerseits und einer altruistischen Ethik sozialer Verantwortung andereseits, zwischen der Gefahr richterlicher Willkür durch Anwendung vager Generalklauseln einerseits und deren notwendiger Funktion als Mittel zur Herstellung von Einzelfallgerechtigkeit andereseits sowie schlieBlich zwischen der Anerkennung der Legitimität richterlicher Rechtsschöpfung auf der Grundlage von Generalklauseln wie Treu und Glauben einerseits und dem Beharren auf Einhaltung der hergebrachten methodologischen Grenzen richterlicher Rechtsforbildung bei deren Ausfüllung andereseits. Die vorliegende Abhandlung versucht, diese typischen Argumentationsstrukturen innerhalb der Diskussion über Treu und Glauben auf eine kleine Zahl von Grundfornen zurückzuführen, die ein Muster geordneter Gegensatzpaare Bilden. Ziel dieser Darstellungsweise ist es, zu verdeutlichen, daB ein wesentlicher Teil der Argumentation, die üblicherweise die Diskussin von Problemen des Prinzips von Treu und Glaube bestimmt, auf konventionellen, stereotypen Argumenten beruht und damit wesentlich weniger konkreten Bezug und zwuingende Überrrrrzeugungskraift im Hinblick auf das jeweils immiten stehende Problem aufweist, als es üblicherweise den Anschein hat.

1. INTRODUCTION

This article approaches the theory and doctrine of good faith in contractual performance from the point of view of structuralist semiotics[3]. Its thesis is that the theoretical and doctrinal

[3] The árticular semiotic and structuralist thesis put forward in this article comes closest to the approach in the following works: J.M. BALKING, 'The Crystalline Structure of Legal Thought', 39 *Rutgers L. Rev. (Rutgers*

debate on good faith consists of a recurring set of typical arguments which show a highly ordered structure in the form of pair-wise, symmetrical opposition.

The concept of good faith, rooted in Greek and Roman legal tradition, has developed into a fundamental principle of contract law not only in Continental European legal systems, especially in Germany[4], but also in the Anglo-American world[5] and in the context of European and international law[6]. One of its most well-known expressions is the general clause of good faith in section 242 of the German Civil Code of 1900[7], which is regarded as an overarching principle of equity embracing the whole German legal system on the basis of a vast body of case law[8]. Moreover, good faith has also developed into a fundamental principle

Law Review) 1986, p. 1, D. KENNEDY, 'A Semiotics of Legal Argument', in Academy of European Law (ed.), *Collected Courses of the Academy of European Law,* vol. III, Book 2, Kluwer, The Hague/London/Boston 1994, p. 309: D. KENNEDY, *A Critique of Adjudication*, Harvard University Press, Cambridge/Mass. 1997, pp. 137-9: D. KENNEDY, 'Form and Substance in Private Law Adjudication', 89. *Harv. L. Ver. (Harvard Law Review)* 1976, p. 1685.

[4] The modern German literature on the good faith clause in § 242 of the Civil Code (see note 7) has been strongly influenced by F. WIEACKER, *Zur rechtsheoretischen Präzisierung des* § 242 BGB, J.C.B.Mohr, Tübingen 1956. With respect to the modern interpretation of § 242 BGB, see,for example, the representative commentary by G.H. ROTH, in Rebmann, F.J. Säcker & R. Rixecker (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 2, C.H. Beck, Müchen, 4 th ed. 2001, at § 242.

[5] With respect to studies on the principle of good faith in american contract law further references, see R.S. SUMMERS, ""Good Faith" in General contract Law and the Sales Provisions of the Uniform Commercial Code', 54. *Va. L. Rev. (Virginia Law Review)* 1968, p 195, R.S.SUMMERS, 'The General Duty of Good Faith – Its Recognition and Conceptualization', 67. *Cornell L. Rev. (Cornell Law Review)* 1982, p. 810; R.S. SUMMERS, 'Good faith in american General contract Law', in O. Behrends et al. (eds), *Rechtsdogmatik und praktische Vernunft. Symposion zum 80. Geburtstag von Franz Wieacker,* Vandenhoeck & Ruprecht, Göttingen 1990, p. 127; S.J. BURTON & E.G.ANDERSEN, *Contractual Good Faith – Formation, Performance, Brreach, Enforcement,* Little, Brown & Co., Boston et al. 1995, pp 327 – 89; E.A. FARNSWORTH, 'Food Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code', 30. *U. Chi L. Ver. (University of Chicago Law Review)* 1963, p. 666; F. KESSLER & E. FINE, 'Culpa in contrahendo, Bargining in good Faith and Freedom of contracto: A Comparative Study', 77. *Harv. L. Ver.* 1964, p. 401 (with respect to bargaining in good faith).

[6] Good faith has become increasingly important as a principle of European private law unification; see art. 1:201 and art. 1:106 (1) of the Principles of European contract Law, in O.LANDO & H. BEALE (eds.), Principles of European contract Law, Kluwer, The Hague/London/Boston 2000. See also R. ZIMMERMANN & S. WHITAKERRRRR, 'Good faith in European contract law: surveying the legal landscape', in R. Zimmermann & S. Whitaker (eds), good Faith in European Contract Law, Cambridge University Press, Cambridge 2000; M. HESSELINK, 'Good Faith', in a. Hartkamp et al. (eds), Towards a European Civil Code, Kluwer, The Hague/London/Boston, 2nd ed. 1998, p. 285; H.KÖTZ, 'Towards a Eutopean Civil Code: The Duty of good Faith', in P. Cane & J. Stapleton (eds), The Law of Obligations. Essays in Celebration of John Fleming, Clarendon Press, Oxford 1998, p 243. The Legitimacy of a good faith clause is also the central issue in the recent international debate on the EU directive on Unfair Terms in Consumer Contracts, Council Directive 93/13/EEC of April 5, 1993 (L 95, April 21, 1993, p 29).

[7] § 242 *Bürgerliches Gesetzbuch (BGB): 'Der Schuldner ist verpflichtet , die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.'* – The obligor is bound to carry out his performance in the manner required by good faith with regard to prevailing usage. Translation by J.P.DAWSON, *The oracles of the Law, Thomas M. Cooley Lectures, The University of Michigan School of Law, Ann Arbor 1968, p. 461.*

[8] See DAWSON, *The oracles of the Law* (note 7), p. 475 and *passim.*

of American contract law during the 20th century[9]. In America, early judicial forays into its recognition as a departure from formal contract doctrine culminated in its incorporation into the Uniform Commercial Code in the late 1940s[10].

Nevertheless, this apparent pervasive recognition of good faith seems to have increased rather than decreased academic disagreement on its funciton, meaning, interpretation, and dangers. On the one hand, good faith is welcomed as adding altruist values as well as equitable flexibility to the law, thereby liberating it from the arbitrary and unfair results caused by legal formalism[11]. On the other hand, however, critics point to the dangers of judicial moralism, lack of predictability of judicial decisions and, ultimately judicial legislaton caused by excessive legislative reliance on general clauses such as good faith[12].

In the German theoretical debate these two opposing positions have spawned the development of a whole field of jurisprudence dealing exclusively with the function and interpretation ('concretization') of the famous general clauses, including good faith and good morals, which may be counted among the distinctive characteristics of the German Civil Code[13]. In the American debate, several attemps have been made to conceptualize good faith in terms of protecting contractual expectations[14], enhacing contract law through altruist principles[15], or at

[9] See Restatement (Second) of Contracts § 205 (1979): 'Every contract imposes upon each party a duty of good faith and fair dealing.' With respect to thes conceptualization of good faith, see SUMMERS, 'The General Duty of cood Faith' (note 5), pp. 812-16.

[10] See uniform Commercial code § 1-203: 'Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement.' With respect to the drafting history and jurisprudencial impact of this provision, see SUMMERS, ''Good Faith' in general Contract Law' (note 5), pp 207-16; R. BRAUCHER, 'The Legislative History of Uniform Commercial code', 58. Colum. L. Ver. (Columbia law Review) 1958, p(798) at 812-4; K.N.LLEWELLYN, 'Why a Commercial code?', 22. Tenn. L. Rev. (Tennesee Law Review) 1953, p. 779; S. MENTSCHIKOFF, 'Highlights of the Uniform Commercial Code', 27, Mod. L. Ver. (Modern Law Review) 1964, p. 167 at 168-71.

[11] See KENNEDY, 'Form and Substance' (note 3), p. 1721 and passim.

[12] See C.P. GILLETTE, 'Limitations on the Obligation of Good Faith', Duke L.J. (Duke L. J. (Duke Law Journal) 1981, p(619) at 643-53.

[13] The first treatise devoted exclusively to the impact of general clauses on German legal thought was J.W. HEDEMANN, *Die Flucht in die Generalklauseln. Eine Gefahr für Recht und Staat,* J.C.B. Mohr, Tübingen 1933. Its title coined the proverb of the 'flight into the general clauses'. With respect to the more recent discussion, see WIEACKER, *Zur rechtsheoretischen Präzisierung des* § 242 BGB (note 4); K. LARENZ & C.W. CANARIS, *Methodenlehre der Rechtswissenschafi*, Springer-Verlag, Berlin/Heidelberg/New York, 3rd ed. 1995, pp 110-3, 241-3, 258; F. BYDLINSKI, 'Möglichkeiten und Grenzen der Konkretisierung aktueller Generalklauseln', in O. Beherends et al.(eds), *Rechtsdogmatik und praktische Vernunft, Symposion zum 80. Geburtstag von Franz Wieacker,* Vandenhoeck & Ruprecht, Göttingen 1990, p. 189; G. TEUBNER, *Standards und Direktiven in generalklauseln,* Athenäum, Frankfurt a/M 1971; G.TEUBNER, in G. Brüggemeier et al. (eds), *Alternativkommentar zum Bürgerlichen Gesetzbuch*, vol. 2, Luchterhand, Neuwied/Darmstadt 1980, at § 242 note 7.

[14]See BURTON & ANDERSEN, *Contractual Good Faith (note 5), pp 38-40; S.J. BURTON,* 'Breach of Contract and the Common Law Duty to Perform in Good Faith', 94. *Harv. L. Rev*. 1980, p(369) at 385-8; D.M PATTERSON, 'Good Faith, Lender Liability, and Discretionary acceletarion: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code', 68. *Text.L.Rev. (Texas Law Review)* 1989, p(169) at 199-205.

[15] KENNEDY, 'Form and Substance' (note 3), p. 1721 and *passim*.

least excluding underisable patterns of bad faith[16], while critics have not failed to point to the dangers of judicial arbitrariness and uncertainty as the inevitable flip-side of employing vague standards such as good faith in the central fields of contract and commercial law[17].

This shord overview over the most important modes of argument in the good faith debate shall suffice to develop an understanding for the thesis of this article, namely, that this debate centres on a set of stereotyped arguments which are reiterated in very similar forms throughout the American, German and international discussion and which tend to appear in ordered pairs of diametrical opposition. For example, the argument that good faith leads to desirable equitable flexibility in the law is often countered by the well-known critique that it will lead not to flexibility but rather to judicial arbitrariness and uncertainty. The same applies, for instance, to the claim that good faith enhances communitarian values and contractual altruism. This claim diametrically opposes the principe of individualism, which might be called one of the fundamental ideas of classical contract law based on private autonomy.

This article does not attempt to add a further conceptualization of good faith to the already existing ones. Rather, it seeks to investigate the structure of the theoretical and doctrinal debate on good faith and to isolate the typical pairs of arguments which are frequently recurring in different contexts and disguises. When seen along these lines, the apparently overwhelmingly complex structure of the debate disappears and offers the insight that it is far more ordered, coherend, and restricted than it seems at first glance. Moreover, this article proposes that the value and meaning of an argument is only comprehensible against, and indeed determined by, the black-ground of the system of related arguments from which it is derived. It follows that conceptualizations of good faith which rely on one side of the argumentative canon but neglect the other side – say, by emphasizing the dangers associated with judicial arbitratiness but failing to recognize the benefits of equitable flexibility – distort the weitht of the arguments used and tend to create a false impression of congency resulting from the omission of a whole dimension of diametrically opposed, yet equally valid, counter-arguments. The conscious use of one argument within the good faith debate presupposes

[16] This 'excluder analysis' of good faith, proposing that good faith cannot be described in positive terms but only as a means to exclude various forms of bad faith, has been developed by SUMMERS in several influential articles. See SUMMERS, 'Good Faith' in General Contract law' (note 5), pp 199-207 and further references listed there.

[17] See GILLETTE (note 12), pp 643-53, In the German debate on general clauses, the dangers associated with their vagueness has spawned a literature which is solely concerned with theis 'concretization', meaning the reduction of their openness. The classic statement is WIEACKER, Zur rechtsheoretischen Präzisierung des § 242 BGB (note 4). See also BYDLINSKI (note 13), pp 199-204 for a comprehensive statement and for further references.

awareness of the whole systems of arguments in which it is embedded. This article is offered as one step on the way understanding this structure.

2. **STRUCTURALIST SEMIOTICS AS A LEGAL METHOD**

The aim to analyze the structure of a given legal discourse rather than its substance, to identify recurring rather than individual arguments, and to investigate their interdependence rather than their concrete ability to convince, places this article within the tradition of legal semiotics in its specifically structuralist expression[18]. Like other to cultural phenomena, legal argument can be undestood in a manner analogous to language". Like language, it is composed of a relatively limited set of basic "signs" and uses typical "operations" or procedures to transform the elemental argument "signs" and to adapt them tonew contexts[19]. The consequence of this deconstruction of the legal "language" is a drastic reduction of its complexity. At first glimpse, theoretical and doctrinal legal discourse seems to be varied and contextual. The linguistic analogy, however, allows us to see the elemental arguments within the different expressions and to understand them as being less contingent on, and less required by, the nature of the particular legal problem to be analyzed than their contextual variety might suggest. It is, therefore, a powerful tool to consciously understand, apply, and generate legal arguments as mere expressions created from a limited set of basic elements[20].

On this basis structuralist theory argues that cultural meaning is derived through perceiving cultural phenomena in terms of conceptual oppositions. While the signs are variable, indeed

[18] To speak of one 'tradition' is somewhat misleading. It appers to be useful to distinguish between at least two branches, the Peircean and the Saussurean tradition of semiotics, respectively. With respect to the former, see R, KEVELSON, *The Law as a System of Signs,* Plenum Press, New York/London 1988. With reespect to the latter, see the references in note 3 and also, for instance, J.M. BALKIN, *Cultural Software: A Theory of Ideology*, Yale University Press, New Haven/Conn. 1998, pp. 217-9: J.M.BALKIN, 'The Hohfeldian Approach to legal Semiotics', in R. Kevelson (ed.), *Law and Semiotics,* vol. 3; 1989, p 31: J.M BALKIN, 'Nested Oppositions', 99, *Yale L. J. (Yale Law Journal)* 1990, p. 1669: T.C. HELLER, 'Structuralism and Critique', 36, *Stan. L. Rev.(Stanford Law Review)* 1984, p. 127: D.H.J.HERMANN, 'Phenomenology, Structuralism, Hermeneutics, and legal Study: Applications of Contemporary Continental Thought to Legal Phenomena', 36. *U. Miami L. Rev. (University of Miami Law Review)* 1996, p. 379.

[19]This is the basic insight of linguistics. See generally F. DE SAUSSURE, Cours de linguistique générale: German edition: C. Bally & A. Sechehaye (eds), Grundfragen der allgemeinen Sprachwissenschaft, de Gruyter, Berlin, 2nd ed. 1967, pp 18-21, 76-82 and passim. De Saussure's work in turn influenced Lévi-Strauss and later structural thinkers; see infra note 21.

[20] With respect to this appropriation of de Saussure's linguistic theory in the analysis of legal argument, see KENNEDY, A Critique of Adjudication (note 3), pp 133-4; KENNEDY, 'Semiotics' (note 3), p. 353; BALKIN, 'Crystalline Structure' (note 3), p. 73.

arbitrary and subject to change over time, their stable and recuring oppositions give them meaning[21].

Applied to legal thought, such as exemplified by the theory of good faith, this implies that arguments appear in ordered antinomies and each side of the pair takes its meaning from its opposition to and interaction with the other side of the pair. Neither pole of the antinomy can gain supremacy over the other pole, because the meaning of both poles can only be derived from their mutual interaction. Since there is no meta-theory to force a final resolution, the argument is potentially interminable. It is always possible to at least theoretically constuct a valid counter-argumet, notwithstanding that it may be much less convincing than its counterpart in a particular situation[22].

3. TYPICAL ARGUMENTS WITHIN THE GOOD FAITH DEBATE: TOWARDS A STRUCUTURALIST FRAMEWORK

On the basis of the semiotic and strucutralist theory elements introduced in the last section, this part of the article attempts to develop a tentative framework of typical arguments within the theoretical and doctrinal debate on good faith. No attempt is made to enter into the actual debate on the interpretation of good faith as it is conducted in national and international contexts. Rather, this article seeks to provide a basic key to understanding the debate by constructing and abstract, context-neutral framework of typical arguments. Moreover, the arguments developed are meant to be tentative and do not represent an inductive vindication of the thesis of this article. Their aim is, however, to convince the reader on the basis of theeir intuitive familiar-ity that a large portion of good faith language consistis of a surprisingly small basic 'vocabulary' of diametrically opposed arguments. An author of legal argument cannot hope for more than this kind of convincing power.

[21] See C.LÉVI-STRAUSS, *La pensée sauvage*, Librairie Plon 1962, pp 64-6, 90-2, 142. In Lévi-Strauss' view, the unchanging relationships between opposites are universal structures of the human inconscious, See M.HÉNAFF, *Claude Lévi-Strauss and the Making of Structural Anthoropology*, translated by M.Baker,University of Minnesota Press, Minneapolis/London 1998, pp 115-9. The present article, however, does not claim that oppositions in legal thought have any kind of universal character. Rather, they should be understood as non-universal, mallleable 'cultural software' in the sense proposed by Balkin, *Cultural Software* (note 18), pp 217-9.

[22] See BALKIN, 'Crystalline Structure' (note 3), pp 72-3; KENNETY, 'Semiotics' (note 3), p. 325; KENNEDY, *A Critique of Adjudication* (note 3), pp 141-7.

A. Good faith and the structure of legal justification

1. The scope of good faith as a series of rule choices

It is important to distinguish between two main ways of looking at good faith to understand the following application of strucutalism to the theoretical debate: first, as a rule, and second, as a means of legal justificiation or rule choice[23].

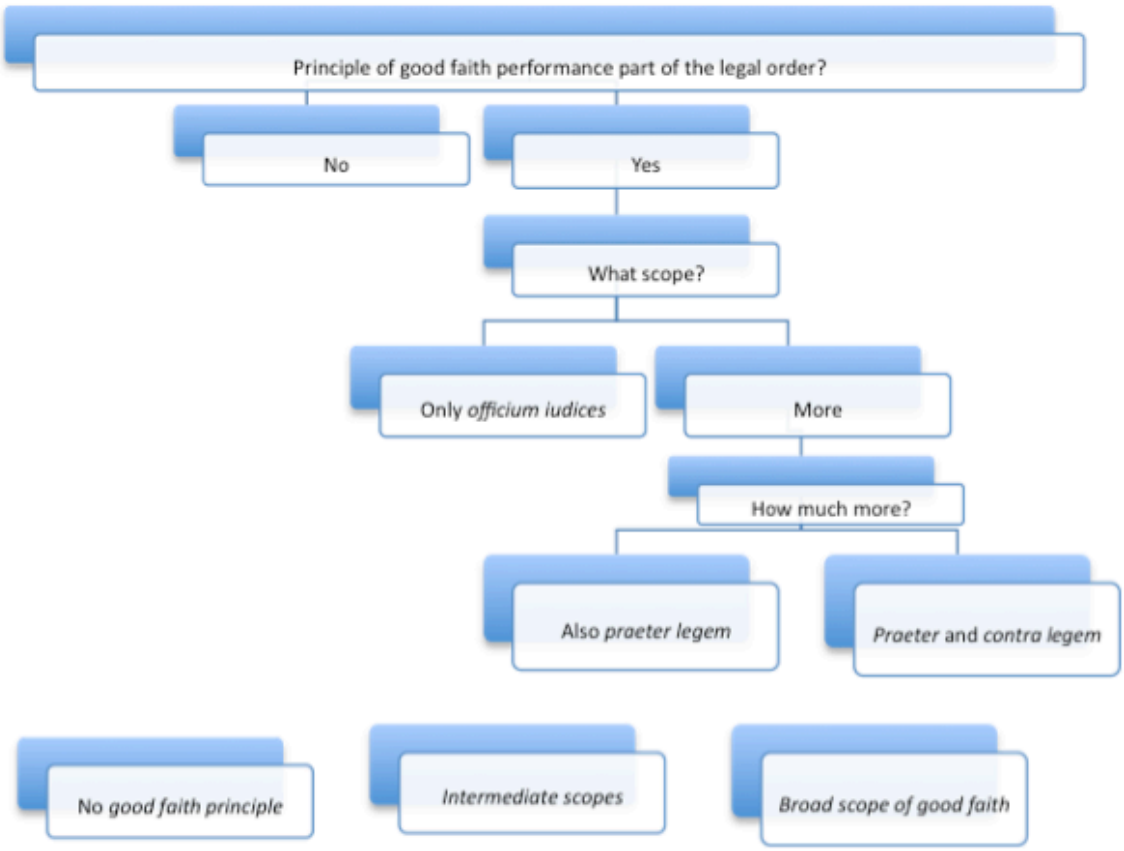
On the one hand, the duty of good faith in contractual performance is a legal rule as laid down, for instance, in section 242 of the German civil Code. As such it is open todefinition and interpretation and can serve as na authoritative justification for the choice of a particular legal consequence in the adjudication of a specific case.

On the other hand, the extreme openness of the good faith standard inevitably raises the question of what its desirable content and scope should be and to what extent it is a legitimate means to ensure openess, flexibility and judicial activity, Viewed in this way,the rcognition of a particular scope of good faith duties is the producto of a rule *choice* between different alternative interpretations of the general principle. For example, the German debate, following Wieacker's classic essay on good faith, commonly distinguishes between three functions of this principle – *iuris civilis iuvandi, supplendi* and *corrigendi gratia*[24]*:* First, good faith serves to particularize incomplete contractual obligations within the scope of contract law by imposing secondary contractual duties, for instance, duties todisclose information to the contractual partner *(officium iudicis)*[25]. Second, it provides a general limitation to the illetitimate exercise of legal rights closely related to the *exceptio doli* under Roman law *(praeter legem)*[26]. Finally, good faith, according to Wieacker, may even allow for the open derogation of statutory law through judicial activism in the pursuit of justice *(contra legem)*[27]. In German law, this third function has found its most important expression in the doctrine of *Wegfall der Geschäftsgrunddlage*. This doctrine, a rough equivalent of the common law doctrine of *frustration of purpose,* enables courts to adjust terms of contracts to changed circumstances[28]. As we will discuss below, this doctrine figured prominently in judicial

[23] For a broader explanation of this necessary change of viewpoint,see, in particular,BALKIN, 'Crystalline Strucuture' (note 3), pp 4-12.
[24] WIEACKER, *Zur rechtstheoretischem Präzisierung des § 242 BGB* (note 4), p 21.
[25] WIEACKER, *Zur rechtstheoretischem Präzisierung des § 242 BGB* (note 4), pp 21-6
[26] WIEACKER, *Zur rechtstheoretischem Präzisierung des § 242 BGB* (note 4), pp 21, 26-36.
[27] WIEACKER, *Zur rechtstheoretischem Präzisierung des § 242 BGB* (note 4), pp 21, 36-44.
[28] See iriginally P.E.W.OERTMANN, Die geschäftsgrundlage. Ein neuer Rechtsbegriff, Schooll, Leipzig/Erlangen 1921. The modern German literature and case law on this doctrine is vast. For na overview, see

decisions durign the period of inflation in the early 1920s in Germany, when contracts affected by extreme inflation-related distortions of exchance justice were readjusted on a large scale.

For the present purposes, Wieacker's triad of potential functions of good faith can be imagined a sequence of several rule choices as illustrated by the following diagram:



This diagram arranges the questions of desirability and scope of good faith in form of a decision treee with subsequent levels of rule choice. The different alternative scopes of good faith associated with every level can be imagined along a continuum stretching from no good faith at all (on the far left of the spectrum) over intermediate degrees (encompassing only *officium iudicis* or *officium iudicis* and *praeter legem*) to a broad scope of good faith encompassing all three functons – *officium iudicis, praeter,* and *contra legem* (on the far right). Moreover, the application of good faith to particular cases opens up wide fields of

ROTH in Münchener Kommentar zum Bürgerlichen gesetzbuch (note 4), at § 242 preceding note 3 (further references) and notes 598-808 (modern scope of doctrine). With respect to its historical development, see DAWSON, The oracles of the Law (note 7), pp 468-70; J.P.DAWSON, 'The effects of Inflation on Private contracts: Germany, 1914-1924', 33. Mich. L. Rev. (Michigan law Review)1934, p (171) at 192; J.P. DAWSON, 'Judicial revision of Frustrated contracts: Germany', 63. B. U. L. Ver. (Boston University law Review) 1983, p(1039) at 1045-7.

doctrinal sub-choices within all three functions, filling in the three basic categories in the continuum explored here with a vast variety of intermediate solutions. It is important to understand that this view of good faith – rather tham perceiving it as a rule in the sense explained above – is a necessary precondition for developing a structuralist model of the debate, because the rule choice approach exposes the arguments which support a particular scope of good faith against any other alternative. This is equivalent to the basic strucutural insight that the meaning of a doctrinal alternative is only comprehensible in relation to anoher alternative , to which it is opposed within a dyadic choice[29].

2. Some caveats

In proposing this way of looking at the good faith debate, however, some important caveats are in order[30]. First, the there rule choices proposed in ths article do not, of course, exclude other conceivable oppositions. Indeed, many doctrinal choices between a higher and a lesser extent of good faith duties take a much more specific from than this article can possibly explore (for example, to what extent should a seller of goods be expected to disclose hidden information relevant to the innocent buyer?). Moreover, the arrangement of the three rule choices in form of a continuous increase in the scope of good faith duties does not exclude the possibility that, for instance, a particular *officium iudicis* case might under certain circumstances involve a hither degree of good faith duties than the average *conta legem* case. The choice of oppositions made here and their arrangement is motivated by the single goal of highlighting the most important orientations within the debate, such as exemplified by Wieacker's triad of functions of good faith.

With these caveats in mind, the goal of this and the following sections is to explore three sets of typical arguments withins the good faith debate[31]: first, a substantive dimension of justification of good faith duties in terms of, for instante, contractual ethics; second, a formal dimension concernet with its structure as a vague standard; and finally, na institutional competence dimension raising the question of judicial freedom and constraint in adjudication based on open standarts such as good faith.

[29] See similary BALKIN, 'Crystalline Structure' (note 3), pp 4-5.
[30] See ibid pp 6-12 as to related refinements.
[31] With respect to a comparable tripartite strucutre of substantive, formal, and isntitucional competence dimensions, see D. KENNEDY, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'", 100 *Colum. L. Rev.* 2000, p (94) at 94-5 and *passim.*

B. Individualism versus altruism: the substantive dimension of arguments

1. Good faith and the opposition between private autonomy and social responsibiry in contract law

The substantive function of good faith in modern contract law is ambivalent and contest. *Officium iudicis* cases, such as the imposition of a seller's duty to disclose certain information th the buyer, are generally perceived as rooted within the normative groundwork of the classic system of contract law founded on the principle of private autonomy[32]. With increasing scope, however, the principle of good faith tends to interfere with the regime of private autonomy so that the possibility of harmonizing both normative demands into one single system of contractural fairness becomes questionable[33]. Recall, for instance, the doctrine of *Wegfall der Geschäftsgrundlage,* which allows for the adjustment of contractual obligations in cases of extreme distortions of exchange justice. The consideration of principles of substantive justice and contractual fairness *necessaily* collides with the formal ethics of classical contract law[34]. In German private law theory,this observarion – that the 'liberal' ideal of freedom of contract is constantly being challenged by countervailing "social" principles of substantive fairness and interpersonal responsibility – is usually stated as a problem of increasint 'materialization" of contract law and treated with either critical or reconciliatory aim[35].

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[32] This is the deeper reason behind the characterization of this function in termes of the Roman *'officium iudicis'*, meaning the exercise of the judicial office within the boundaries of law. See, WIEACKER, *Zur rechtstheoretischen Präzisierung des § 242 BGB* (note 4), pp 23-4. This premisse about the normative quality of auxiliary contractual duties on the basis of § 242 is widely shared in the modern German literature on good faith. See, for instance, ROTH, in *Münchener Kommentar zun Bürgerlichen Gesetzbuch* (note 4), at § 242 notes 141-143.

[33] This is one of the most ardently contested issues in modern German private law theory. The discussion centers on the issue of 'materialization' of the classic system of private law, based on the individualist principle of private autonomy; see *infra* note 35. The way the question is presented here shows its important implications for the possibility of a normatively homogeneous,internally coherent system of private law. With respect to this goal of private law theorizing, see C.-W. CANARIS, *Systemdenken und Systembegriff in der Jurisprudenz,* Duncker & Humblot, Berlin, 2nd ed. 1983, pp 16-8.

[34]This is a consequence of the ideal of legal and ethical formality. The essence of a 'formal' understanding of contractual freedom and justice – not to be confused with the 'formal' dimension of arguments explored here – is the assumption that a universally valid criterion of exchange justice cannot be grounded on 'substantive' (partial, non-neutral) measures of exchange justice, but only on the 'formal' criterion of the free will of the individual. With respect to the fundamental difference between 'formal' and 'substantive' approaches to the ethics of private law, see, in particular, C.-W. CANARIS, 'Wandlungen des Schuldvertragsrechts – Tendenen zu seiner materialisierung', 200. *AcP (Archiv für die civilisthsche Praxis)* 2000, p(273) at 276-92.

[35] As stated before, this is one of the most important debates in German private law theory. The problem found na early and well-known expression in F. WIEACKER, *Das Sozialmodell der Klassischen Privatrechtsgesetzbücher und die Entwicklund der modernen Gesellschaft,* c.f. Müller, karlsruhe 1953. Mot modern statements aim at a moderate compromise between the primacy of private autonomy and some concessions to substantive measures of contractual freedom or exchange justice in cases like *Wegfall der Geschäftsgrundlage,* duress, contracts of adhesion, and consumer protection. See the representative statement by

This article takes another approach. Instead of looking for a mediatin solution between the two opposing poles of contractual ethics, it aims at highlighting their opposition in order to understand the constant tension in the application of good faith. In this article, the two opposing ideals normally associated with the "liberal" and the "social" approaches to contractual ethics shall be termed *individualism* and *altruism*[36]. The essence of individualism is the claim that since every individual is the best judge of his or her own needs and preferences, the most desirable state of society is one in whick individual freedom to pursue one's own interest is maximal and only constrained by the rules necessary to ensure coexistence with other individualist actors. The corollaries of individualism are private autonomy and self-reliance[37]. Together, these principles characterize the liberal system of classical contract law based on private autonomy. By contrast, the essence of altruism, as understood here, is the primacy of duty owed to others over one's own interest[38]. This broad concept of altruism, encompassing all cases of interpersonal as opposed to purely self-interested legal action, applie whenever the principle of private autonomy is modifield or displaced by notions of distributive justice or legal paternalism. From this point of view, it is easy to see the broad recognition the law itself gives to altruist concepts even in the core areas of contract law[39].

In particular, this article aims to show that the imposition of good faith duties generally implies a deviation from the purely individualist standpoint of classical contract law towards a higher degree of interpersonal responsability and distributive justice. This is obvious with respect to the *contra legem* function and, in particular, with respect to the doctrine of *Wegfall*

CANARIS (note 34), in addition C.-W. CANARIS, *Die Bedeutung der iustitua distributiva im deutschen Vertragsrecht,* Verlag der Bayerischen Akademie der Wissenschaften,Müchen 1997, pp 44-63 and *passim;* L. FASTRICH*, Richterliche Inhaltskontrolle im Privatrecht, C*.H. Beck, München 1992, pp 36-61 and *passim*. For more critical approaches, see E.A. KRAMER, *Die "Krise" desliberalen Vertragsdenkens*, Wilhelm Fink Verlag, München/Salzburg 1974, pp 12-66; J.NEUNER, *Privatrecht und Sozialstaat,* C.H. Beck, München 1999, pp 219-81. American private law theory has taken na entirely different path since the groundbreaking essay by R.L. HALE, 'Coercion and distribution in a Supposedly Non-Coercive State', 38. *POL. SC. Q (Political Science Quarterly)* 1923, p 470. See also *infra* note 42 for further references.

[36] On this terminology, see KENNEDY, 'Form and Substance' (note 3), p 1713.

[37] Ibid pp 1713-5 (further references ibid note 76). See also CANARIS, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (note 35), pp 61-2.

[38] KENNEDY, 'Form and Substance' (note 3), pp 1717-9, See also F.WIEACKER, *Privatrechtgeschichte der Neuzeit,* Vandenhoeck & Ruprecht, Göttingen, 2 nd ed. 1967, pp 260-71, 599-616.

[39]This hods even if one takes na extremely liberal standpoint towards the ethics of private law. Even the most liberal conceptions of private law recognize exceptions for lack of capacity, duress, fraud etc which protect the exercise of private autonomy of one party by restricting the coresponding freedom of the other. This is obviously not a highly altruist state of the law, but a relatively more altruist one than the complete absence of such provisions. 'The strong, who would supposedly dominate everyone if there were no state, are deprived of their advantages and forced to respect the 'rights' of the weak. If altruism is the sharing or sacrifice of advantages that one might have kept to oneself, then the state forces the strong to behave altruistically', KENNEDY, 'Form and substance' (note 3), p 1719.

der Geschäftsgrundlage as described above[40]. The same also apllies, however, to the *officium iudicis* and *praeter legem* functions[41]. For instance, duties to disclose information based on *officium iudicis* interfere directly with the distribution of contractual opportunities achieved under the conditions of free market economy and private autonomy. Paradoxically, this implies a deviation from the individualist principle of contract law even in such cases where these duties are intended to ensure equal opportunities in contracting and thus to *establish* the preconditions for the exercise of private autonomy in the liberal model, because it is necessary to recur to substantive, non-neutral criteria of private law policy in order to distinguish these cases from the remaining realm of informational self-reliance[42].

Thus, the function of good faith in contract law, as understood in this article, lies in its ability to introduce altruist notions into the law while mediating their tension with the underlying individualist principle of private autonomy. As we will see in the following section, the theoretical debate on good faith involves both diametrically opposed, yet equally valid, standpoints without allowing for a final decision. A strongly individualist understanding of contract law tends to minimize or eliminate good faith obligations at odds with bargained-for contractual rights and duties, while an altruist standpoint will maximize the amount of interpersonal duty required on the basis of good faith even at the cost of infringing on freedom of contract[43].

This view is especially helful in understanding the history of good faith.Indeed, the tentative statement may be made that the historical development of the good faith debate in the 20th century can be understood as a series of interactions between the extremes of individualism and altruism, leading to na overall gradual shift towards the latter[44]. Probably the most

[40] See WIEACKER, Social modell (note 35), pp 18-9.

[41] At this point, it mignt be worth repeating that this article does not claim to provide na exhaustive theory of the distributive consequences of good faith. Such an entreprise would merit a publication on its own. Especially the officium iudicis and praeter legem functions may, of course, include particular applications of good faith which do not fit he scherme of contractual altruism proposed here.

[42] This insight is far more common in American than in German private law theory due to the influence of Legal Realism and progressive Law and Economics tendencies in the tradition of R. L. Halle's well-known article cited above in note 33. See, for instance, A.T.KRONMAN, 'Contract Law and Distributive Justice', 89, Yale L.J. 1980, p (472) at 474-83; D. KENNEDY, 'Distributive and Paternalist Motives in contract and Tort law, with Special Reference to Compulsory Terms and Unequal Bargaining Power', 41. Md.L.Rev. (Maryland Law Review)1982, p (563) at 580-3 and passim. The standpoint of German private law theory is beest expressed by C.-W.CANARIS, Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht (note 35), pp 60-2. But see H.C. GRIGOLEIT, Vorvertragliche Informationshaftung, C.H. Beck,Müchen 1997, pp 64-6, 77. There is, however, also an increasing tendency towards an economic analysis of the problem of informational distribution. See H. FLEISCHER, Informationsasymmetrie im Vertragsrecht, C.H. Beck, Müchen 2001, pp 93-232.

[43] See KENNEDY, 'Form and substance' (note 3), p 1721.

[44] This is one of the main topics in the debate on the 'materialization' of private law. See note 33 above for references and, in particular, WIEACKER, *Sozialmodell* (note33), pp 18-9; KESSLER & FINE (note 5), pp 407-12, 416-8, 448-9; J.P. DAWSON, 'Economic Duress and the fair Exchange in French and German Law', 11. *Tul L. Rev. (Tutale law Review)*1937, p 345 and 12. *Tul L. Rev.*1937, p (42) at 49-50, 64-73.

remarkable and well-known example for this development was the German explosion of good faith during the period of rapid inflation in the early 1920s. Forced to respond to the desparate situation caused by economic hardship and social disorder accompanying inflation, German courts increasingly relied on good faith clothed in the doctrine of *Wegfall der Geschäftsgrundlage.* This development reached is zenith in a famous 1923 decision[45] in which the *Reichsgericht* adjusted a debt arising from a loan of money and thereby set aside the strict statutory rule that the paper *Mark* was legal tender at its nominal par (‘*Mark equals Mark’)*, since this rule would have had the consequence that pre-inflation debts could be paid back in inflated currency worth only a tiny fraction of the original loan. This development of good faith can be understood as the aplication of an altruist principle of loss-sharing in a situation where otherwise a mere windfall for one party would have been derived at the expense of an unreasonable loss for the other[46].

On the basis of this general exploration of the substantive opposition of private law policy, the following four subsections provide a “vocabulary” of the opposing groups of individualist and altruist good faith arguments in their most commonly applied modes: ethical, rights-based, expectation-based, or clothed in the language of law and economics[47].

2. Ethical arguments

The following dichotomy contains a typical statement of the most common ethical arguments:

(1) (a) *Altruist:* Good faith incorporates contractual fairness into the law.The law protects fair dealing and not its opposite (altruism as legal principle)[48].

(b) *Individualist:* The parties are responsible for designing their contract according to their interests. The law should not interfere with the regime of

[45] See RG 28.11.1923, RGZ 107,78; commented, for instante, by DAWSON, *The Oracles of the Law* (note 7), pp 469-79; R. ZIMMERMANN & S. WHITAKER (note 4), pp 20-2. See also note 26 above for further references.

[46] See KENNEDY, ‘Form and Substance’ (note 3), p 1721.

[47] The reappearance of this opposition in various different ‘modes’ of argument is a frequent observation in the semiotics of legal argument. See BALKIN, ‘Crystalline Structure’ (note 3), p 28.

[48] “The law contemplates fair dealing and not its opposite”. Grad v. Roberts, 14 N.Y.2d 70, 198 N.E.2d 26, at 28 (New York 1964).

private autonomy on the basis of unprincipled Good Samatitan ideals (individualism as legal principle)[49].

3. Rights-based arguments

The opposition between individualism and altruism also appears clothed in the language of rights. The altruist rights argument for recognizing a broad duty of good faith typically evokes the "righ" of the protected party to enjoy the fruits of the contract. The opposite individualist claim states that there is no such "right", but, on the contrary, a right of the other party to use its freedom according to the terms of the contract. In other words, the conflict emerges between, on the one hand, "rithgs" as protection, and on the other, "rights" as freedom[50].

(2) (a) *Altruist:* Good faith protects the right of the other party to receive the fruits of the contract (rigths as Security)[51].

(b*) Individualist*: Every party is free to act within the sphere of rights and duties created by the contract (rights as freedom)[52].

4. Expectation-based arguments

Another common way to support a broad scope of good faith is to claim that it protects the reasonable contractual expectations of the parties. An argument that good faith serves to protect the expectations of the contracting parties is an elegant way of introducing notions of mutual responsibility into contract law, yet avoiding direct reference to morality. The most common variant of the argument, which has a long tradition in commercial law, claims that

[49] "(T)he parties themselves should negotiate na agreement that approximates anequilibrium between risks assumed and prices paid". GILLETTE (note 12), p 650.
[50] See BALKIN, 'Crystalline Structure' (note 3), p 28;KENNEDY, 'Semiotics' (note 3), pp 328, 331.
[51] [49] "(I)n evety contract there is na implied covenant that n either party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists na implied covenant of good faith and fair dealin". Kirke La Shelle Co. v. Paul Amstrong Co.,263 N.Y. 79, 188 N.E. 163, at 167 (New York 1933).
[52] "Our system permits parties who have a dispute over a contract to present their case to an impartial tribunal for a determination of the agreement as made by the parties and embodied in the conract itself". English v. Fischer, 660 S. W.2d 521, at 522 (Texas Sup.Ct. 1983).

the parties' expectations can reasonably be understood only against the background of common usage or commercial custom within their contract is situated[53]. Good faith, therefore, protects expectations by incorporating standards of commercial custom into law.

(3) (a) *Altruist*: Good faith protects the reasonable contractual expectations of the parties by refering to commercial custom or social norms. These ensure flexible adaptation of the law to the rules of the social background which are essential to a meaningful understanding of the parties' agreement (protection of expectations through social norms)[54].

(b) *Individualis*t: The law, and not custom, should be the basis of understainding the parties' agreement, since a reference to custom causes more ambiguities than it solves (separation of law and social norms)[55].

5. Social welfare arguments

Arguments on whether a general or particular good faith obligation is efficiente or not sometimes also appear in the context of a discussion on the economics of legal form. The two subsequent arguments are an example of this kind of analysis at the borderline of welfarist substance and jurisprudence of form.

(4) (a) *Altruist:* General standards such as good faith are efficient bcause they avoid the additional costs of contracting arising out of the need to master the mechanical artibrariness of rigid rules (good faith is efficient)[56].

[53]See, in particular, PATTERSON (note 14), pp 199-207. Another variant of the expectations-based arguments has been developed by Burton on the basis of the parties' discretion forgone by contracting. See note 12 above for referentes.

[54] See PATTERSON (note 14), pp 199-207; LLEWELLYN (note 8), pp 779-83; MENTSCHIKOFF (note 8), p 170, for comprable statements.

[55] See, for instance, the opinion of the Committee on the Proposed Commercial code, reported by W.D.MALCOLM, 'The Proposed Commercial Code', 6. Bus. Law (Business Lawyer) 1951, p (113) ar 128; also quoted by SUMMERS, '"Good Faith" in General Contract Law' (note 5), p.209.

[56]See I.EHRLICH & R. POSNER, 'Na Economic analysis of Legal Rulemaking', 3. J. Legal Stud. (Journal of Legal Studies) 1974, p(257) at 258-71, 277-80; R.A.POSNER, Economic Analysis of Law, Aspen Law & Business, 5th ed. 1998, pp 590-5; KENNEDY, 'Form and Substance' (note 3), pp 1695-1701.

(b) *Individualist:* General standarts such as good faith are inefficient because they make the consequences of private activity less clear and thereby discourage investment (good faith is inefficient)[57].

At this point, the reader will already have developed an understangind for the symmetrical and stereotyped nature of typical good faith arguments. The preceding four dichotomies of ethical, rights-based, expectation-based and welfarist arguments for and against a broad reading of a duty of good faith in contractual performance all share a common structure. In general, they can be aligned along a continuum of greated or lesser recognition of altruist duties or, put differently, of a lesser or greater extent of individualism and self-reliance in contract law. They appear in orderer pairs of diametrical opposition, resulting in a potentially interminable debate between individualist and altruist ethics and policies in the application of good faith. What remains is the task of developing a similar structure for the fomal and institutional competence dimensions of the debate, respectively.

C. Flexibility versus bias: the formal dimension of arguments

1. The oppositions between formal realizability and equitable flexibility

The formal dimension of argument within the good faith debate concerns the formal properties of good faith as a vague standard. The choice between standards and rules and the typical arguments associated with either alternative is a common topic of jurisprudence[58].
In this article, the choice between general clauses such as good faith and more precise rules will be described in terms of their degree of *formal realizability*. This notion, originally coined by Rudolph von Jhering, pertains to the easiness and security of the application of legal concepts[59]. Generally, clear-cut rules are formally realizable to a relatively higher degree than vague standards such as good faith. Highly formally realizable rules therefore serve the

[57] See, for instance, GILLETTE (note 12), pp 632, 649-53. See also note 54 above for further references.
[58] This is particulary true for Anglo-American jurisprudence. See H.L.A HART, The Concept of Law, Clarendon press,Oxford, 2nd ed. 1994, pp 124-63 (postscript: reply to Dworkin); R. DWORKIN, Taking Rights Seriously, Harvard University Press, Cambridge/Mass. 1978, pp 14-80; R.POUND, An Introduction to the Philosophy of Law, Yale University Press, New Haven/London 1954, pp 56-8; KENNEDY, 'Form and substance' (note 3), pp 1687-9 (further references). With respect to the parallel German debate, see J. ESSER, Grundsatz und Norm, J.C.B. Mohr, Tübingen, 4th ed. 1990, pp 95-7, 183-218; R. ALEXY, 'Rechtsregeln und Rechtsprinzipien', 25. ARSP Beiheft (Archiv für Rechts – und sozialphilosophie) 1985, p (13) ar 14-21.
[59] See R.v.JHERING, Geist des römischen Rechs auf den verschiedenen Stufen seiner Entwickling, vol. I, Breitkopf und Härtel,Leipzig, 5th ed. 1891, pp 51-55.

ideal or generalizing justice, while vague standars such as good faith lack formal realizability and are therefore open to judicial bias and arbitrariness by inviting the introduction of illegitimate criteria intothe decision[60].

On the other hand, the disadvantage commonly associated with rules is that of abstraction from potentially relevant specifics of single cases for the sake of a more administrable definition of the rule. In ither words, rules are necessarily over-and underinclusive in the sense that their cler-cut scope of application is never perfectly congruent with their purpose. Rules therefore cause another kind arbitrariness, that of mchanical, blind operation of the law without regard to the equities of the single case. This problem can only be avoided by reliance on a standard which allows for *equitable flexibility* and individual justice under consideration of all circunstances of a particular case[61].

This is the formal dilemma: the more a legal provision serves the demand for formal realizabiblity, the less it tends to satisfy the countervailing value of equitable flexibility and vice versa. Thus, rules fulfill the ideal of formal realizability only at the cost of a lack of equitable flexibility, whereas the opposite tends to be true for standards such as good faith. Note that both sides, rules as much as standards, can equally claim the fundamental value os justice[62] for themselves as well as pointing to the arbitratiness caused by their respective opposite. Therefore, the formal choice between rules and standards can be regarded as a dilemma of equally irreconcilable tension as the opposition between individualism and altruism; and again, it does not seem possible to give a universally valid meta-criterion to decide once and for all: "Indeed, most of the ideas that might serve to dissolve the conflict and make rational choice possible are claimed vociferously by both sides"[63].

There is, however, one exception to the perfect two-sidedness of this opposition. Theoretically, the goal of replacing a standard by rules makes it necessary to enact not just one or a few, but a multitude of rules providing for all the exceptions and under-exceptions covered by one single standard. Imagine, for instance, you had to replace the principle of good faith by a canon of rules: you would have to write a virtual sub-code of rules in order to

[60] See KENNEDY, 'Form and Substance' (note 3) pp 1688-9.
[61] KENNEDY, 'Form and Substance' (note 3) p 1689.
[62] The opposition between the individualizing and generalizing tendency of justice is a basic category in Continental as well as in Anglo-American jurisprudence. With respect to Germany, this has, for instance been expressed by WIEACKER, Zur rechstheoretischen Präzisierung des § 242 BGB (note 4), p.10: 'Ruhm und Tadle des § 242 folgen beide aus unausweichlichen Antinomien des Rechtsbegriffs selbst.ZweckmäBigkeit und Berechenbarketi, genauer: Fallgerechtigkeit und Allgemeingültigkeit sind beide notwendige Elemente von Recht und Gerechtigketi und geraten doch in der Wirklichkeit meist in Konflikt', See also CANARIS, Systemdenken und Systembegriff (note 33), p. 153. With respecto to Anglo-American jurisprudence, see H.L.A.HART, The Concept of Law (note 58), p. 130.
[63] KENNEDY, 'Form and substance' (note 3), p 1711.

capture every aspect to modern good faith case law. In such a case, one might justly argue that the reliance on a single or a few standards migth actually *increase* the overall degree of formal realizability of a legal system vis-à-vis the complexity caused by a thicket of rules. Moreover, standards allow for the open considerarion of the interests at stake, while rules may force judges to introduce them into the process of adjudicaion through the back door by manipulating the scope and meaning of a rule or by creating ad hoc exceptions. This argument, common in American Realist and modern jurisprudence, may be termed *reserve formal realizability* because is reverses the usual thrust of the demand for formal realizability by proposing that standards might actually fultill it to a *higher* degree than rules[64].

2. A typology of formal arguments

With respect to good faith, this implies that the advantage of the good faith standard, the pursuit of individualized, equitable justice, can at least theoretically always be countered by its disadvantage, the potential of judicial arbitrariness and bias, unless the latter argument is reversed as follows:

(5) (a) *Standards:* Standards such as good faith ensure equitable flexibility. They are a necessary corrective of the over and under-inclusion caused by strict rules and, thus, a necessary means to ahieve individualizing justice (equitable flexibility)[65].

(b) *Rules:*Standards such as good faith cause uncertainty and judicial arbitratiness.Only formally realizable rules provide for foresseable criteria of application and, thus, for generalizing justice (formal reaizability)[66].

(c) Standards: Standards such as good faith may actually lead to a higher degree of security than rules, because they allow the open recognition of the

[64] For a discussion of this type of argument, see KESSLER & FINE (note 5), p 449; KENNEDY, 'Form and Substance' (note 3) p 1700; KENNEDY, 'Semiotics' (note 3) p 335; POSNER (note 56), p 592.
[65] KENNEDY, 'Form and Substance' (note 3), pp 1688-9. See also notes 56 and 60 above for further references.
[66] KENNEDY, 'Form and Substance' (note 3), pp 1688-9.

interests at stake and avoid their introduction througn the back dorr (reverse formal realizability)[67].

D. Judicial versus legislative competence: the institutional competence dimension

1. Good faith and the problem of judicial legislation

The third and final strucuture of argumentative opposition this article will investigate is the institutuinal competence dimension of arguments. In terms of historical as well as jurisprudental significance, this dimension might well be the most important of the three. The problem to be explored, the border between the spheres of judicial and legislative competence in view of extremely open general clauses such as good faith, has not only been a central issue within the historical development of the debate especially on Germany[68], but it also intersects with one of the most ardently contested issues of jurisprudence, the problem of judicial legislation[69].

The historical development of good faith in inflation-era Germany most clearly raised the question whether the application of good faith, as a means to create freefloating legal doctrines contrary to explicit statutory law, was judicial legislation. As discussed above, the German courts openly challenged the statutory regulation of the value of the inflated German currency by adjusting the exchange ratio of contracts on the basis of the doctrine of *Wegfall der Geesthäftsgrundlage.* The legislative character of this development has been captured, as will be remembered, by Wieacker in the description of the third *contra legem* function of good faith[70]. On the other hand, many applications of good faith and of the doctrine of *Wegfall der Geesthäftsgrundlage* in iths contemporary boundaries have long since become embeded into tightly-knit chains of well-settled precedents, making their application no more legislative than the application of any other more specific rule. Contemporary German jurisprudence, therefore, generally tends to emphasize that good faith and other general clauses are not to be understood as na additional source of justification for judicial action.

[67] See note 64 above for references.
[68] See notes 28 and 45 above and accompanyng text.
[69] See H.L.A. HART, The concept of Law (note 60), pp 124-54; R. DWORKIN, Taking Rights Seriously (note 60), pp 81-130; R DWORKIN, Law's Empire, Harvard University Press, Cambridge/Mass. 1986, pp 254-66 and passim. For a summary of the existing positions and for further references, see KENNEDY, A Critique of Adjudication (note 3), pp 23-38.
[70] See notes 29 and 30 above and accompanying text.

Rather, in the application of good faith, judges are seen as bound by the same canon of legal methodology and the limitations it traditionally imposes upon the legitimacy of judge-made law as in any other case[71].

Yet, the sweeping assertion that any kind of judicial legislation on the basis of good faith is illegitimate appears to be rash in view of the various shades of grey between adjudication and legislation experienced in the adjudication of this standard. In some circumstances, such as during the German inflation as expressed in the Free Law writings of that time, judicial activism and pioneering have been accepted as inevitable, indeed, by some, welcomed[72]. This insight into the inevitability of judicial creativity, by whatever name it be called, has also been shared by American Realism and can indeed be seen as one of the commonplaces of a modern understanding of law[73].

2. A typology of institutional competence arguments

The fllowing dichotomy reflects only a small fraction of the answer given to the problem of judicial legislation by legal scholarship since American legal Realism and the German Free Law School.

(6) (a) *Judicial freedom:* The judiciary is in a unique position to react immediately to newly arising legal problems and changing demands of society througn the application of open terms such as good faith. Thus, judicial legislation on the basis of good faith is not only unavoidable, but indeed desirable (pro judicial legislation)[74].

(b) *Judicial restraint:* It is the task of the legislature, not of courts, to react to changing demands within society by the enactement of

[71] See BYDLINSKI (note 15), pp 211-29; LARENZ & CANARIS (note 15), pp 240-252.

[72] The classics statement of the Free Law position is H.KANTOROWICZ (GNAEUS FLAVIUS), Der Kampf um die Rchtswissenschaft, Carl Winter's Universitätsbuchhandlung, Heidelberg 1906, pp 41-2 and passim. See also J.E. HERGET & S. WALLACE, 'Th' German Free Law Movement as the Source of American Legal Realism', 73. Va. L. Rev. 1987 p(399) pp 440-52 and note 26 above for further references.

[73] See Generally M.J.HORWITZ, The transformation of American Law 1870-1960, Oxford University Press, New York/Oxford 1992, pp 169-212.

[74] See note 70 above for references. See also TEUBNER, Standards und Direktiven in Generalklauseln (note 13), p 61.

new statutes. Thus, the unfettered judicial discretion exercised on the basis of good faith is illegitimate judicial legistalion (contra judicial legislation)[75].

E. The reiterative structure of the debate

To complete the structuralis model of contractual good faith proposed in this article, it is necessary to understand that the three groups of typical arguments explored up to now are reiterated in identical form on every level of rule choice[76]. Thus, structuralist analysys greatly reduces the complexity as well as increases the transparency of legal argument. For instance, the arguments in favour of altruism, standards and judicial freedom will not only lead the arguer to a preference for a good faith obligation over no such obligarion at all, but they are equally relevant on the subsequent levels of doctrinal choice, where they will generally favour the relatively broader interpretation of good faith. They will, therefore, lead the arguer to the conclusions that, first, good faith should encompass more than just *officium iudicis,* and second, that it shoud indeed include all three functions, *officium iudices, praeter* and *contra legem.* Conversely, the arguments in favour of individualim, rules, and judicial restraint can be brought to bear against any good faith obligation as well as against any subsequent expansion of its scope.

To demonstrate the reitetative structure of the good faith debate, consider the following example. Imagine a legal argument aiming at a defense of the principle of good faith in contractual performance, but under restriction to its first and second function. Such a argument might appear as follows, utilizing first one and then the other side of the argumentive canon:

(1) Contract law should recognize a general duty of good faith performance among its fundamental principles, because the law should regard itself as protecting fair dealing and not its opposite *(altruism as legal principle)*. Moreover, a duty of good faith performance ensures the protection of contractual rights against bad faith behaviour in contracting *(rights as security*). This applies, in particular, to the

[75] See note 69 above for referentes. In Germany, the warning that the drift into unprincipled case law and judicial discretion will destroy the function of the rule of law has found a lasting expression in Hedemann's treatise on the 'flight into the general clauses'. See HEDEMANN (note 13), pp 73-4 nd passim. But see DAWSON, The Oracles oooof the Law (note 5), p 476, with respect to Hedemann's personal entanglement with Nazism.

[76] See BALKIN, 'Crystaline Structure' (note 3), pp 36-43 with respect to the similarly reiterative ('crystalline') structure of tort law. See also KENNEDY, 'Semiotics' (note 1), pp 344-9.

problem of contractual interpretation. Good faith protects the reasonable contractual expectations of the parties by referring to those common or customary practices which are essential to a meaningful inderstanding of the parties' agreement *(protection of expecations through social norms)*. For this reason, good faith also increases the efficiency of contract law because it allows for reliance on common usage na therefore enables the parties to avoid the cost of including every single eventuality in their contract *(good faith is efficient)*. Generally speaking, good faith therefore ensures the necessary degree of flexibility in contract law *(equitable flexibility)*. In interaction with more rigid structures of contract law such as the doctrines of offer, acceptance, and consideration, a good faith principle serves as a residual category to recognize interests at stake which are not adequately represented by other doctrines. Thus, it will increase the overall predictability and stability of contract law *(reverse formal realizability)*. The principle of good faith, therefore, allow a steady growth and flexible adaptation of contract law to newly arising problems of law and society (pro judicial legislation). In accordance with the function of good faith to protect contractual rights and expectations, its scope encompasses the creation of auxiliary contractual duties within the boundaries of contract law – *officium iudicis*. Moreover, it serves as a limitation to contractual rights where their exercise would offend basic principles of contractual fairness – *praeter legem*.

(2) However, any further expansion of good faith into a general principle of equitable adjustment of unfair cotracts in favour of weaker parties, to be exercised as free judicial discretion – *contra legem* - , would contradict fundamental principles of contract law and ajudication, because the law does not recognize a general principle of substantive fairness *(individualism as legal principle)*. Rather, contractual parties are generally free to act within the sphere of right and duties they created themselves *(rights as freedom)*. Thus, the expansion of good faith into a general principle of case-to-case-based equity would destroy the reability of the institutions of contract and private autonomy. This would cause unforeseeable additional costs to the contracting parties *(good faith is inefficient*). More fundamentally, to allow for such a degree of free judicial discretion in contract law would invite judicial arbitrariness and bias. Thus, in order to minimize the risk of biased decisions, good

> faith obligations should be restricted to a reasonable degree *(formal realizability)*. Finally and perhaps most importantly, a reading of good faith which allows for or even welcomes the exercise of unfettered discretion would lead to illegitimate judicial legislation *(contra judicil legislation).*

As described above, the two opposing sides of argument employed here could, suitably modified, also be used to justify *any* other rule choice in the spectrum between no good faith at all and its broad recognition includind all three functions[77]. The first altruist set of arguments could also serve as a valid justification for the *contra legem* function of good faith. By the same token, the individualist arguments deployed against the *contra legem* function in this particular example could, with a little modification, also be brought to bear against the recognition of any good faith obligacion[78]. The question whether good faith should be recognized at all follows exactly the same argumentative pattern as the subsequent questions as to its doctrinal scope.

Moreover, this example allows na additional insight into the structure of legal argument. Even though the argumentative patterns are identical at every level of rule choice, this does not at all imply, that na arguer has to choose the same "side" at every level. Quite to the contraty, it is a common observation in the practice of legal argument that a decision for one side of the argumenttive canon is followed by the choice of the opposite side on the next sub-level of doctrinal choice[79]. Perhaps the deepest puzzle of perhaps the deepest puzzle of this structural property of legal argument is that this apparent inconsistency does not seem to detract from the cogency of an argumentative pattern[80]. To the reader, the good faith argument exemplified above might appear convincing even thoughn its second paragraph contains the exact negation of the arguments made in the first.

The reason for this is that legal argument usually appears in contextualized form, that means, adapted to the specific balance of interests at stake[81]. The relevance of context to legal argument helps to explain why sometimes one alternative seems to be clearly to the other norwithstanding the fact that it is, in its scructural substance, nothing more than just one half

[77] See similary BALKIN, 'Crystaline Structure' (note 3), pp 18-21.
[78] It follows that every argument 'proves too much' and 'too little' at the same time. See ibid pp 62-6.
[79] In KALKIN's terms: 'doctrinal conundrum'. See ibid pp 67-72.
[80]This point obviously raises interesting questions with respect to the rationality of legal argument. See ibid pp 70-2; KENNEDY, 'Form and Substance' (note 3), p 1724.
[81] With respect to the contextualization of legal argument in its normal use, see BALKIN, 'Crystalline Structure' (note 3), pp 59-61; KENNEDY, 'Form and Substance' (note 3), p 1724; KENNEDY, 'Semiotics' (note 3), p 329 and passim.

of a standardized pair of equally valid pro and contra arguments. It follows that tule choices do not necessarily have to come out the same way on all levels because the context of interests involved may not be regarded as identical.In the example given above, the two diametrically opposing argument sequences are not perceived as contradictory because they pertain to "different" legal problems: the problem as to whether a principle of good faith performance should be recognized at all is perceived as involving a significantly different balance of interests and consequences than the subsequent doctrinal question of whether good faith should entail a *contra legem* function.

But is there really a difference between those two problems? The answer is certainly "yes" from the standpoint of common analysis of legal argument. Such an analysis would focus on the contextualization of an argumentative patrern and would ask whether it appears to be cogent under the circumstances. In the example it might indeed be much more difficult to justify the *contra legem* function in view of the criticism of potential judicial tyranny than to defend the basic existence of a good faith principle against the same attack. Structural analysis, however, focuses on the typical, repetitive structures of dichotomous arguments which appear behind the many disguises of context[82]. Therefore, the contribution of structuralist semiotics to the theory and doctrine of good faith stands in ironic, perhaps disquieting, contrast to the manifold expressions of context: the whole world of good faith argument can be reduced to little more than six pairs of stereotyped arguments which reappear in every compromise and every single rule choice na arguer might propose within the possible realm of good faith duties.

4.CONCLUSION: SOME REMARKS ON THE COGENCY OF STEREOTYPED ARGUMENTS

Consistent with the premises of this article, the reader could draw two diametrically opposed conclusions from theabove. On the one hand, the identification of a set of stereotyped, self-repreating and self-defeating arguments seems to entail the inevitable conclusion that legal argument in general and the theory of good faith in particular is empty, meaningless or arbitrary:

[82] See similarly KENNEDY, 'Semiotics' (note 3), p 329.

> Legal argument has a certain mechanical quality, once one begins to identify its characteristic operations. Language seems to be 'speaking the subject', rather than the reverse... It is hard to imagine doing this kind of argument in utter good faith, that is, to imagine doing it without some cynical strategy of fitting foot to shoe[83].

Much can be said for such a conclusion in view of the stereotyped structure of good faith argument. This article, however, rejects this consequence in favour of its diametrical opposite[84]. Structure is only one half of the substance of legal argument; the other half is context. The structuralist model developed in this article does not exclude, indeed, is perfectly compatible with the insight that many arguments and doctrinal solutins that are part of the debate on good faith are convincing or even compelling in particular contexts. The insight that it is always possible to construct a counter-argument on the basis of a given set of stereotyped arguments, and, thus, that it is theoretically possible to argue any legal position does not al all imply that it is desirable or even legally plausible to do so[85]. The existence of particular signs and operations in a language is fully independent of the meaning of the speech act they are part of; and no one would regard it as cynical to learn the grammar of a language just because the language could be used to express anything. Quite to the contrary, the knowledge of the grammar of law seems to be an essential premise to apply it rationally – which presupposes awareness of the limits of its argumentative power.

[83] See similarly KENNEDY, 'Semiotics' (note 3), p 350.
[84] See also the reply to cynicism by BALDIN, 'Crystalline Structure' (note 3), pp 74-5.
[85] BALDIN, 'Crystalline Structure' (note 3), p 75.