

Legitimacy of Good Faith Principle and Its Characteristics in the Saudi System: An Analytical Study

Saleh Mohammed Al-Hammami¹, Ghaleb Mubarak Al-Hammami², Salem Talib Al-Hammami³

Abstract

This research deals with the legitimacy of the principle of good faith and its characteristics in the Saudi system (an analytical study). It is organized into two sections. The first section states the definition of the principle of good faith to be distinguished from similar terms. The section addresses its legitimacy, and discusses its characteristics. The significant results and findings arrived at are as follows: the principle of good faith is legitimate in the Saudi system, and it is distinguished by subjective nature in its characteristics. Moreover, it is a positive intentional stance, specific to its owner, and it is an ethical principle. On the other hand it contains two elements i.e. material and objective. This research recommended that the Saudi regulator is advised to establish a control over the principle of good faith in commercial law, criminal law, civil law, international law, and so on.

Keywords: *Good faith, honorable motive, good conduct.*

Introduction

The principle of good faith is considered one of the important principles upon which material transactions among people are based. It is a broad and wide-ranging principle that extends to include all actions and contracts. This is because its subject matter is too great to stop at any point, and too broad to be dismissed as prematurely minor. Therefore, the intention is to study the legitimacy of this principle and its characteristics in the Saudi system under the title: The legitimacy of the principle of good faith and its characteristics in the Saudi system (an analytical study).

Significance of research

The significance of this research lies in the following:

- 1) Revealing and approving the extent of the Saudi regulator's interest in the principle of good faith.
- 2) A statement of deficiencies or shortcomings - if any - and a suggestion for correction.

¹ Assistant Professor of Civil System, Najran University, smalhamame@nu.edu.sa, <https://orcid.org/0009-0005-3751-347X>

² Assistant Professor of Administrative System, Najran University, gmalhamami@nu.edu.sa, <https://orcid.org/0009-0001-8981-4603>

³ Instructor at Najran University, stalhamami@nu.edu.sa, <https://orcid.org/0009-0001-8981-4603>

Reasons for selecting this research topic

There are a number of reasons that led me to choose this topic and explore its depths, which are as follows:

- 1) What was aforementioned in the significance section.
- 2) This principle is of great importance, especially in this era in which rights have been lost and liabilities destroyed.
- 3) The principle of good faith is largely aimed at combating fraud and corruption; in order to protect the individual and society from actions based on bad faith.

Research objectives

This research aims to:

- 1) Reveal the extent to which the principle of good faith is implemented in the Saudi system.
- 2) Analyze the principle of good faith and highlight it in the situations where it must be implemented.
- 3) Explain the extent to which the principle of good faith contributes to achieving justice, preserving rights, and combating fraud and deception.

Literature review

There is a doctoral thesis that addressed the principle of good faith, entitled: "Good Faith in International Sales by Dr. Wael Hamdi Ahmed, House of Thought and Law, 2010. This thesis was openly defended at the Department of Criminal Law, Faculty of Law, Ain Shams University. It discussed certain issues such as the legal concept of international sales contracts, the concept of the principle of good faith in international trade law, the legal analysis of it in international sales contracts, and the effects of breaching it. Therefore, both researches, this research and the present one, have agreed in terms of determining the principle of good faith and its definition. Unlike other researches, the context of the present research is the Saudi system.

Research Methodology

This research was based on the analytical approach. The analysis adhered to the following steps:

- 1) Collecting statutory texts related to the research topic and analyzing them,
- 2) Attributing Quranic verses by mentioning the name of the surah and the verse number in the margin, and writing them in Uthmani script,
- 3) Attributing the texts and opinions of scholars directly to their books, and not attributing them through an intermediary except when the original is not possible,
- 4) In the case of conveying a statement or opinion in the text, the quoted text is placed between two quotation marks and the source is indicated in the bottom margin of the page in the following manner: the name of the author - the title of the book - the part - the page. However, in the case of conveying in the meaning, it is preceded by the word (to be considered),
- 5) Controlling ambiguous words by vowelization, especially those words that if they are not vowelized, would create ambiguity,

- 6) Taking care of the correctness and integrity of what is written from a spelling and linguistic standpoint, and taking into account the good consistency of speech and the sophistication of its style,
- 7) Append the research with recognized technical indexes.

Research outline

The research consists of two sections, a conclusion, and indexes. The first section i.e. defining the principle of good faith, and distinguishing it from similar terms, has two topics. The two topics are: defining the principle of good faith in the Saudi system; distinguishing the principle of good faith from similar terms. The second topic i.e. the legitimacy of the principle of good faith, and its characteristics in the Saudi system, has two topics. The two topics are: the legitimacy of the principle of good faith in the Saudi system; characteristics of the principle of good faith in the Saudi system. The conclusion of this research includes the most important results and recommendations. Finally there is a list of index that contains appropriate recognized technical indexes.

The first section: defining the principle of good faith, and distinguishing it from similar terms

The first topic: Defining the principle of good faith in the Saudi system

Defining good faith requires defining the two terms related i.e. good faith in the language and the system, then defining it as an additional compound.

Firstly: Defining the term “good faith” in the language

"Good" linguistically is the opposite of ugliness, so "good" is an adjective for what is good, and it is and was good. In short, "good" reflects the beauty. On the other hand, "intention" comes from the verb "intend". The meaning of saying " he intends to do something" is "he resolved to do it, and to the place".

Secondly: Defining the term "good faith" in the system

I did not find a definition for the word “good” that is specific only to law. Moreover, through my reading about the concept of “good” among legal scholars, I found that they only use the linguistic meaning of the word, which is beauty and the opposite of ugliness. This does not mean at all that there is no criterion for goodness in the law - especially the topic of good faith, which is the focus of the research, this is because goodness is a universal meaning, with its own criterion, which each group is unique in defining in terms of its source.

Some see it as social judgments linked to the prevailing values in a particular society. These values stem from the rules and laws that prevail in society in an era. Some value it as focusing on characterization of goodness according to the following concepts: sincerity, honesty, justified ignorance of a particular fact, false belief, dealing honestly, uprightly and honorably, correct behavior, normal behavior, taking into account the relationship of trust in dealing, acting reasonably, acting justly, taking the legitimate interests of the other party into account, frankness.

They look at it from the negative side and say: It is not acting opportunistically, not treachery, betrayal, lying, not deceit and injustice, and other such expressions. To me, it seems that society’s custom is what determines what is good or not, but that will not provide an explanation. It is clear to the nature of this norm even with variety of societies, it is very difficult to give a unified answer to the term. Even though, it can be said: In the positive laws of Western countries in particular, the prevailing beliefs in the group, as well as the human mind and the custom based on it, along with whims, play a major role in determining a short-cut definition for the term.

As for intention, the commentators of the law have defined it without any addition, and among their definitions is that it is: an intentional element that allows some legal

situations to be described correctly , and therefore: intention and intent are synonymous terms in the law.

Thirdly: Defining "good faith" as an additional compound term

The reality is that the Saudi system did not mention an independent definition of good faith, and this is true in other legislation, as it lacks a direct definition of good faith, even though it considers it as a necessary rule in all legal relations, and it is assumed a priori in all cases. By referring to the jurisprudence of legal scholars, we find that they differed in its definition, and perhaps the chosen definition is: "an obligation to direct the will in achieving the direct purpose of concluding the resolution, in a way that is consistent with the legitimate justified interests of the opposing party". This definition includes many characteristics, which are:

- 1) It is a directing of the will. It requires the negotiating parties to direct their will in a manner consistent with what good faith requires in concluding resolution. It is a directive of the will to achieve the direct purpose of concluding the resolution.
- 2) The guidance shall be in a manner consistent with the legitimate, justified interests of the opposing party. By saying: "consistent" we exclude the necessity of sincerity in directing the will because sincerity requires directing the will for the sole benefit of the opposing party.
- 3) The commitment to good faith in concluding contracts is a mutual obligation between the two parties. It is not an obligation imposed on one party for the benefit of the other party only. Directing the will is imposed on both parties.
- 4) Directing the will is prior to concluding the contract because good faith requires directing the will, and acting in accordance with the directive requires the existence of the directive before the issuance of the will.

The second topic: distinguishing the principle of good faith from similar terms

First: Distinguishing good faith from honorable motivation:

The term "Motivating" in language comes from the verb "motive," both words have one root i.e. motive. It is said: "I sent the camel when I stirred it."

The term "Honorable" is taken from "honor", and that indicates highness and elevation. So the honor refers to elevation. The honorable refers to the high man i.e. An honorable man is from noble people.

As for the definition of "motive" according to legal jurists, we find it frequently mentioned in criminal law. It has been defined with several definitions, perhaps the most prominent of which is that "motive" is "the psychological force resulting from the perception of the goal, and the impetus for voluntary behavior". Considering this definition, it has become clear that to what the extent there is a strong relationship between "the motive" and "the will". Thus the relationship appears as that the motive is nothing but a mover of the will and a guide to the intention.

As for distinguishing "good faith" from "the honorable motive", the honorable motive - which is called the social, humanitarian, or moral motive - in light of the previous definition is the criterion for the availability of good faith. In other words, the motive in general is the one who describes the intention as good or bad. If he was honorable, the intention was good, and if he was dishonest, the intention was bad. In this regard, there should be no confusion between honorable motive and good faith, as they are not the same concept. This is because good faith requires adding, in addition to the mere intention, an honorable motive.

On the other hand the honorable motive is merely a criterion by which the availability of good faith is known after the existence of the intention. However, it precedes good faith,

meaning that it is not possible for someone who is characterized by good faith to be motivated to do anything, except after to verify that its motive is honorable.

Second: Distinguishing good faith from good behavior

"Goodness" has already been defined in language and terminology, so there is no need to repeat it. As for behavior, linguistically, it is given several meanings, the closest to which is the meaning: its root is "disposition," and "disposition" is to return something from its face, and to act in the matter is to deal with it, to deceive or change it, and to act: the path. It is said: "putting it at his disposal" means "putting it at his request".

In short, the meaning of disposal refers to returning the thing, transforming it from one side, or transferring it from one side to another. Accordingly, if we say: "So-and-so disposed of the matter", what this means is that he turned the matter around and moved it from one side to another, or from one state to another, such as if the price was deferred and became immediate, or it was sold and became rented, and so on.

In other words, the case is that to transform the matter and turn it from a bad state to a good state, and from a good state to a better state, and there is no doubt that this requires skill and opinion. The definition of "behavior" according to legal scholars is: "the direction of the will towards creating a legal effect, whether this effect is the creation, modification, transfer, or termination of a right."

The legal act may be binding on both parties, such as a sales contract that obligates the seller to transfer ownership to the buyer and obligates the buyer to pay the price to the seller. On the other way, it may be binding on one side, such as a declaration and a will. In a will, it is sufficient to complete the disposition towards the will of one person in order to produce legal effect.

As for the definition of good behavior, it is: "what is issued by a distinguished person voluntarily, whether in word or deed, in a way that achieves the interest of the contract." As for distinguishing good faith from good conduct, there is no correlation between them. A person may have good intentions but behave poorly. Most likely, the person with bad intentions misbehaves, but nevertheless he may act well to achieve his bad goal.

A person is praised for his good intentions, but he may not be praised for his bad actions. However, if it is known that he is known for his advice and guidance, then he will be excused for his bad behavior and an excuse will be sought for him. Accordingly, intention precedes action and is its motivation. Good or bad behavior may be considered evidence of good or bad intentions.

The second section: The legitimacy of the principle of good faith, and its characteristics in the Saudi system

The first topic: the legitimacy of the principle of good faith in the Saudi system

A researcher contemplating the systems of the Kingdom of Saudi Arabia will find that the principle of good faith is considered one of the important principles upon which the legitimacy of actions is based as a system.

I will briefly mention some regulatory texts in order to clarify the idea of the legitimacy of good faith. Article 10 of the Companies Law stipulates the requirement to write the contract for the company. The purpose of this condition is to protect third parties in good faith from exploitation by some bad faith partners. The text of the article is as follows: "With the exception of a joint venture company, the company contract shall be proven in writing at a solicitor, otherwise the contract shall be ineffective against third parties. The partners may not protest against third parties for the non-enforcement of the contract or an amendment that has not been proven as previously mentioned, but rather third parties may invoke it against them."

By extrapolating what is stated in this text, it has become clear that the system requires that the company contract be written in official writing. Customary writing is not sufficient in this regard. Failure to write the company contract or any amendment thereto also results in a penalty of a special nature. The rulings differ according to whether the partners or others adhere to the non-writing.

In the relationship between partners, it is not permissible for any partner to insist, vis-à-vis the other partners, not to write the company contract or not to write the amendments. As for the relationship with others, it is not permissible for partners to insist on not writing the contract or its amendments in the face of others, because the lack of writing results from their negligence and error. While others may cling to the existence of the company or its non-existence if that is in their interest.

The requirement to write the company contract is an exception to the principle of freedom of proof in commercial matters. This requirement was not imposed by the system except to establish the principle of good faith. If we assumed that the contract was not required to be written, this would be a justification for the partner in bad faith to confront a third party in good faith by claiming to change some of the terms of the contract, etc. This may lead to canceling the rights of others and manipulating them.

Among the provisions mentioned in the Saudi Companies Law confirming the legitimacy of this principle are what relates to security shares in a joint-stock company. Article (68) of the Companies Law stipulates that: "A member of the board of directors must own a number of company shares, the nominal value of which is not less than ten thousands riyals".

The aim of imposing these shares is to ensure the responsibility of the members of the Board of Directors. These shares, which the member of the Board of Directors is obligated to provide to the company within thirty days of his appointment, are in fact considered a guarantee of his responsibility for any errors that may occur during his management. If the member of the Board of Directors does not present the security shares within the specified time, his membership will be invalidated. By contemplating the previous text, we find that it gives a message of reassurance to whoever wants to contribute to any joint-stock company.

The security shares paid by the member of the Board of Directors, it makes him very keen to play a successful role in its management, and this protects other people's money from being tampered with, or risking it at their expense. If a mistake occurs by the members during their management, the company has the right to file a liability lawsuit against the members of the Board of Directors, due to the errors that result in damage to all shareholders. The Ordinary General Assembly decides to file this lawsuit and appoints someone to act on behalf of the company in conducting it.

Among the legal texts that confirm the legitimacy of this principle is what relates to founding shares. Article (100) of the Saudi Companies Law stipulates: "It is not permissible to trade cash shares subscribed by the founders, in-kind shares, or founding shares, before the balance sheet and profit and loss account are published."

For two complete financial years, each of which shall not be less than twelve months from the date of the company's founding. These instruments shall be marked with an indication of their type, the date of the company's founding, and the period during which they shall not be traded. In-kind shares and cash shares subscribed by the company's founders, this ban has a specific period, which is before the budget and the profit and loss account for two full financial years, each of which is not less than twelve months from the date of the company's founding, that is, from the date of the company's registration in the commercial registry.

The aim behind stipulating these restrictions is to oblige the owners of in-kind shares, as well as the company's founders to remain in the company for at least two years from the

date of its founding, which is a sufficient period during which the actual financial position of the company can be determined, and the seriousness of its project can be ascertained. This is important to third parties in good faith who wish to contribute. If the shares were allowed to be sold before the time specified in the previous article, it might be unfair to the ordinary shareholders. It may appear to the founders of the company that it is about to collapse, so they rush to sell the shares without considering the harm to the rest of the shareholders.

Therefore, the system required staying in the company for a certain period so that rights are not lost. Finally, it is clear that these texts and others clarify the legitimacy of the principle of good faith in the Saudi system.

The second topic: Characteristics of the principle of good faith in the Saudi system

In fact, the Saudi regulator - like other law makers - did not single out a specific topic for the characteristics of good faith. Hence, the researcher is the one who extracts it from the definition considered by the system's creator. It has been mentioned that the Saudi regulator, like others, did not mention a direct, conventional definition of good faith, but legal scholars have defined the term good faith. Accordingly, the characteristics of good faith can be extracted from it, and they are explained as follows:

First: Good faith is of a subjective nature:

Good faith in contracts and transactions is inherently subjective in nature, as it emanates from the person whose behavior is to be judged as good or bad. It is a psychological element that can be inferred in two ways: One of them is by its relation to a certain behavior, so it is known from the text of the behavior and its apparent form. The second is by apparent objective evidence and indications surrounding the action in its origin and implementation.

According to legal scholars, evidence is the conclusions that the law or judge draws from a known incident in order to find out an unknown fact. Therefore, they are indirect evidence, as the proof in them is not based on the fact itself, the source of the right, but rather on another fact, if it is proven. It is possible to deduce from it the fact to be proven. Good faith may have an objective nature by including the moral aspect of honesty, trustworthiness, and other good morals that a person should have toward those with whom he deals with by selling, buying, etc., or bad morals that a person should avoid, especially with regard to dealing with others in various types of transactions.

Second: Good faith is a positive intentional stance.

Good faith in contracts and transactions is considered an intentional stance because it stems from intention, which is intent, determination, and decision. The decision is one of the positive intentional stances. Accordingly, it is not possible to give a description of good or bad intentions to an insane person, an indiscernible child, a drunkard, a sleeping person, or an unconscious person.

These people do not meet the description of good or bad faith due to their incomplete capacity, which is the capacity to perform. Capacity to perform is "the ability of a person to express his will in an expression that has legal consequences." Or it is "his authority to carry out legal actions and actions on his own account in a legally reliable position". The symptoms of eligibility can be limited to four: insanity, imbecility, heedlessness, and foolishness. Rather, foolishness is included among the symptoms of competence because it is a lack of discernment in the scope of financial transactions.

Third: Good faith is an internal position specific to its owner.

Good faith is considered one of the matters of its owners, and therefore it cannot be estimated except by referring to the person himself because the intention itself is located in the heart and no one can see it. However a person's good or bad intentions may be

known through evidence attached to it. Although the presumption is considered indirect evidence, the presumption may or may not be valid in the ruling. Basically, if we are dealing with a specific incident, we cannot describe a person as having bad intentions in his behavior unless we go back to him and actually prove that. We cannot assume bad faith because it is contrary to the principle, since the principle in humans is good intention and whoever claims otherwise must prove it.

Fourth: Good faith is essentially a moral principle.

Good faith is essentially a moral principle based on honesty and truthfulness, which are among the things that indicate the extent of a person's commitment to this principle. The availability of the material element, which is represented by external material evidence that generates a common belief in the legality of a realistic center, is not sufficient. Rather, another essential element must be present, which is the moral element. The moral element is represented by the good faith of the opponent when dealing with his opponent and when taking litigation and enforcement measures against him to fulfill what he owes to him or to obtain from him his rights for his failure to fulfill them.

Fifth: Good faith may not be evaluated independently of its psychological element.

Good faith - as previously mentioned - is of a subjective nature and therefore it should not be estimated independently of its psychological element, otherwise this would lead to unjust results. Rather, it is estimated with two elements, a psychological element and an objective element. They are complementary, as the objective element is considered evidence of the psychological element, but it is evidence that can be proven to the contrary by apparent physical evidence and signs.

Conclusion

The most important results and recommendations include:

First: The most important results:

- 1) The definition of good faith in the system is an obligation to direct the will in achieving the direct purpose of concluding the contract in a way that is consistent with the justified interests of the opposing party.
- 2) The principle of good faith is legitimate in the Saudi system. Like other systems, it was only applied with regard to transactions of various types between individuals - financial, social, blood-related, and so on.
- 3) The principle of good faith has many characteristics in the system, namely that it is of a subjective nature. It is a positive, intentional stance specific to its owner. It is an ethical principle and contains two material and objective elements.

Second: The most prominent recommendations:

- 1) The Saudi regulator must refer to the principle of good faith independently in one or more articles, whether in the Commercial Companies Law or in other regulations, given its utmost importance.
- 2) It is suggested that the Saudi regulator establish a control for this principle in all fields, and mention its control when talking about crimes and punishments, as in criminal law, and the like in commercial, civil, and international law, and so on because it appears in all of these laws, and there is nothing in the Saudi system that indicates a control in them.

Acknowledgement

The authors are thankful to the Deanship of Scientific Research at Najran University for funding this work, under the Research Groups Funding program grant code NU\RG\SEHRC\12\7.

References

- 1) abin zakaria, 'ahmad bin faris. muejam maqayis allughati, bidun tu, bayrut, dar alfikri, bidun tarikhi.
- 2) abn manzuri, muhamad bin mukram. lisan alarabi, alrayad, dar ealim alkutub, 1424hi/2003m.
- 3) albadrawi, eabdalmuneami. almadkhal lileulum alqanuniati, bidun ta, bayrut, dar alnahdati, 1966m.
- 4) aljabara, muhamadu. alqanun altijariu alsueudiu, ta4, alrayad, jamieat almalik saeud, 1417h/1996m.
- 5) alkhuli, 'akthama. durus fi alqanun altijarii alsueudii, bidun ta, alriyad, maehad al'iidarati aleamati, 1393h/1973m.
- 6) alruis walriys, khalid waruzaqu. almadkhal lidirasat aleulum alqanuniati, ta1, alriyad, maktabat alshuqri, 1420h/1999m.
- 7) sliman, shir zad eaziza. hasan alniyat fi 'iibram aleuqudi, ta1, al'urdunn, dar dijlata, 2008m.
- 8) alsinhuri. alwajiz fi alnazariat aleamat lilialtizami, bidun ta, al'iiskandiriati, almaearifi, 2004m.
- 9) alsharfi, ealay. albaeith wa'atharuh fi almasyuwliat aljinayiyati, ta1, alqahirati, alzahra', 1406hi.
- 10) eabdalrahman, muhamadu. nazariat alwade alzaahir fi qanun almurafaeati, ta1, bayrut, alhalbi, 2011m.
- 11) aleamari, hasan. hasan alniyat wa'atharuh fi aleuqubat altaeziriati, risalat majistir, alriyad, jamieat al'iimam muhamad bin sueud al'iislamiati, 1426hi.
- 12) alghamidi wahusini, eabdalhadi wabin yunus. alqanun altijari, ta3, alrayad, maktabat alshaqri, 1430h.
- 13) faraj, twfiqi. almadkhal lileulum alqanuniati, bidun ta, bayruta, aldaar aljamieati, 1992m.
- 14) fraj waljamali, twfiq wamustafaa. masadir wa'ahkam alialtizami, ta1, bayrut, alhalbi, 2008m.
- 15) alfiumi, 'ahmad almaqariy. almisbah almunir fi ghurayb alsharh alkabiri, ta1, bayrut, muasasat fuad bieinu, bidun tarikhi.
- 16) alqadi, muhamad. hasan alniyat fi qanun aleuqubati, ta1, alqahirata, dar alnahdati, bidun tarikhi.
- 17) alquni, eabdalhalim. hasan alniyat wa'atharuh fi altasarufat fi alfiqh al'iislami walqanun almadanii, ta4, al'iiskandariatu, dar almatbueat aljamieati, 2004m.
- 18) alqadi, mansur. muejam almustalahat alqanuniati. jirar kurnu, ta1, bayrut, almuasasat aljamieati, 1998m.
- 19) alqilyubi, samiha. alsharikat altijariati, ta5, alqahirata, dar alnahdati, 2011mi.
- 20) mansur, muhamad. alnazariat aleamat lilialtizami, ta1, al'iiskandiriatu, dar aljamieat aljadidati, 2006m.
- 21) alhashimi, sultan. 'ahkam tasarufat alwakil fi euqud almueawadat almaliati, ta1, dibi, dar albuqhuth, 1422hi/ 2002m.
- 22) yusuf, yusif. madkhal lieilm alqanuni, ta1, alqahiratu, almarkaz alqawmi, 2013m.
- 23) nizam alsharikat alsueudiu.
- 24) majmae allughat alarabiati. almuejam alwasiti, ta1, lubnanu, dar 'iihya' alturath alarabii, 1429h/2008m.